ADJUDICATOR'S DECISION 2760615

Pursuant to the *Building Industry Fairness (Security of Payment) Act 2017* (Qld)

DETAILS OF THE APPLICATION

Adjudication Application number	2760615	
Claimant	Tomkins Commercial & Industrial Builders Pty Ltd ABN 98 061 732 778	
Respondent	York Property Holdings Pty Ltd as trustee for the York Property Trust ABN 30 159 035 748	
Project	Midwater Residences at 3496 Main Beach Parade Main Beach QLD 4217	
Payment Claim	Claimed amount:	$57,542,356.00 including GST
	Date served:	16 October 2024
Payment Claim type	Complex Claim	
Payment Schedule	Scheduled amount:	$0.00 including GST
	Date served:	30 October 2024
Adjudication Application	Date served:	11 December 2024
Adjudicator Acceptance	Date served:	18 December 2024
Adjudication Response	Date served:	17 February 2025

DETAILS OF THE ADJUDICATION DECISION

Adjudicator	John Tuhtan (Registration No: J1190798)
Adjudicator's agent	Australian Building & Construction Dispute Resolution Service Pty. Ltd.
Adjudicated amount	$9,098,702.42 excl. GST $10,008,572.66 incl. GST
Due date for payment	6 November 2024
Rate of interest	14.41%
Adjudication fees apportionment	Claimant: 50% Respondent: 50%
Date of decision	8 April 2025

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DECISION OF ADJUDICATION APPLICATION 2760615

1. I, John Tuhtan[1], the adjudicator appointed pursuant to section 81 of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (the **Act**), for the reasons set out below, decide that:

   (a) The amount of the progress payment to be paid by the Respondent to the Claimant (the **adjudicated amount**) is $10,008,572.66 incl. GST.

   (b) The date on which the adjudicated amount becomes payable is 6 November 2024.

   (c) The rate of interest payable on the adjudicated amount is 14.41%, which is the penalty rate pursuant to section 67P of the QBCC Act.

   (d) The parties must pay the adjudicator's fees and expenses and the fee for the Adjudication Application pursuant to section 96 of the Act in the proportions set out below:

      (i) Claimant 50%.

      (ii) Respondent 50%.

[1] Registered Adjudicator Number J1190798.

BACKGROUND

2. On or about 12 August 2021, the Respondent entered into an agreement (the **Contract**) with the Claimant for the construction of the residential tower known as Midwater situated at 3496 Main Beach Parade Main Beach QLD 4217.

3. The work under the Contract was to have been completed by August 2024 (being 36 months from the date of commencement).

4. The Claimant asserts that due to extensive delays caused by the Respondent's failure to provide the construction design in a timely manner, the Claimant issued a Show Cause Notice on 21 August 2024 under clause 39.7 of the Contract relating to the Respondent's substantial breaches of its design obligations under the Contract relating to the following;

   (a) Ceilings and Partitions;

   (b) Waterproofing to balconies;

   (c) Fire pump-room;

   (d) Hot water unit location;

   (e) Requirements of additional balancing valves to riser branches of the chill water line;

   (f) Design of lobby relief riser; and

   (g) Failing to correct errors in the design documentation relating to Ceilings and Partitions.

5. The Claimant re-issued the Show Cause Notice on 12 March 2024 under clause 39.7 of the Contract relating to the Respondent's

substantial breaches of its design obligations under the Contract following a complaint from the Respondent asserting the 1 March 2024 Show Cause Notice was invalid;

6. On 22 March 2024, the Claimant issued a Notice of Suspension of part of the works under clause 39.9 of the Contract because the Respondent failed to remedy the alleged substantial breaches set out in the Show Cause Notice of 12 March 2024;

7. On 21 August 2024, the Claimant issued a Show Cause Notice under clause 39.7 of the Contract relating to;

   (a) the Respondent's substantial breaches of its design obligations under the Contract;

   (b) the Respondent's substantial breaches of its obligations to provide information under the RFI procedure set out in Part H the Contract;

   (c) allegedly preventing the Superintendent from carrying out its duties as described under clause 20 of the Contract; and

   (d) failing to pay the adjudicated amount under the decision made in relation to a prior adjudication application.

8. On 29 August 2024, the Claimant issued a notice of full suspension of the works under the Contract asserting the Respondent had; "failed to show reasonable cause in the manner contemplated by clause, 39.8 and clause 39.9 of the Contract."

9. On 2 September 2024, the Respondent issued a notice to show cause to the Claimant under clauses 39.2(b) and 39.3 of the Contract relating to a wrongful suspension of the work.

10. On 10 September 2024, the Claimant issued a notice of termination under clause 39.9 of the Contract.

11. On 11 September 2024, the Respondent determined that the Claimant failed to show reasonable cause by the date and time stated in the Principal's Notice to Show Cause, and refused to lift the wrongful suspension and return to the Site to perform the WUC.

12. On 12 September 2024, the Respondent exercised its right under clause 39.4 of the Contract to "*take out of the Contractor's hands the whole of the work remaining to be completed and suspend payment until it becomes due and payable pursuant to subclause 39.6*."

13. On 16 October 2024, the Claimant submitted a payment claim under the Act (the **Payment Claim**) to the Superintendent under the Contract and to the Respondent.

14. The Payment Claim was described as the "*Final Claim*" and was comprised of;

    (a) A progress claim for work carried out under the Contract in the amount of $25,394,326.10 excl. GST comprised as follows;

    (b) Claims for variations to the Contract in the amount of $25,781,942.49 excl. GST; and

    (c) Acknowledgment that the Respondent had previously paid $58,165,633.55.

    In total, the Payment Claim claimed payment of the amount of $52,311.233.10 excl. GST.

15. On 30 October 2024, the Respondent submitted its payment schedule under the Act (the **Payment Schedule**). The Respondent rejected the Payment Claim and scheduled $0.00 for payment. In the Payment Schedule, the Respondent;

    (a) informed the Claimant in its Cover Letter that the Superintendent was no longer authorised to issue the Payment Schedule in response to the Payment Claim;

    (b) informed the Claimant in the cover letter it had determined the Claimant owed it a debt in the amount of $47,506,760.81 excl. GST; and

    (c) informed the Claimant it had provided the reasons for the difference between the claimed amount and the scheduled amount in Schedule 1 to the Cover Letter.

16. On 11 December 2024, the Claimant made an adjudication application relating to the payment dispute that had arisen as described above.

APPOINTMENT OF ADJUDICATOR

17. On 18 December 2024, in accordance with section 79(4) of the Act, the Adjudication Registrar of the Queensland Building and Construction Commission (the **QBCC**) referred this Adjudication Application to me.

18. On 18 December 2023, in accordance with section 81(1) of the Act, the adjudicator's agent served a notice of acceptance of the Adjudication Application on the Claimant, the Respondent and the Registrar.

SUBMISSIONS AND DOCUMENTS PROVIDED

19. The following documents were provided to me by the Claimant including the Adjudication Application dated 11 December 2024, to which was attached the following documents;

    (a) Claimant's submissions (Volume 1- A4 lever arch folder of about 150 pages);

    (b) Correspondence, notices and the Payment Claim (Volume 2 - A4 lever arch folder of about 346 pages);

    (c) Payment Schedule, Statutory Declarations of Robert Bearcroft (1 off), Rodney John McKenzie (4 off), Marcus James Sebastian (1 off), Benjamin Bowden (1 off), Bernard John Blom (1 off) and Secretariat quantum report (Volume 3- A4 lever arch folder of about 400 pages;

    (d) Exhibits of drawings, specifications, correspondence etc. (Volumes 4, 5, 6, 7 and 8 - A4 lever arch folders each about 400 pages);

    (e) Bundle of Authorities (Volume 9, 10 and 11- A4 lever arch folder of about 300 pages); and

    (f) 1 USB drive containing 6.018 Gb of documents.

20. The following documents were provided to me by the Respondent on 17 February 2025 including the Response dated 17 February 2025, to which was attached the following documents;

    (a) Legal submissions (Volume 1- A4 lever arch folder of about 400 pages);

(b) Payment Schedule (Volumes 2 and 3- A4 lever arch folder of each about 400 pages);

(c) First, Second and Third adjudication decisions, extract of payment schedule reasons, 4th Easterbrook Declaration (Volumes 5 & 6 - A4 lever arch folder of about 400 pages);

(d) 4th Murphy Declaration (Volume 4- A4 lever arch folder of about 400 pages);

(e) 4th Heran Declaration and the 2nd BG&E Report (Volume 4- A4 lever arch folder of about 400 pages); and

(f) 1 USB drive containing 6.97 Gb of documents.

GENERAL JURISDICTIONAL CONSIDERATION

21. The Claimant is the person who, under the construction contract concerned, is or may be entitled to receive a progress payment and, accordingly, is entitled to make a Payment Claim under the Act.

22. The Respondent is the person who, under the construction contract concerned, is or may be liable to make the payment.

23. The Contract was entered into on or about 12 August 2021 and is after the commencement of the Act, which was 10 November 2017. Therefore, the Contract is a construction contract to which the Act applies.

24. The work carried out under the construction contract is "*construction work*" as defined under section 65(1) of the Act and I am satisfied that the exclusions under section 65(3) of the Act are not applicable. Accordingly, the Contract is a construction contract for the purposes of the Act.

25. The Contract was entered into on or about 12 August 2021 and is after the commencement of the Act, which was 10 November 2017. Therefore, the Contract is a construction contract to which the Act applies.

26. I am, therefore, satisfied that pursuant to section 84(2) of the Act, this Adjudication Application falls within the jurisdiction of the Act and I have jurisdiction to adjudicate this Adjudication Application.

27. Therefore, the version of the Act applicable to the Adjudication Application is the version that was in force at 10 June 2022.

ACT APPLIES TO THIS CONTRACT

28. On or about 12 August 2021, the Claimant and the Respondent entered into a contract for the construction of the project named "Midwater", being a high-rise apartment complex at 3496 Main Beach Parade Main Beach QLD 4217. The Claimant was required to construct only (excluding a few minor exceptions and the diaphragm wall, which were design and construct) and the form of contract used by the parties was an amended AS4000-1997.

29. The construction of a high rise building is, pursuant to s. 65(1)(a) "*construction work*" for the purposes of the Act.

30. The contract between the parties, for the purposes of this Adjudication Application, is comprised of the following;

    (a) A Formal Instrument of Agreement dated 12 August 2021 and documents referred to therein including;

        (i) The Contract Conditions, being an amended form of AS4000-1997;

        (ii) Annexure A – Contract particulars;

        (iii) Annexure B – (deletions, amendments, and additions);

        (iv) Annexure C – (approved form of unconditional undertaking);

        (v) Annexure D – (Deed of Release (Practical Completion));

        (vi) Annexure E – (Deed of Release (Final Completion));

        (vii) Annexure F – (Escrow Deed);

(viii) Annexure G – (Specifications and Drawings);

(ix) Annexure H – (Contractor's Qualifications);

(x) Annexure I – (Principal's project requirements);

(xi) Annexure J – (Deed of Novation);

31. I am, therefore, satisfied that the parties entered into a construction contract to carry out "*construction work*" pursuant to s. 64 of the Act, which is a contract to which the Act applies.

ADJUDICATION APPLICATION FRIVOLOUS OR VEXATIOUS

32. Pursuant to section 84(2) of the Act the adjudicator must decide whether the adjudication application is frivolous or vexatious.

33. The Respondent alleges that the Adjudication Application is frivolous or vexatious.

34. The terms "*frivolous*" and "*vexatious*" are not defined in the Act.

35. In the *Commissioner of Police of Western Australia -v- AM [2010] WASCA 163* (S) the court determined the meaning of the terms; "*frivolous and vexatious*" in the Act referred to in those proceedings, which did not define those terms. In the judgment, Buss J held:

> *29. The ordinary meaning of 'frivolous', in relation to a claim, is, relevantly, having no reasonable grounds for the claim.* ***The ordinary meaning of 'vexatious', in relation to a claim, is, relevantly, instituting the claim without sufficient grounds for success purely to cause trouble or annoyance***

to the other party. *See the Shorter Oxford English Dictionary, (5th ed) 1038, 3529; Mudie v Gainriver Pty Ltd (No 2) [2002] QCA 546; [2003] 2 Qd R 271 [35] - [37] (McMurdo P & Atkinson J), [59] - [61] (Williams JA). It is apparent from the ordinary meaning of these words that 'frivolous' is, in substance, a subset of 'vexatious'.*

36. The Queensland Court of Appeal considered the meaning of "*frivolous or vexatious*" under the now repealed Local Government (Planning and Environment) Act 1990 (Qld) in *Mudie v Gainriver Pty Ltd (No.2) [2003] 2 Qd R 271* and found that:

> *"The words 'frivolous or vexatious' are not defined in the Act and should be given their ordinary meaning…The* ***Macquarie Dictionary defines 'frivolous' as 'of little or no weight, worth or importance; not worthy of serious notice: a frivolous objection. 2. characterised by a lack of seriousness or sense:*** *frivolous conduct...' and 'vexatious' as '1. causing vexation; vexing; annoying...'. Unquestionably, something much more than lack of success needs to be shown before a party's proceedings are frivolous or vexatious. Although in a different context, some assistance can be gained from the discussion of the meaning of these words in Oceanic Sub Line Special Shipping Company Inc v Fay where Deane J states that 'oppressive' means seriously and unfairly burdensome, prejudicial or damaging and* ***'vexatious' means productive of serious and unjustified trouble and harassment****, meaning apparently approved by Mason C.J., Deane, Dawson and Gaudron JJ in Voth v Manildra Flour Mills Pty Ltd. Those meanings are apposite here' [original emphasis].* ***The Vexatious Proceedings Act 2005 (Qld) provides a further definition and says that a "vexatious proceeding includes – (a) a proceeding that is an abuse of the process of a court or tribunal; and (b) a proceeding instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and (c) a proceeding instituted or pursued without reasonable ground; and (d) a proceeding conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose".***

37. Additionally, vexatious proceedings have been described as;

> *"…proceedings intended to harass or annoy, cause delay or…taken for some other ulterior purpose or which lack reasonable grounds"*

38. Mullins J provided the following definition of a "*vexatious proceeding*" in *Cooper v Mbuzi [2012] QSC 105;*

> *"66. That definition of what can be a vexatious proceeding is expansive and not prescriptive. That is consistent with the object of the Act, as expressed in the Explanatory Notes for the Vexatious Proceedings Bill 2005 to address the problems created by vexatious litigants: 'A vexatious litigant is a person who demonstrates particular behaviours in the pursuance of legal actions through the courts. These behaviours include* ***taking legal action without any legal grounds, a repetition of arguments which have already been rejected****, disregard for the court's practices and rulings, and persistent attempts to abuse the court's processes. The consequences of pursuing such actions include wastage of public resources and the harassment and annoyance of defendants in litigation that lacks a reasonable basis" [emphasis added]. 20.*

39. I have considered the Adjudication Application in the context of the above case law. I consider the Claimant was reasonably entitled to make this Payment Claim.

40. I can find nothing that would lead me to conclude that the Adjudication Application is frivolous or vexatious. Specifically, none of the Claimant's claims or submissions are;

(a) without sufficient grounds for success purely to cause trouble or annoyance to the other party;

(b) not worthy of serious notice or characterised by a lack of seriousness; and

(c) action without any legal grounds or a repetition of arguments which have already been rejected.

41. Accordingly, I have decided that the Adjudication Application is neither frivolous nor vexatious.

PAYMENT CLAIM

42. On 16 October 2024, the Claimant served its progress claim 36 (the **Payment Claim**), on the Respondent by email and by personal service, for work carried out under the Contract. The Payment Claim was entitled; "Final Payment Claim".

43. The Respondent, however, disputes the Payment Claim is a valid payment claim under the Act.

44. I have summarised the relevant events leading to the submission of the Payment Claim as follows.

    (a) The Claimant sent a "*Notice of full suspension of the works under Contract*" on 29 August 2024.

    (b) The Respondent does not deny that full suspension of the works under Contract occurred on or about 29 August 2024 and I take that the mean the Claimant carried out work under the Contract up to that date.

    (c) The Claimant sent the Respondent a "*Show Cause Notice*" on 21 August 2024 to which the Respondent provided its response on 28 August 2024.

    (d) The Respondent sent the Claimant a "*Show Cause Notice*" on 2 September 2024 asserting the Claimant's "*Show Cause Notice*" was invalid and further demanding the Claimant lift its unlawful full suspension of the works.

    (e) The Claimant asserts the Respondent failed to remedy the substantial breaches identified in its Show Cause Notice and issued its "*Notice of termination*" on 10 September 2024 allegedly due to the Respondent's ongoing breaches of Contract on 10 September 2024.

(f) The Respondent asserts the Claimant failed to remedy the substantial breaches identified in its Show Cause Notice and issued its instruction under clause 39.4 of the contract to take the whole of the works out of the hands of the Claimant on 12 September 2024.

(g) The Respondent denies it committed the breaches of contract relied upon by the Claimant to terminate the Contract. The Respondent asserts the Claimant's termination was unlawful.

(h) The Respondent asserts that the Payment Claim is not a valid payment claim under the Act for the following reasons;

(i) The Claimant submitted a payment claim (referenced # 35) on 28 August 2024 and the next reference date was 28 September 2024;

(ii) The Claimant did not accrue a right to terminate on 10 September 2024 or at all because the Respondent was not in substantial breach of Contract and the purported termination was unlawful;

(iii) The Claimant refused to lift a "wrongful suspension" by 11 September 2024 and the Respondent took out of the hands of the Claimant the whole of the work remaining under the Contract on 12 September 2024 and suspended payment until it becomes due and payable pursuant to clause 39.6 of the Contract;

(iv) The Contract remains on-foot; and

(v) Therefore, the Claimant had no reference date upon which to found the Payment Claim and the Payment Claim is invalid.

45. The Claimant asserts it accrued a reference date on the date of termination, which was used for the Payment Claim.

46. The Claimant's purported termination preceded the Respondent's exercise of power under clause 39.4 to take the whole of the work out of the hands of the Claimant by 2 days.

47. I will consider below whether the Claimant's termination was lawful in the section below entitled; "*Jurisdiction*" and whether the Payment Claim is a valid payment claim under the Act.

48. In relation to the form and timing requirements of a valid payment claim under the Act, sections 68 and 75 must be satisfied.

49. The Payment Claim must satisfy the form requirements set out in s.68 of the Act. Section 68 of the Act requires:

"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

(b) states the amount (the claimed amount) of the progress payment that the Claimant claims is payable by the Respondent; and

(c) requests payment of the claimed amount; and

(d) includes the other information prescribed by regulation.

50. Section 75 of the Act prescribes the time by which the Claimant may submit a payment claim and the supporting statement as follows;

'Making payment claim

(1) A person (the claimant) who is, or who claims to be, entitled to a progress payment may give a payment claim to the person (the respondent) who, under the relevant construction contract, is or may be liable to make the payment.

(2) Unless the payment claim relates to a final payment, the claim must be given before the end of whichever of the following periods is the longest—

(a) the period, if any, worked out under the construction contract;

(b) the period of 6 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.

(3) If the payment claim relates to a final payment, the claim must be given before the end of whichever of the following periods is the longest—

(a) the period, if any, worked out under the relevant construction contract;

(b) 28 days after the end of the last defects liability period for the construction contract;

(c) 6 months after the completion of all construction work to be carried out under the construction contract;

(d) 6 months after the complete supply of related goods and services to be supplied under the construction contract.

(4) The claimant can not make more than 1 payment claim for each reference date under the construction contract.

(5) A payment claim may include an amount that was included in a previous payment claim.

(6) Subsection (7) applies if—

(a) there is a subcontract under the construction contract for the progress payment; and

(b) the construction contract is not also a subcontract for another construction contract.

(7) The claimant must ensure the payment claim is accompanied with a supporting statement.

Maximum penalty—100 penalty units.

(8) A failure of the claimant to comply with subsection (7) does not affect the validity of a payment claim.

(9) In this section—

final payment means a progress payment that is the final payment for construction work carried out, or for related goods and services supplied, under a construction contract.

supporting statement, for a payment claim, means a written document—

(a) declaring that all subcontractors have been paid all amounts owed to them by the claimant at the date of the payment claim; or

(b) stating—

(i) the following for each subcontractor who has not been paid the full amount owed to them by the claimant at the date of the payment claim—

(A) the subcontractor's name;

(B) the amount still unpaid;

(C) the details of the unpaid payment claim for the subcontractor;

(D) the date the subcontractor carried out the construction work or supplied the related goods and services;

(E) the reasons the amount was not paid in full; and

(ii) that all other subcontractors have been paid the full amount owed to them by the claimant.

51. In accordance with section 68 of the Act, the Payment Claim;

(a) identified the Claimant, the Respondent and the Contract under which the work for which payment is requested was undertaken;

(b) identified the work to which the Payment Claim relates;

(c) claimed payment of $52,311,233.10 excl. GST.

52. Additionally, the Payment Claim;

(a) Indicates it was made on 16 October 2024;

(b) indicates the value of completed work under the (original) Contract was; $83,769,558.72 excl. GST

(c) indicates the Claimant had completed variations to the Contract valued at $26,706,337.93 excl. GST;

(d) acknowledged the amounts previously certified was $58,164,663.55 excl. GST;

53. The Respondent does not deny that full suspension of the works under Contract occurred on or about 29 August 2024 and I take that the mean the Claimant carried out work under the Contract up to that date.

54. The Contract prescribes the times for making a progress claim as follows;

(a) Clause 37.1 and Item 28 of Annexure Part A of the Contract provides the dates from which the Claimant may claim payment for completed work. In particular, clause 37.1 provides;

> *"37.1 Progress claims*
>
> *Subject to Clause 37.1A. the Contractor will claim payment progressively in accordance with Item 28 while WUC is being carried out, at practical completion and at the time for making the final payment claim.*

(b) Further, Item 28 of Annexure Part A of the Contract provides;

> *"33 Progress Claims*
> *(subclause 37.1)*
>
> *(a) Times for progress claims*
>
> *28th day of each month for WUC done to the 28th day of that month, and at the time of practical completion and making the final payment claim.*
>
> …

55. The Contract makes no provision for any further reference dates in the event the Contract was terminated.

56. Section 67 of the Act provides a reference date in the event a construction contract provides no reference date in the event of termination as follows;

> *"(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**.*

57. Accordingly, provided the Claimant lawfully terminated the Contract, the Act provided a further reference date for making a payment claim on the date of termination.

58. I will consider whether the Claimant lawfully terminated the Contract on 10 September 2024 below in the section entitled; "*Jurisdiction – Validity of Payment Claim*" and whether the Payment Claim is a valid Payment Claim under the Act because there exists a valid reference date upon which it was founded.

59. In accordance with section 75 of the Act, the Payment Claim;

(a) Was made about 48 days after the work was last carried out on the Site, which is within the period prescribed by section 75(3)(c) of the Act; and

(b) Was accompanied by a complying "supporting statement" as defined in section 75 of the Act.

60. Prima facie, for the reasons set out above, the Payment Claim is a valid payment claim because;

(a) it satisfies the form requirements for a valid payment claim set out in section 68 of the Act; and

(b) it satisfies the requirements for making a valid payment claim pursuant to section 75 of the Act.

PAYMENT SCHEDULE

61. On 30 October 2024, the Respondent submitted its payment schedule under the Act (the **Payment Schedule**). The Respondent rejected the Payment Claim and scheduled $0.00 for payment. In the Payment Schedule, the Respondent;

(a) informed the Claimant in its Cover Letter that the Superintendent was no longer authorised to issue the Payment Schedule in response to the Payment Claim;

(b) informed the Claimant in the cover letter it had determined the Claimant owed it a debt in the amount of $47,506,760.81 excl. GST; and

(c) informed the Claimant it had provided the reasons for the difference between the claimed amount and the scheduled amount in Schedule 1 to the Cover Letter.

62. Section 69 of the Act prescribes the requirements for a valid payment schedule as follows;

"69 Meaning of payment schedule

*A **payment schedule**, responding to a payment claim, is a written document that—*

(a) identifies the payment claim to which it responds; and

(b) states the amount of the payment, if any, that the respondent proposes to make; and

(c) if the amount proposed to be paid is less than the amount stated in the payment claim—states why the amount proposed to be paid is less, including the respondent's reasons for withholding any payment; and

(d) includes the other information prescribed by regulation."

63. Section 76 of the Act prescribes the time by which the Respondent must provide a response to the Claimant's payment claim (in the event that it has withheld any part of the amount claimed) as follows;

76 Responding to payment claim

(1) If given a payment claim, a respondent ***must respond to the payment claim by giving the claimant a payment schedule within whichever of the following periods ends first*** *—*

(a) ***the period, if any, within which the respondent must give the payment schedule under the relevant construction contract****;*

(b) 15 business days after the payment claim is given to the respondent.

Maximum penalty—100 penalty units.

Note—

A failure to give a payment schedule as required under this section is also grounds for taking disciplinary action under the Queensland Building and Construction Commission Act 1991.

(2) However, the respondent is not required to give the claimant the payment schedule if the amount claimed in the payment claim is paid in full on or before the due date for the progress payment to which the payment claim relates.

(3) If the respondent gives the claimant a payment schedule, the respondent must pay the claimant the amount proposed in the payment schedule no later than the due date for the progress payment to which the payment schedule relates.

Maximum penalty—100 penalty units.

(4) Subsection (3) does not apply to an amount to the extent the respondent is required to retain the amount under chapter 3, part 4A

64. The Payment Schedule satisfied section 69 of the Act for the following reasons;

(a) Identified the Payment Claim entitled; "Final Payment Claim", which was served on 16 October 2024 and was addressed to the Claimant;

(b) Stated the amount the Respondent proposed to pay as (negative) -$51,200,844.40 incl. GST; and

(c) Gave reasons for withholding payment relating to the amounts claimed in the Payment Claim.

65. The Payment Schedule also raised jurisdictional challenges asserting the Payment Claim was invalid including;

(a) There is no valid reference date for the Payment Claim and the Payment Claim is invalid;

(b) Issue estoppel restrains the adjudicator due to the existence of matters in the Payment Claim that have been decided in previous adjudication applications referenced; # 2573124, # 2602454 and # 2671069.

66. The Payment Schedule satisfied section 76 of the Act for the following reasons;

(a) The Payment Schedule was served on the Claimant within the period prescribed; and

(b) It provided reasons for withholding payment.

67. For the reasons set out above, the Payment Schedule is a valid payment schedule under the Act because;

(a) it satisfies the form requirements for a valid payment schedule set out in section 69 of the Act; and

(b) it satisfies the requirements for responding to a payment claim pursuant to section 76 of the Act.

ADJUDICATION APPLICATION

68. The Payment Claim satisfies the requirements of ss. 68 and 75 of the Act for the reasons stated above.

69. The Payment Claim was served on the Respondent on 16 October 2024 and is for an amount that is more than $750,000. Therefore, pursuant to s.64 of the Act, the Claimant made a complex payment claim for the purposes of the Act.

70. The Payment Schedule was served on the Claimant on 30 October 2024 and satisfies the requirements of ss. 69 and 76 of the Act for the reasons stated above.

71. The Adjudication Application is in writing and was made to the QBCC on 11 December 2024.

72. The Adjudication Application was served on the Respondent on 13 December 2024.

73. Section 79 of the Act provides the permissible time for making an Adjudication Application as follows;

> *79. Application for adjudication*
>
> *(1) A claimant may apply to the registrar for adjudication of a payment claim (an adjudication application) if—*
>
> *(a) the claimant is entitled to apply for adjudication under section 78(2)(b) because of a failure by the respondent to pay an amount owed to the claimant by the due date for the payment; or*
>
> *(b) **the amount stated in the payment schedule, given in response to the payment claim, is less than the amount stated in the payment claim**.*
>
> *(2) An adjudication application—*
>
> *(a) must be in the approved form; and*

(b) must be made within—

(i) for an application relating to a failure to give a payment schedule and pay the full amount stated in the payment claim—30 business days after the later of the following days—

(A) the day of the due date for the progress payment to which the claim relates;

(B) the last day the respondent could have given the payment schedule under section 76; or

(ii) for an application relating to a failure to pay the full amount stated in the payment schedule—20 business days after the due date for the progress payment to which the claim relates; or

*(iii) **for an application relating to the amount stated in the payment schedule being less than the amount stated in the payment claim—30 business days after the claimant receives the payment schedule; and***

(c) must identify the payment claim and the payment schedule, if any, to which it relates; and

(d) must be accompanied by the fee prescribed by regulation for the application; and

(e) may include the submissions relevant to the application the claimant chooses to include.

> *(3) A copy of an adjudication application must be given to the respondent.*
>
> *(4) The registrar must, within 4 business days after the application is received, refer the application to a person eligible to be an adjudicator under section 80.*

74. Pursuant to section 79(2)(b)(iii)(A) of the Act, the Claimant was permitted to make an Adjudication Application within 30 business days after the Claimant received the Payment Schedule. In other words, the Claimant was entitled to make the Adjudication Application up to 11 December 2024.

75. The Claimant made the Adjudication Application to the QBCC on 11 December 2024.

76. I am satisfied the Adjudication Application has been made in accordance with s.79 of the Act.

REQUEST FOR AN EOT TO SERVE THE RESPONSE

77. The Respondent received the Adjudication Application on 13 December 2024 and notice of the Adjudicator's acceptance on 18 December 2024.

78. The Adjudication Application relates to a complex payment claim.

79. Section 83(2) of the Act provides;

> *"If responding to a complex payment claim, the Respondent must give the adjudicator the adjudication response within the later of the following to end—*
>
> *(a) 15 business days after receiving a copy of the Adjudication Application;*

> *(b) 12 business days after receiving notice of the adjudicator's acceptance of the Adjudication Application."*

80. The Respondent was entitled to serve its written Response on the Claimant up to 24 January 2025, which is the time permitted by section 83(2)(b) of the Act.

81. On 19 December 2024, the Respondent requested an extension of time pursuant to section 83(3) of the Act. Section 83(3) of the Act provides;

> *"However, if responding to a complex payment claim, the Respondent may apply to the adjudicator for an extension of time, of up to 15 additional business days, to give the adjudication response to the adjudicator."*

82. Further, the application for the extension of time for making the Response must satisfy the requirements of s. 83(4) of the Act, which provides;

> *"The application must—*
>
> *(a) be in writing; and*
>
> *(b) be made within the later of the following periods to end—*
>
> *(i) 5 business days after receiving a copy of the Adjudication Application;*
>
> *(ii) 2 business days after receiving notice of the adjudicator's acceptance of the Adjudication Application; and*
>
> *(c) include the reasons for requiring the extension of time."*

83. Accordingly, the Respondent had up to 20 December 2024 to request an extension of time for issuing its Response and made a valid request for an extension of time pursuant to s. 83(4) of the Act.

84. The Respondent applied for an extension of time on 19 December 2024 pursuant to s. 83(4) of the Act and on 23 December 2024, I granted the Respondent an extension of time for submitting a Response up to 17 February 2025 under section 83(5) of the Act.

RESPONSE

85. On 17 February 2025, the Respondent served on the adjudicator a copy of its Response, which was within the extended period permitted by the adjudicator under s. 83(5) of the Act.

86. I am satisfied the Response has been made in accordance with s.83 of the Act.

JURISDICTION – VALIDITY OF PAYMENT CLAIM

87. The Respondent has raised jurisdictional challenges in the Response.

88. The Respondent asserts that the Payment Claim is not a valid payment claim under the Act for the following reasons;

(a) The Claimant submitted a payment claim (referenced # 35) on 28 August 2024 and the next reference date was 28 September 2024;

(b) The Claimant did not accrue a right to terminate on 10 September 2024 or at all because;

(i) the Respondent was not in substantial breach of Contract; and

(ii) the purported termination was unlawful.

(c) The Claimant refused to lift a "wrongful suspension" by 11 September 2024 and the Respondent took out of the hands of the Claimant the whole of the work remaining under the Contract on 12 September 2024 and suspended payment until it becomes due and payable pursuant to clause 39.6 of the Contract; and

(d) The Contract remains on-foot.

89. In order to determine whether the Payment Claim was a valid payment claim under the Act I must decide whether the termination made in accordance with the Contract.

90. It is important to consider the events and the dispute leading up to the issue of several Notices to Show issued by both parties to decide this jurisdictional dispute.

91. The issue of Notices to Show from both parties is as follows:

(a) On 1 March 2024, the Claimant issued a Show Cause Notice under clause 39.7 of the Contract relating to the Respondent's substantial breaches of its design obligations under the Contract. The alleged substantial breaches of Contract were;

(i) "… *failed to perform its design related obligations under the Contract, having failed to produce "suitable documentation for procurement and construction" that is "coordinated and free from clashes" for the Contractor to perform construction works pursuant to the Contractor's obligation under the Contract*";

(ii) "…*failed to address, concerns raised by the Contractor with respect to errors and omissions in the design documentation provided by the Principal to date*."

(iii) In that Show Cause Notice, the Claimant referred to the following deficient design documentation;

A. Ceilings and Partitions - designs issued under site instructions (SI) 51, 71, 80, 93, 119, 124 and 129 during the period 7 November 2023 to 28 February 2024;

B. Waterproofing to balconies - design requested under RFI 426 and issued under SI 118, which the Claimant asserts remains defective;

C. Fire pump-room - design requested under RFI 433 and 438, which the Claimant asserts still has not been provided;

D. Hot water unit location - design requested under RFI 406, which the Claimant asserts has still not been provided;

E. Location of power points on party walls – design requested under RFI 437, which the Claimant asserts has still not been provided;

F. Additional balancing valves to riser branches of the chill water line -design requested under RFI 436, which the Claimant asserts has still not been provided;

G. Lobby relief riser - design requested under RFI 303, which the Claimant asserts has still not been provided;

H. Design that contained notified errors relating to ceilings and the design of partitions that contained notified errors which the Claimant identified on 9 February 2024 - the Claimant asserts has still not been provided; and

I. The preliminary design of ceilings and the preliminary design of partitions could not be used for construction. This is evidenced in the Respondent's direction of 22 February 2024 to the Claimant where the Respondent directed the Claimant to carry out a design review as follows;

> *" [. . .] under separate cover (Sl No 24) we have now issued revised wall partition details.*
>
> *Can you review each of the wall type, and wall junction detail, and* ***advise (for each detail) if these are in your opinion: -***
>
> ***. Buildable: or***
>
> ***. Non-complaint.***
>
> *... **can you also confirm if the Rondo project specific information issued with S/ No 80, in your view, constitutes a buildable C&P solution**."*

(iv) In that Show Cause Notice, the Claimant asserts the Respondent failed to provide the designs that could be used to construct the Works because;

J. the design documentation was not co-ordinated and was not fit for purpose design documentation that could be used by the Claimant to proceed with the works under the Contract;

K. the Claimant could not plan the construction works because the Respondent failed to provide complete, co-ordinated and fit for purpose design documentation; and

(v) In the Show Cause Notice, the Claimant also asserts the Respondent failed to provide the requisite designs in a timely manner as follows;

*"**Failing to reasonably ensure that all activities of its consultants are carried out in a timely manner that is consistent with the construction program and procurement schedule supplied by the Contractor**. The Contractor notes, by way of example, that it has been unable to progress planned works on ceilings and partitions (and associated works) due to the Principal's failure to address deficiencies in its designs as referred to in paragraph 10(b)(i) above."*

(b) The Claimant re-issued its Show Cause Notice on 12 March 2024 (the **Claimant's First Cause Notice**) in ostensibly the same form as is described in the preceding paragraph following a complaint from the Respondent asserting the 1 March 2024 Show Cause Notice was invalid.

(c) On 20 March 2024, the Respondent responded to the Claimant's First Cause Notice rejecting the Claimant's assertions.

(d) On 22 March 2024, the Claimant issued a Notice of Suspension of part of the works under clause 39.9 of the Contract because it determined the Respondent failed to remedy the alleged substantial breaches set out in the Show Cause Notice of 12 March 2024. Specifically, the Claimant informed the Respondent that it was suspending the following works;

Balcony

(i) Waterproofing – "*…balconies with external light weight walls cannot proceed until the wall design is resolved*."

(ii) Partitions – "*…[design] documentation is [to be] coordinated [with services] prior to proceeding with works on site with relevant details in response letter to SI 151*"

(iii) Façade – "*balconies with external light, white walls cannot proceed until the wall design is resolved*."

(iv) Balcony Tiling – follows " *completion of previous trades*";

Common Area

(v) Mechanical – "*… concerns with the design performance of the lobby relief. Proceeding based on the client warrants the design and compliance*."

(vi) Mechanical – "*fire rating of penetration, performance solution to be issued by the Superintendent*."

(vii) Mechanical – "*unable to complete installation of mechanical plant. Coordination of plant/acoustic requirements for discontinuous wall/access to the plant for maintenance and replace*."

(viii) Mechanical – *"…[design error in] branch line in plant room."*

(ix) Mechanical – *"[design error in] Location of tundish and amount of ceiling space to run the drain from the unit to the tundish believe will not work."*

(x) Door Frames – *"[design errors in] drawings, need to be updated to reflect agreement in RFI and issued by the Superintendent under the Contract."*

(xi) Partitions – *"[design error] unable to install speed panel to the stair press and stair due to works not being coordinated and completed within the plant room"*

(xii) Formwork – "[design error] *unable to weld returns to install stair handrails"*

(xiii) Fire – *"additional core holing through current walls for additional fire pipe, require coordination with structure engineer and architect for location"*

(xiv) Ceiling – cannot proceed until core hole designed for additional fire sprinkler and plant room design is coordinated.

(xv) Electrical – cannot proceed until above items are resolved.

(xvi) Plumbing - cannot proceed until above items are resolved.

(xvii) Lifts - cannot proceed until above items are resolved.

(xviii) Garbage chute - cannot proceed until above items are resolved.

Forming SOU's

(xix) Partitions – "*unable to build party walls/corridor walls due to documents, not being fully coordinated/compliant*"

(xx) Electrical – change of specification – "SilenceF" not currently available. Unable to proceed.

(xxi) Waterproofing internal – cannot proceed until design of partitions is resolved.

(xxii) Hydraulic Services – design of H/Water unit locations not acceptable to GCCC.

(xxiii) Hydraulic Services – rough-in unable to proceed until partitions designs are resolved.

(xxiv) Hydraulic Services – fixtures and fittings unable to proceed until partitions designs are resolved.

(xxv) Electrical Services – design of H/Water unit locations not acceptable to GCCC.

(xxvi) Electrical Services – rough-in unable to proceed until partitions designs are resolved.

(xxvii) Electrical Services – fixtures and fittings unable to proceed until partitions designs are resolved.

(xxviii) Mechanical Services - rough-in unable to proceed until partitions designs are resolved.

(xxix) Mechanical Services – grilles, exhaust and control panels unable to proceed until partitions designs are resolved.

(xxx) Finishes - unable to proceed until partitions designs are resolved.

92. On 21 August 2024, the Claimant issued a Show Cause Notice under clause 39.7 of the Contract relating to;

(a) the Respondent's substantial breaches of its design obligations under the Contract;

(b) the Respondent's substantial breaches of its obligations to provide information in accordance with the RFI procedure set out in Part H the Contract;

(c) allegedly preventing the Superintendent from carrying out its duties as described under clause 20 of the Contract; and

(d) failing to pay the adjudicated amount under the decision made in relation to a prior adjudication application.

(e) The Claimant referred to its Show Cause Notice of 12 March 2024 and asserted the design defects addressed in that notice remained unresolved and also provided a summary of 79 outstanding requests for information (**RFIs**). The most overdue was 474 days relating to wall sizes on level 4 and the least overdue was 5 days relating to L18-22 Council approved plans. The median overdue request was 102 days.

93. On 28 August 2024, the Respondent replied to the Claimant's "Show Cause Notice" served on 21 August 2024. In particular;

(a) The Respondent asserted the "Show Cause Notice" served on 21 August 2024 was invalid because the Claimant did not provide to the Respondent 7 clear days within which to respond as was required under clause 39.8(d) of the Contract.

(b) The Respondent rejected;

(i) the Claimant's assertion about substantial breaches of Contract for failure to provide a design to a certain standard and within a certain time as was required under the Contract and provided a detailed response about each of the 79 RFIs identified in the Claimant's "Show Cause Notice" served on 21 August 2024 that it argued showed at least 78 of 79 RFIs had been satisfactorily answered; and

(ii) rejected the Claimant's 2 alleged substantial breaches of contract that it had in any way interfered with or prevented the Superintendent from discharging its duties under the Contract.

(c) The Respondent referred to the Claimant's design related obligations set out in clause 2.1 of the Contract but did not explain how the Claimant breached that term and how that relieved the Respondent of its purported design obligations or how some of the design obligations that the Claimant asserted belonged to the Respondent actually were obligation of the Claimant pursuant to clause 2.1.

(d) The Respondent submitted that none of the alleged design breaches were substantial breaches and further argued that even if there were many minor design breaches,

cumulatively they would not amount to a substantial breach.

94. On 29 August 2024, the Claimant issued a notice of full suspension of the works under the Contract asserting the Respondent had; "failed to show reasonable cause in the manner contemplated by clause, 39.8 and clause 39.9 of the Contract."

95. On 2 September 2024, the Respondent issued a notice to show cause to the Claimant under clauses 39.2(b) and 39.3 of the Contract relating to a wrongful suspension of the work.

96. On 10 September 2024, the Claimant issued a notice of termination under clause 39.9 of the Contract.

97. On 11 September 2024, the Respondent determined that the Claimant failed to show reasonable cause by the date and time stated in the Principal's Notice to Show Cause, and refused to lift the wrongful suspension and return to the Site to perform the WUC.

98. On 12 September 2024, the Respondent exercised its right under clause 39.4 of the Contract to take out of the Contractor's hands the whole of the work remaining to be completed and suspend payment until it becomes due and payable pursuant to subclause 39.6.

Decision of whether the Contract was terminated in accordance with the Contract.

99. The provisions of the Contract that must be satisfied before the Claimant accrued a right to terminate the Contract are as follows.

100. Clause 39.7 defines the circumstances under which the Claimant may terminate the Contract as follows;

> *"39.7 Principal's default*
>
> *If the Principal commits a substantial breach of the Contract, the Contractor may, by hand or by certified post, give the Principal a written notice to show cause.*
>
> *Substantial breaches include, but are not limited to:*
>
> *a) failing to:*
>
> *i) provide security:*
>
> *ii) produce evidence of insurance:*
>
> *iii) rectify inadequate Contractor's possession of the site if that failure continues for longer than the time stated in Item 31: or*
>
> *vi) make a payment due and payable pursuant to the Contract; and*
>
> *b) the Superintendent not giving a certificate of practical completion or reasons as referred to in subclause 34.6.*

101. Clause 39.8 sets out the form and requirements of the Contractor's notice to show cause as follows;

> *"39.8 Contractor's notice to show cause*
>
> *A notice given under subclause 39,7 will state:*

a) *that it is a notice under clause 39 of these General Conditions of Contract:*

b) *the alleged substantial breach;*

c) *that the Principal is required to show cause in writing why the Contractor should not exercise a right referred to in subclause 39.9:*

d) *the date and time by which the Principal must show cause (**which will not be less than 7 clear days after the notice is received by the Principal**); and*

e) *the place at which cause must be shown.*

102. Clause 39.9 explains the Claimant's rights if the Respondent failed to show cause as follows;

"39.9 Contractor's rights

*If the Principal fails to show reasonable cause by the stated date and time, **the Contractor may, by written notice to the Principal, suspend the whole or any part of WUC**.*

The Contractor will remove the suspension if the Principal remedies the breach.

*The Contractor may. by written notice to the Principal, **terminate the Contract, if within 7 days of the date of suspension under this subclause the Principal fails**:*

a) *to remedy the breach: or*

> *b) if the breach is not capable of remedy, to make other arrangements to the reasonable satisfaction of the Contractor.*
>
> *Damages suffered by the Contractor by reason of the suspension will be assessed by the Superintendent, who will certify them as moneys due and payable to the Contractor.*

103. The Respondent asserts that the Show Cause Notice served on 21 August 2024 was invalid because it did not satisfy the requirements for a valid show cause notice as required under clause 39.8(d) of the Contract.

104. Specifically, the Respondent points out that the Show Cause Notice dated 21 August 2025 provided the following;

> *"The Contractor requires the Principal to show cause as to why the Contractor should not exercise its right to suspend the whole of the Works Under Contract in accordance with clause 39.9 of the Contract, by no later than 4:00 pm on Wednesday, 28 August 2024."*

105. The Respondent argues that the Claimant only allowed 7 clear days because the date of service is not counted, and neither is the day the response was returnable. That meant the Claimant only allowed the Respondent 6 clear days.

106. In the Adjudication Application the Claimant asserts a "clear day" means 24 hours, which commenced at the time of service of the Show Cause Notice served by hand at 2:45pm and on the basis that a day (being a 24 hour period) commenced at that time, the time for return of the response was in excess of 7 clear days ending at 4:00 pm on Wednesday, 28 August 2024. The Claimant asserts there is nothing in the Contract that indicates a clear day means anything else.

107. The Respondent argues that does not comply with clause 1 of the Contract. Clause 1 of the Contract provides;

> *"In the Contract:*
>
> *a)* ***references to days mean calendar days*** *and references to a person include an individual, firm or a body, corporate or unincorporate:*

108. The phrase clear days is not italicised and is not a defined term under the Contract.

109. Accordingly, I decide "*clear day*" in counting days means a full day that is not included when calculating a period of time or a day when nothing is scheduled. This essentially excluding the day on which an event starts and the day on which it ends, so you only count the complete days in between.

110. The Claimant also asserts that by the operation of law in circumstances where the Respondent replies to the Show Cause Notice within the specified time, it is deemed to have waived its right to insist on strict compliance with the form requirements of clause 39.8. The Claimant relies on *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3) [2012] VSC 99* (***Dura***) as authority in support of its argument.

111. I have copied below a part of the judgment of Dura which sets out the requirements for a valid show cause notice as follows;

> "…
>
> *359. On 4 September 2006, Hue served four notices to show cause, with annexures, to Dura pursuant to cl 44.2 of the contract, regarding -*
>
> *(a) failure to provide evidence of insurance in breach of cl 21.1 of the contract (notice to show cause 1);*
>
> *(b) failure to use the standard of materials or provide the standards of workmanship required by the contract in breach of cl 30.1 of the contract (notice to show cause 2);*
>
> *(c) failure to comply with a direction of the superintendent under cl 30.3 of the contract, in breach of cl 23 of the contract (notice to show cause 4); and*
>
> *(d) failure to proceed with the works with due expedition and without delay in breach of cl 33.1 of the contract (notice to show cause 3).*
>
> *I accept Mr Chu's evidence that the set of notices that were served on 4 September included, as annexures, the documents referenced in the lists that form part of the notices. The insurance notice is no longer in issue.*
>
> …
>
> *367. A curious debate developed at trial, resulting from a lack of attention by Dura to its pleadings.* ***The issue developed from the re-service, on 11 September 2006, of the notices to show cause initially served on 4 September 2006****. The notices were*

in identical form save that the second set of notices served on 11 September 2006 specified a time and date for showing cause that was 7 clear days after the notice was given. Apart from the question of what accompanied the served notices, this proposition was not in issue.

…

368. ***Dura responded to the notices dated 4 September 2006 by hand delivering two folders of documents on 8 September 2006 under cover of a letter from its solicitor****. Dura did not accept the validity of the show cause notices, asserting that the board of directors of Hue had not properly resolved to authorise the procedure. Secondly, Mr Noble contended that Hue did not act in good faith when issuing the show cause notices, pointing to both the timing of the notices and the number of notices issued all requiring compliance by the same allotted time and date. Mr Noble contended that this conduct was oppressive. Mr Noble pointed out that Hue must be satisfied, before taking any further step under cl 44.4, that Dura had failed to show reasonable cause as to why Hue should not do so. Mr Noble contended that Hue was obliged to consider reasonably each of Dura's responses.* ***Finally, Mr Noble noted that the time specified by the notices for compliance was less than the seven clear days mandated by the contract. Mr Noble did not complain that Dura was not served with, or could not readily identify, the referenced documents listed in the notices****.*

…

Legal requirements for a valid notice

384. Generally, the common law adopts a strict approach to contractual requirements that may permit the principal to

terminate the contract for unremediated breach in the period following the service of a notice. A common form is that the contractual provision permits either a self-executing notice, or a second notice, that unless breach is remedied, the contract is terminated. Dura sought to develop its submission by reference to conveyancing cases.[40] *However, issues of forfeiture can arise upon termination of leases or contracts that create equitable interests on specific performance that are absent from the building cases. The different considerations that may arise in relation the forfeiture of interests in property are not appropriate to construing a notice to exercise a power of determination in a construction contract.*[41]

[40] *Fletcher v Nokes* [1891] 1 Ch 271; *Penton v Barnett* [1898] 1 QB 276.

[41] *Hometeam Constructions Pty Ltd v McCauley* [2005] NSWCA 303, at [146] (McColl JA).

385. Under AS 2124-1992 on substantial breach by the contractor, the principal is not entitled by the contract to immediately elect to terminate the contract or take the work out of the hands of the contractor. The right to take either course of action does not automatically follow failure to rectify the breach after the service of a notice. The contractor has the opportunity to influence the principal's choice about its response to its substantial breach by showing reasonable cause to the notice that the principal had served. The process affords to the contactor an opportunity to show cause why the principal should not exercise those rights at all.

386. Clause 44 does not contemplate that the contractor's response needs to be to rectify the breach that is the subject of the notice. ***The clause is primarily concerned with future performance, not rectification.***[42] ***AS 2124-1992 requires***

that the principal name expressly, or mention definitely, the alleged substantial breach. *It does not require that the principal detail or particularise each matter constituting the default. The response expected is not necessarily an activity-based response, remediation within the time permitted, not less than 7 days. The clause contemplates that the notice will require the contractor's response in writing, at a place nominated by the notice and by a time and date specified by the notice. The process of showing cause under cl 44 requires communication, not necessarily just rectification. Thus, a contractor who remedied its breach but failed to communicate to the principal that it had done so, would fail to show reasonable cause and the principal could proceed to exercise a cl 44.4 right. The contract does not contemplate that the principal must discover for itself whether a substantial breach has been remedied after notice before so doing.*

> *[42] Cf Brenmar Building Co Limited v University of Newcastle (1999) 15 BCL 467.*

387. In Brenmar Building Co Pty Ltd v University of Newcastle,[43] the NSW Court of Appeal held that 'both authority and commonsense … fully support the view that to inform a builder that he has not been proceeding with the general task which he has been given – not with a particular item – in a competent manner or with reasonable diligence is a sufficient specification'. In Re Stewardson Stubbs & Collett Pty Ltd & Bankstown Municipal Council[44] Moffat J dispatched a contention, that Dura advanced in this proceeding about the expedition notice - that it was not sufficient, in order to specify a default, to merely state that the contractor had failed to proceed with reasonable diligence. His Honour stated:

> *It has been argued it is not sufficient merely to refer to the failure to proceed with reasonable diligence.* ***A default can be specified in two ways; one is by directing attention to the provision in the contract in respect of which default is made. The other is by giving particulars of***

> ***the manner in which a breach has occurred.*** *In order to specify the default, I think at least the former must be pointed out. But each case will depend on its own circumstances as to whether in order to specify the default there must be added some particulars as will identify the particular breach alleged. Thus a default under sub-clause (3) [failure to comply with notices] may well require some further specification so that the builder is put in the position to discontinue the default which is complained of. Somewhat different considerations apply with regard to sub-clauses (1) [suspending work] and (2) [failing to proceed with reasonable diligence or in a competent manner] where the mere reference to the clause] said to be in breach may be sufficient to specify the default … what is called for is not a repair of the consequences of past lack of diligence but compliance in a substantial and commercial sense with the general obligations under the contract.* ***Accordingly, I think a notice which is in general terms referring to the breach of the general obligation is a notice which does specify the default****.*
>
> *[43] (1999) 15 BCL 467.*
>
> *[44] [1965] NSWR 1671, 1675-6.*

388. Hudson's Building and Engineering Contracts,[45] state the general rule concerning modern contractual determination clauses that require written notice in one form or another at the time of determination of the contract in these terms:

> *Express notice requirements are often in 'two tier' form …* ***In every case the clause must be carefully considered and closely followed in all respects, both as to the contents and timing of the notices, but the courts will usually regard the notices as commercial documents, and the modern approach is to interpret notice clauses with regard to their commercial purpose*** *[Mannai Investments Co Ltd v Eagle Star Assurance [1997] AC 749]. Provided a*

*reasonable recipient of the notice can be left in no reasonable doubt as to its meaning the form of words used will usually not be important. The contents of the notice then have to be matched against the relevant requirements in order to determine whether it meets them [Trafford MBC v Total Fitness (UK) Ltd[2002] EWCA Civ 1513, at [49]]. **Applying this principle, notices referring the reader to the applicable clause of the contract and identifying the default are generally likely to be sufficient**. [Re Stewardson Stubbs & Collett Pty Ltd & Bankstown Municipal Council [1965] NSWR 1671 see also Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd [2010] EWHC 465 (Comm)]. On the other hand, time limits or requirements will ordinarily require strict compliance, particularly those requiring continuation of a default for a specified period [Eriksson v Whalley [1071] 1 NSWLR 397]. Particularly where a determination clause is conditioned on a number of different eventualities or defaults of the contractor, it is evident that any required preliminary notice should sufficiently identify the particular ground relied upon, if that is called for by the contract (and particularly where continuation of the default is made a condition of any second notice), but further detail, particularly in regard to a generalised ground like due diligence, will not usually be called for.*

[45] 12th ed, paragraph 8-045.

389. The corresponding passage in an earlier edition (11th) of Hudson is cited with approval by the NSW Court of Appeal in Hometeam Constructions Pty Ltd v McCauley[46] following review of the construction, and other, cases.

[46] [2005] NSWCA 303. This decision and the cases reviewed by McColl JA are considered below. See also Diploma Construction Pty Ltd v Marula Pty

Ltd [2009] WASCA 229; (2010) 26 BCL 204, at [77] – [79], Newnes JA (Owen and Miller JJA agreeing).

390. The Court of Appeal of this court, in MLW Technology Pty Ltd v May,[47] in the context of a licensing agreement, considered the principles relevant to interpreting the effect of contractual notices. ***Gillard AJA[48] emphasised that in construing commercial contracts, and the actions of businessmen, a common sense non-technical approach should be adopted.***[49] *Gillard AJA approved of the observations of the House of Lords in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd[50] finding them to accord with authority in this court. A reasonable recipient, in the circumstances of the parties is aware of the terms of the contract, of the correspondence that has passed between the parties, and of the history of the building project. A builder would have had extensive knowledge of the works.*

[47] [2005] VSCA 29.

[48] With whom Winneke P and Buchanan JA agreed.

[49] Ibid at [76].

[50] [1997] AC 749.

391. The process contemplated by cl 44 of AS 2124-1992 defers the principal's right to determine its response to a substantial breach from the time of discovery of the breach until after an opportunity to show cause has been afforded to the contractor. To my mind, that is an important distinction. Showing cause why a principal should not exercise a choice whether to exercise, at all or to elect between different, contractual rights contemplates a process of communication between principal and contractor. This process may involve a broad range of considerations, enlivening analysis of the particular circumstances of each party's performance of the contract. Because this process differs from implementing a decision to terminate the

contract, a notice can effectively convey what is amiss, without providing detailed particulars of the state the works must be in when the period expires, to avoid termination of the contract.

392. Under AS 2124-1992, the contractor may show reasonable cause why the principal should take no action, or no immediate action, or accept or impose agreed conditions while continuing to require performance from the contractor. It cannot be that the opportunity to show cause is limited to whether the principal ought to terminate the contract or take the works out of the contractor's hands. ***The process of showing cause, for a defaulting party, in the period after the innocent party's notice, is conditioned by the form and content of the notice and the consequence for that party of the innocent party's response to the cause shown****. That the opportunity provided to the contractor in the period after notice from the principal under AS 2124-1992 is to show cause, not to remedy its breach, is a relevant consideration in determining the approach to be adopted by the principal in giving notice, the contractor in showing cause and the principal in its response to cause shown. Where, unlike AS 2142, the effective consequence for the contractor is self-executing termination of the contract by the principal if there is not rectification of the substantial breach within the period, the principal will have determined to terminate on the contractor's failure to rectify within the specified period, before the notice is first given. Then the principal's notice will need to be necessarily detailed and specific in its requirements.*

393. ***Dura contended that the notices failed for want of detailed and specific particulars of breach. In Hounslow LBC v Twickenham Garden Developments Ltd,[51] Megarry J considered a like contention concluding:***

> ***I do not read this condition as requiring the architect, at his peril, to spell out accurately in his notice further and better particulars, as it were, of the particular default in question. All that I think the notice need do is to direct the contractor's mind to what is said to be amiss: and***

this was plainly done by this notice. If the contractor had sought particulars of the alleged default and had been refused them, other considerations might have arisen.

393. The observations that I noted earlier about common sense interpretations of commercial documents with regard to their commercial purpose remain apposite.

[51] [1971] 1 Ch 233 at 265.

394. In Re White Industries (Qld) Pty Ltd,[52] whether the notice must be self-contained or may incorporate, by reference, material not actually served was raised but not decided. The proceeding was an application by the builder for summary determination of the validity of notices given by the principal. The contract in that case, the parties used JCCB 1985, was materially different to AS 2124-1992 and it permitted the principal to serve a notice that it intended to determine the employment of the builder under the agreement unless the substantial breach specified in the notice was remedied in terms consistent with the contract within 10 days. The contract provided that the principal's notice specify and detail the default relied upon.

[52] (1991) 7 BCL 200.

395. Byrne J reasoned that a notice would not be effective unless the detail of the default is clearly identified. Referring to earlier authority,[53] he held that the notice must be unequivocal in order to convey what was amiss. Were it otherwise, the giving of the notice would be an empty gesture. This consequence followed because it was only if the notice descends to the particularity of not merely specifying the substantial breach, but also detailing the default relied upon, that the builder could avail itself of the opportunity provided by the contract to remedy the default and avoid the serious consequences that might follow. The provisions of the contract expressly contemplated a form of self–executing procedure. The architect's notice did not set out the necessary detail of the principal's complaint

and was held to be a notice that did not meet the requirements of the contract. For present purposes, the distinction between taking the opportunity to remedy the default to avoid the consequences of an intention to terminate and showing cause as to why the principal should not exercise a right referred to in cl 44.4 can be noted. Under AS 2124-1992, an imperative for the principal to detail each default or defect relied on to constitute the substantial breach does not arise from the express terms of cl 44.

[53] Yendex Pty Ltd v Prince Constructions Pty Ltd (1989) 5 BCL 74.

396. This is not to say that a notice under cl 44.3 would sufficiently specify the alleged substantial breach if it merely identified one of the sub-paragraphs of cl 44.2, the clause which states, without limitation, what matters may amount to substantial breaches. The type of substantial breach in issue will determine the form of specification in the notice. Providing the opportunity for the contractor to show reasonable cause determines the content of the notice. Some forms of substantial breach - such as failing to provide evidence of insurance, or failing to lodge security - relate to single events. The method for showing cause is correspondingly clear, evidence of insurance, or lodged security, is provided, or the contractor provide written cause explaining why the principal should not exercise a cl 44 right when that step has not been taken. ***Other forms of substantial breach, such as failing to comply with a direction of the superintendent or failing to use, or provide, the standard of materials or workmanship required may also relate to a single event, but they may be ongoing circumstances.*** *Where ongoing circumstances found a substantial breach, and that will usually be the case where the breach concerns failing to proceed expeditiously with the contract, the contractor's reasonable cause shown may concern continuing processes rather that rectification of an existing condition. In the circumstances, it may not be reasonable to expect a contractor to rectify 1000 identified defects within, say, 10 days. It may be reasonable for the contractor, within 10 days, to communicate in writing with the principal about how its systems, processes, or*

resources on the project are appropriate to rectify the substantial breach identified and ensure future compliance with the contract, according to its terms.

397. In White Industries, the proprietor contended that regard could be had to the communications that had preceded the notice from which the necessary detail of the proprietor's complaints emerged. Byrne J noted that the notice did not reference any document that might have provided the detail ignored by the notice. Here, the drafter of the notice has sought directly to provide details of the substantial breach by specific reference to other documents. It is not a requirement for validity that the notice be completely accurate in every particular. What is required is to convey what is amiss for the purposes of showing cause. While it might be prudent to annex or otherwise provide copies of documents that provide the particulars of the substantial breach, in my view incorporation of documents, properly identified by reference in the notice, is sufficient to unequivocally convey what the principal considers to be amiss and provide the opportunity intended by the contract for the contractor to show cause.

398. I dealt earlier with the debate during the course of the trial as to whether the reference documents were served with the notices. It is of no consequence for a further reason. I am satisfied that the referenced documents are communications of a kind required or authorised by the terms of the contract, e.g. cl 56, or of a kind commonly exchanged in commercial projects of this sort. It is both reasonable, and acceptable, for Hue to expect that Dura would have ready access to the referenced documents or, if it did not, that it would request copies. There is no reason to suppose that the parties to a contract of this magnitude are not maintaining proper record keeping systems, permitting ready access to referenced documents. As events transpired, Dura made no request before, or after, preparing its response showing cause to the notices. Mr Maaser gave evidence that he assisted in the process of collating all the documents needed for Dura to respond to the notices, showing cause.

399. ***The substantial breach that concerned Hue when it served the direction notice was more than a single instance of a failure to comply with a superintendent's direction or a single defect. The relations between the parties had then progressed beyond a request for a response to single events.*** *Although that proof of a single instance of failing to comply with a direction may be sufficient proof of substantial breach, that proof merely enlivens the entitlement under cl 44.2 to give a written notice. The same can be said of a single instance of failing to use, or provide, the standard of materials or workmanship required. What the contractor must then do, to show reasonable cause in such circumstances, will be directed to rectifying an existing condition or complying with a direction.* ***The directions and defects notices unequivocally conveyed to Dura that what was amiss was its performance of the contract, evident in multiple instances of outstanding directions and of defects.*** *The matters being identified as the substantial breaches were continuing processes as much as existing conditions. Demonstrating reasonable cause for Hue not exercising a right under cl 44.4 needed to address not just rectification but also Dura's manner of performance of the contract in respect of directions and standards.*

400. *For these reasons, I reject Dura's submission that the notices were objectionable as ambiguous, confusing, prolix and obtuse and failed to specify with sufficient particularity the directions or alleged items of defective workmanship to identify the substantial breach. Dura's contention that each specific respect in which it failed to comply with a superintendent's direction or failed to use the standard of materials or provide the standards of workmanship required by the contract, in breach of cl 30.1 was not exactly articulated in each notice respectively, puts too highly the requirement, under cl 44.3(b), that the notice specify the alleged substantial breach.*

401. *Dura goes further. It contends that in order to be unambiguous, a show cause notice should also state which of the remedies the principal intends to exercise. I consider that this submission goes too far. No authority was cited to me. Dura referred*

to a statement in Building and Construction Contracts in Australia[54] where the authors observe:

> *The principal ought to specify in the notice pursuant to clause 44.3 just which of the remedies in clause 44.4 it proposes to exercise in the event that cause is not shown so that the contractor is made fully aware of the specific consequences of not showing reasonable cause.*
>
> *[54] Dorter & Sharkey, Building and Construction Contracts in Australia, Vol 1 at para 12.120.*

402. This position is misconceived. The contract permits the principal to determine its response after affording an opportunity to the contractor to show reasonable cause. That decision may be influenced by the contractor's response. It is not a situation where the contractor is left to guess which remedy will be exercised, the contractor must show cause as to why either right should not be exercised. In any event, the contractor is fully aware of the specific consequences of not showing reasonable cause as cl 44.4 makes it clear that the principal may elect for one or other of the rights set out in that clause.

403. ***Dura also contends that having regard to the vast number of issues which required Dura's response, the time for cause to be shown was too short and unreasonably so****. This submission misconceived the task of showing cause. It is not to the point that the task of co-ordinating the trades to attend site and rectify defects might not reasonably have been achieved in seven clear days. That seemed to be the basis of its complaint, as explained at trial. Dura had weeks or, in some cases, months to comply with directions or deal with defects, prior to service of the notices. Further, to the extent that the task required Dura to communicate that it had already complied with a direction or completed rectification of a list of defects, or even negotiated with Hue's consultants an alternative solution to the consequences of an earlier breach, such as incorrect set out, -*

*(a) **Dura made its response by the time permitted by the second set of notices, viz. 19 September 2006**;*

(b) the effective period for showing cause became 15 days. I am satisfied that notwithstanding the objection taken to the short period permitted by the first set of notices for a response, Dura anticipated that the period could be extended to resolve that objection and commenced preparing its response from the time of service of the first set of notices;

(c) Dura did not seek any extension of time to show cause or renew its objection that the period of time for its response was too short after the notices were re-served; and

(d) Dura, when instituting this proceeding and seeking interim injunctive relief, did not instruct its legal advisers that the period allowed for it to show cause was unreasonably short. It proceeded with its case for more than 4½ years on the first set of notices only that, on their face, allowed an unreasonably short time for a response. It is common ground that Hue did not respond to cause shown until the second set of notices expired.

While the point may have appealed to Dura's legal advisers at trial, it did not appeal to Dura during 2006 and if there was in fact a valid procedural objection based in the reasonableness of the period allowed, which I do not accept, Dura plainly, by its conduct, waived it. I think it likely that, had a timely objection been made, after re-service, to the reasonableness of the period allowed, or further time sought by Dura to respond, Hue would likely have granted some further time and avoided exposure to a technical or procedural point in determining what course to take.

Waiver of rights to insist on strict compliance with clause 39.8 of the Contract

112. The Claimant asserts the Respondent waived its right to insist on strict compliance with the minimum notice period set out in clause 39.8(d) because the Respondent;

(a) did not object to the non-compliant notice period in the Notice to Show Cause and demand the requisite period be applied for it to provide its reply; or

(b) did not simply assert it rights to provide no reply given the non-compliant notice period relating to the Notice to Show Cause.

113. The Claimant argues that if the Respondent had objected or not replied, the Claimant would have re-served the Notice to Show Cause.

114. The Claimant asserts it relied on the Respondent's reply to the Notice to Show Cause to take its next steps, being issuing a notice of full suspension on 29 August 2024.

115. The Respondent argues that *Dura* is not relevant to its argument because Dura did not consider the consequences of nominating a period within which to respond that was less than the notice period set out in the AS2124 form of contract. Dura was about whether the notice period notified in the second set of notices to show cause was a reasonable period in the circumstances.

116. Dura seems to support the Claimant's argument that the Claimant provided its reply and did not request additional time on the basis the time provided was unreasonably short. In that context, it waived its right to assert that the time provided was unreasonably short.

117. The current facts are somewhat analogous because the Respondent had options as explained above but it elected to not insist on those options and rather answered the Notice to Show Cause and implicitly invited the Claimant to either issue the notice of full suspension or otherwise accept the Respondent's reply and lift the suspension.

118. The Respondent argues that regardless that the Respondent responded to the Show Cause Notice within the period specified therein, the Show Cause Notice issued by the Claimant on 21 August 2024 was void and of no effect. The Respondent refers to *Westbourne Grammar School v Gemcan Constructions Pty Ltd [2017] VSC 645* as authority as follows:

> *[90] As is shown in the passage cited* [referring to Hudson's Building and Engineering Contracts cited in Dura], *the degree of information of the builder's conduct that must be provided to the builder in the show cause notice is treated differently to the compliance required where time limits or other such requirements are laid down.*

> *[91] Hudson's Building and Engineering Contracts provides that "**[e]xact compliance with time limits for notices will usually be required, and will be treated as a condition precedent to a valid contractual termination**."50 In dealing with the formalities of notices, Hudson observes that the object of these clause is to protect the interest of the determining party, and not to convey some special protection or advantage on the defaulting party.51 Similarly in this case, one might expect exact compliance to avoid any risk to the determining party in taking over the contract or terminating the contract.*

119. It is clear that the Show Cause Notice must satisfy clause 39.8(d) of the Contract.

120. The Claimant's Show Cause Notice dated 21 August 2024 did not satisfy clause 39.8(d) because it specified a time that was less than 7 clear days.

121. *Westbourne Grammar School v Gemcan Constructions Pty Ltd [2017] VSC 645* however does not deal with a situation where a respondent waives its contractual right to assert the notice sent is invalid because it elects to answer the notice including within the time specified in the notice to show cause,

122. The Respondent could have informed the Claimant that its Show Cause Notice was invalid and done nothing more. The Claimant would then have had no contractual basis for terminating the Contract and would have had to re-issue its amended Notice to Show Cause to commence the process of termination.

123. The Respondent, however, responded to the Show Cause Notice within the time specified by the Claimant in the 21 August 2024 Notice to Show Cause and waived its right to do nothing as it was contractually entitled to do.

124. I refer to *Dura* which supports my conclusion to how to regard the Notice to Show Cause as follows;

> "…
>
> *388. Hudson's Building and Engineering Contracts,[45] state the general rule concerning modern contractual determination clauses that require written notice in one form or another at the time of determination of the contract in these terms:*
>
> > *Express notice requirements are often in 'two tier' form … **In every case the clause must be carefully considered and closely followed in all respects, both as to the contents and timing of the notices, but the courts will usually regard the notices as commercial documents, and the modern approach is to interpret notice clauses with regard to their commercial purpose** [Mannai Investments Co Ltd v Eagle Star Assurance [1997] AC 749].*
> >
> > …
> >
> > *390. The Court of Appeal of this court, in MLW Technology Pty Ltd v May,[47] in the context of a licensing agreement, considered the principles relevant to interpreting the effect of contractual notices. **Gillard AJA[48] emphasised that in construing commercial contracts, and the actions of businessmen, a common sense non-technical approach should be adopted.**[49] Gillard AJA approved of the observations of the House of Lords in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd[50] finding them to accord with authority in this court. A reasonable recipient, in the circumstances of the parties is aware of the terms of the contract, of the correspondence*

that has passed between the parties, and of the history of the building project. A builder would have had extensive knowledge of the works.

125. The purpose of the Show Cause Notice dated 21 August 2024, was to make it clear to the Respondent that the Claimant considered the numerous identified failures to provide design information within the period agreed by the parties that is set out in Part H of the Annexure to the Contract substantial breaches of Contract and demanded the Respondent to show cause as to why it should not terminate the Contract.

126. By answering the Notice to Show Cause, the Respondent indicated it did not wish to rely on its contractual right to do nothing and provided a full response on 28 August 2024. In other words, the Respondent waived its right to insist upon the Claimant's strict compliance with clause 39.8 of the Contract.

127. In further support of that conclusion, I refer to *Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788* [2022] HCA 38. In that judgment, Kiefel CJ, Gageler, Edelman, Stewart and Gleeson JJ described a similar form of waiver in the following terms;

> *"…*
>
> *28. It has been repeatedly said that "waiver" is a term that is used in many different senses[5]. **Perhaps the most common usage of waiver is to describe an unequivocal decision by a party, communicated to the other party, not to insist upon a right or not to exercise a power**[6].*
>
> *[5] The Commonwealth v Verwayen (1990) 170 CLR 394 at 406, 422, 467; Mann v Carnell (1999) 201 CLR 1 at 13 [28]; Agricultural and Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570 at 587-588 [51]-[54]; Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850 at 882-883; Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd [2000] Ch 12 at 28-29.*
>
> *[6] See Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd (2013) 250 CLR 303 at 315 [30]; Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd [2000] Ch 12 at 29. See also Stoljar, "The Modification of Contracts" (1957) 35 Canadian Bar Review 485 at 489-490.*
>
> *29. By itself, a waiver of a right is rarely irrevocable. For that reason, it has sometimes been said that the general rule concerning a waiver of a right, "in the sense of an intimation of an intention not to enforce it", is that the mere act of representing*

*that a right has been waived is "of itself inoperative"[7]. **Similarly, it has been said that "the mere statement of an intention not to insist on a right is not effectual unless made for consideration** ... A mere waiver signifies nothing more than an expression of intention not to insist upon the right"[8]. Perhaps more accurately, the legal position is that although a waiver does have legal effect in that "the waiver is binding on the waiving party, unless the waiver is effectively retracted"[9], the waiver can generally be revoked at any time with reasonable notice[10].*

> *[7] O'Connor v S P Bray Ltd (1936) 36 SR (NSW) 248 at 257.*
>
> *[8] Mulcahy v Hoyne (1925) 36 CLR 41 at 50, quoting Stackhouse v Barnston (1805) 10 Ves 453 at 466 [32 ER 921 at 925].*
>
> *[9] Restatement of the Law of Liability Insurance §5, Comment h.*
>
> *[10] Stevens, "Not Waiving but Drowning", in Dyson, Goudkamp and Wilmot-Smith (eds), Defences in Contract (2017) 125 at 126.*

30. Nevertheless, exceptions or "special cases"[11] exist where a unilateral waiver cannot be revoked. One exception is where the strength of the interest of finality in litigation can sometimes mean that a waiver of particular rights related to litigation is irrevocable. For instance, the waiver of legal professional privilege will be irrevocable "where the actions of a party are plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect"[12]. A similar approach, which also "depended upon considerations founded in the nature of the adversarial litigious process" that are "not relevant to the

identification of the rights and obligations of parties to contracts"[13], was taken in The Commonwealth v Verwayen[14] by Toohey J and Gaudron J. Their Honours concluded that an undertaking not to plead a limitations defence had become irrevocable. But, even then, that view did not command the support of a majority of the Court. Brennan J, by contrast, considered that the "ordinary principles of estoppel"[15] applied to the waiver in that case so that it could be revoked at any time before it had been relied upon to the detriment of the other party, or otherwise until judgment was entered so that no amendment to the pleading was possible[16].

128. The Respondent replied to the Claimant's Notice to Show Cause, within the prescribed time, and made clear its position. By that act, the Respondent expressly made clear to the Claimant its position and implicitly invited the Claimant to accept its reply or take the next steps.

129. The Claimant considered the Respondent's reply to the Claimant's Show Cause Notice of 21 August 2024 and determined the Respondent's reply did explain (show cause) as to what the Respondent proposed to do to rectify the breaches in relation to failure to provide design in a timely manner.

130. The Claimant relied and acted on the Respondent's reply of 28 August 2024 and issued its notice of full suspension under clause 39.9 on 29 August 2024.

131. Clause 39.9 of the Contract provides;

"39.9 Contractor's rights

If the Principal fails to show reasonable cause by the stated date and time, ***the Contractor may, by written notice to the Principal, suspend the whole or any part of WUC***.

The Contractor will remove the suspension if the Principal remedies the breach.

The Contractor may. by written notice to the Principal, ***terminate the Contract, if within 7 days of the date of suspension under this subclause the Principal fails****:*

a) to remedy the breach: or

b) if the breach is not capable of remedy, to make other arrangements to the reasonable satisfaction of the Contractor.

Damages suffered by the Contractor by reason of the suspension will be assessed by the Superintendent, who will certify them as moneys due and payable to the Contractor.

132. The Respondent had a further 7 days from the date of the Notice of full suspension of works under Contract to explain how the Respondent would remedy the breaches. The Respondent did not take any such steps in the period following the Claimant's notice of full suspension.

133. On 10 September 2025, 12 days after it had issued its Notice of full suspension of works under Contract to remedy the breaches, the Claimant send a further written notice terminating the Contract.

134. Notwithstanding the issue of whether the Respondent had committed the notified substantial breaches of Contract, I am satisfied that the Claimant followed the requirements of the Contract, as amended by the conduct of the parties and lawfully terminated the Contract.

The Respondent's substantial breaches of contract

135. The Claimant asserts the Respondent is liable for the following substantial breaches of Contract;

(a) Failure to perform the Respondent's design obligations as required under Part H of the Annexure to the Contract. Specifically;

(i) Numerous RFIs remained unresolved on average for in excess of 100 days, with several outstanding in excess of 12 months. This has caused severe disruption and delay to the works and caused the Claimant to suffer loss and expense.

(ii) In particular, 79 design-related RFIs remain overdue and unresolved as of 21 August 2024; and

(iii) Failing to resolve the RFIs in a timely manner has delayed the Claimant from planning, procuring and progressing the works as anticipated by the agreed construction program.

(b) The Claimant refers to the first notice to show cause dated 12 March 2024 and asserts the requested design information referred to in that notice remained overdue and the Respondent took no steps to resolve the breaches of contract up to the time of termination.

(c) Failure to ensure the Superintendent performed its role "*honestly and in good faith*"; and

(d) Failure to make a payment that is due and payable to the Claimant.

136. I will consider the Claimant's alleged substantial breaches of Contract purportedly made by the Respondent notified by the Claimant on 21 August 2024 and the Respondent's rejections and explanations provided on 28 August 2024 below.

The Claimant's design obligations under the Contract

137. Set out below is a summary of the Claimant's design obligations under the Contract.

138. Clause 1 of the General Conditions of Contract indicates the Claimant has some design obligations under the Contract and the following phrases are relevant to determining the Claimant's design obligations under the Contract;

> ***Consultant*** *means any person engaged by the Contractor to perform design or certification services in connection with the retention works, and may include a subcontractor;*
>
> ***Contractor's design obligations*** *means any tasks necessary to design and specify the retention works required by the Contract, including preparation of the design documents and developing the Preliminary design;*

Design documents *means the drawings, specifications and other information, samples, models, patterns and the like required by the Contract and created by or on behalf of the Contractor for the construction of the retention works;*

Preliminary design *means the documents stated in Annexure Part I* [which sets out by specification and drawings the "Principal's project requirements" in respect of the retention system]*;*

Principal's project requirements *means the Principal's written requitements for the retention works described in Annexure Part I which:*

(a) shall include the stated purpose for which the retention works are intended

(b) may include the Principal's design, riming and cost objectives for the retention works; and

(c) include a preliminary design.

Retention works *means a permanent waterproof and earth-retaining barrier lor the basement diaphragm wall which does not allow for any water seepage.... with hydrostatic loads to be determined by the Contractor and its subcontractors and approved by OSKA, the structural engineer.*

139. Clause 1 the Claimant's limited design responsibility by use of the following phrases; "*contractor's design obligations*", "*design documents*", "*preliminary design*" and "*retention works*" , which relate to the retention works.

140. Under clause 2.1 of the Contract, the Claimant gave a warranty that it would construct in accordance with the design provided by the Respondent as follows;

"…

In performing the WUC, the Contractor warrants:

*a) that the **Works will comply with the specification and drawings contained in Annexure Part G**;*

b) that the curtain wall system to be installed will not result in water/moisture leaks nor cause a wind-generated whistling effect: and

c) that the Works will be fit for the purpose of purposes:

(i) described in this Contract:

(ii) informed to the Contractor by the Principal or Superintendent in writing; and

(iii) for which these types of works are commonly provided.

…

141. The Contract and extant legislation make it clear that with the exception of the retention system, the Claimant's design responsibility was limited to producing (through its subcontractors as explained below) detailed designs that provide additional information not contained in the specifications and drawings in Part G of the Annexure but which strictly comply with the designs contained in Part G of the Annexure. Those additional details were required to construct certain parts of the

design contained in Part G of the Annexure and are normally not detailed in a principal's design documents such as fixings etc…

142. Reading the Contract as a whole, the Claimant's warranty about fitness for purpose can only relate to the detailed designs that the Claimant produced. Whether the design included in Part G of the Annexure was fit for purpose was a matter for the Respondent and its consultants, which was made clear in Part H of the Annexure.

143. Clauses 1 and 2.1A and Part H of the Annexure to the Contract also made it clear that the Claimant's warranty as to fitness for purpose applied to the entire design of the retention system.

144. Clause 2A sets out the design and construct warranties the Claimant provides in relation to the retention system it was to design and construct under the Contract. Clause 2A of the Contract provides;

> *2A. 1 Contractor's warranties*
>
> *Without limiting the generality of clause 2.1, the Contractor warrants to the Principal that:*
>
> *(a) the Contractor:*
>
> *(i) at all times shall be suitably qualified and experienced, and shall exercise due skill, care and diligence in the carrying out and completion of WUC[2] :*
>
> *(ii) has examined any preliminary design included in the Principal's project requirements and that such preliminary design is suitable, appropriate and adequate for the purpose stated m the Principal's project requirements[3]:*
>
> *(iii) shall carry out and complete the Contractor's design obligations to accord with the Principal's project requirements; and*
>
> *(iv) shall carry out and complete the retention works in accordance with the design*

[2] This applies to all of the work under the Contract regardless of whether it is design and construct or construct only

[3] This applies only to the retention works

documents so that the retention works, when completed, shall:

(A) be fit for their stated purpose; and

(B) comply with all the requirements of the Contract; and

(b) the consultants engaged by the Contractor are suitably qualified and experienced.

2A.2 Warranties unaffected

The warranties remain unaffected notwithstanding:

a) that design work (including the preliminary design) has been carried out by or on behalf of the Principal and included in the Principal's project requirements;

b) any receipt or review of, or comment or direction on, the design documents by the Superintendent; or

c) any variation unless the Contractor can demonstrate to the satisfaction of the Superintendent (acting reasonably) that carrying out the variation will mean that the Contractor cannot comply with a warranty.

145. Clause 9.6 creates certain design obligations for the Claimant as follows;

9.6 Issue of Certificates

Upon completion *of any work performed by a subcontractor or supplier in relation to WUC, the* ***Contractor must procure from such subcontractor or supplier and provide to the Principal, all certificates (including form 15 and form 16 pursuant to the Building Act 1975 (Qld))*** *or other documents that may be required to obtain an occupancy certificate for the Works. The Contractor must deliver an original copy of all such certificates and other documents to the Superintendent promptly upon receipt by the Contractor.*

146. Excluding the design of the retention system, Part H of the Annexure to the Contract makes it clear that the Respondent was responsible for producing a design that was capable of being used for construction by the Claimant and was approved for construction by the relevant authorities (the **Design**).

147. The detailed design is produced by the Claimant and, in particular, its subcontractors and provides information not included in the Respondent's design such as the subcontractor's proprietary systems, details fixings and incidental items, and fabrication drawings required to construct but must strictly conform with the Design produced by the Respondent and its consultants.

148. Clause 9.6 of the Contract indicates that the Claimant was responsible for procuring from its relevant subcontractors (such as the façade subcontractor) a Compliance Certificate for Building Design under section 10 of the *Building Act 1975* (Qld) wherever a relevant detailed design was required.

149. The Form 15 is used when a competent person such as a QBCC licensee (such as a water proofer, a window installer, a pest control contractor) certifies that an aspect of the Design has been detailed (the **detailed design**) and that detailed design complies with relevant building codes, such as the Building Code of Australia (**BCA / NCC**), relevant Australian Standards or the Queensland Development Code (**QDC**).

150. The Form 15 is also used when a detailed design can only be produced by a professional engineer under the *Professional Engineers Act 2002* (Qld) (such as a structural engineer) certifies that an aspect of the Design has been detailed (the **detailed design**) and that detailed design complies with relevant building codes, such as the Building Code of Australia (**BCA / NCC**),

relevant Australian Standards or the Queensland Development Code (**QDC**).

151. The Form 15 provides details about the specific Design aspect being certified, including relevant standards, codes, calculations, and any supporting documentation.

152. Clause 4.2 of Part H of the Annexure to the Contract further sets out the Claimant's design responsibilities as follows;

> *"…*
>
> *The Contractor is to carry out the design and construction of the retention works. The Contractor will submit all D&C documentation to OSKA (the project design structural & civil engineers) for review and approval and will be required to ensure all form 15's & 16's are supplied as required by the project certifier and OSKA*
>
> *…"*

153. Part I of the Annexure to the Contract provides 23 preliminary drawings produced by OSKA structural consultants that formed the preliminary design and set out the Principal's Project Requirements for the retention system, which the Claimant was to design and construct.

The Respondent's design obligations under the Contract

154. Set out below a summary of the Respondent's design obligations under the Contract.

155. The Respondent's obligations relating to the provision of a design that is suitable for construction are set out in the General Conditions and Annexure Part H of the Contract.

156. Clause 2.1 makes it clear that the Claimant must construct the Works in accordance with the drawings and specifications identified in Part G of the Annexure to the Contract as follows;

> *"…*
>
> *In performing the WUC, the Contractor warrants:*
>
> *a) that the **Works will comply with the specification and drawings contained in Annexure Part G**;*
>
> *b) that the curtain wall system to be installed will not result in water/moisture leaks nor cause a wind-generated whistling effect: and*
>
> *c) that the Works will be fit for the purpose of purposes:*
>
> *(i) described in this Contract:*
>
> *(ii) informed to the Contractor by the Principal or Superintendent in writing; and*
>
> *(iii) for which these types of works are commonly provided.*
>
> *…*

157. The implication of clause 2.1 is that the Respondent will provide the Claimant all design, excluding the excepted designs, for the Claimant to perform the Works in accordance with the terms of the Contract.

158. Clause 4.2 of Part H of the Annexure to the Contract provides further details of the Respondent's design responsibilities under the Contract. Clause 4.2 provides;

> *"4.2 RESPONSIBILITIES*
>
> *Save for with respect to the retention works, the responsibilities of the Principal's consultants include but are not limited to;*
>
> ***1. Producing suitable documentation for procurement and construction, including adoption into the documentation of anything that is agreed between the Principal & Contractor*** *(eg value management initiatives);*
>
> *2. Ensuring that* ***the completed design****/engineering reflects outcomes that s****atisfy all statutory requirements*** *(eg NCC) and* ***fit-for purpose constructed outcomes;***
>
> ***3. Producing all required NCC performance solutions*** *(eg. FP1.4, Fire Engineering, Accessibility, etc*
>
> *4. Managing all required design meetings and other interactions;*
>
> ***5. Ensuring that the design & engineering deliverables are coordinated and free from clashes;***

6. Carrying out regular & targeted site progress inspections (eg Structural engineering inspections);

7. RPEQ structural certification of all custom designed elements within the Contract design *(eg balustrades);*

8. Completing responses to RFI's and updating documentation as required in response to RFIs and general queries from the Contractor;

9. Reviewing & approving shop drawings submitted by the Contractor & its subcontractors for dimensional correctness and conformity to the Contract documents;

10. Reviewing & approving material & fixture physical & samples submitted by the Contractor & its subcontractors for statutory conformance and conformity to the Contract documents;

11. Reviewing & approving technical literature for budding elements submitted by the Contractor & its subcontractors for statutory conformance and conformity to the Contract documents issuing building approvals;

12. Preparing various authority & utility applications/submissions;

13. Obtaining various authority & utility approvals;

14. Completing progressive title surveying (Contractor to provide unobstructed access to Principal's surveyor);

The Principal will reasonably endeavour to ***ensure that all activities by the Principal's consultants are carried out in***

a timely manner and in accordance with timeframes set out in the Contract where applicable. ***For clarity. the definition of timely, where not expressly stated in the contract terms &/or schedules, shall be****;*

> ***15. in accordance with the construction program and procurement schedule supplied by Tomkins;***
>
> ***16. in accordance with the Contractor's demonstrable advice with regards to required timeframes so as not to delay the WUC*** *(including procurement processes);*
>
> ***17. 3working days for RFI's where relates to a critical path activity and 5 working days for non-critical path activities;***
>
> *18. 2 working day (48 hours) notice period requirement for structural engineering inspections; and*
>
> *19. for any other activity, in the absence of specific mention in the Contract (incl contract program) or any other direction, then 5 working days.*

The Principal will reasonably endeavour to ensure that the Principal's design & engineering documentation is completed to a sufficient level of detail, accuracy & completeness to facilitate construction of the works. For clarity this means, amongst other things. That;

> ***20. All elements shall be fully described****, dimensioned. & setout;*

> ***21. All proprietary items shall be fully specified***. *Contractor to supply shop drawings for custom items such as façade and structural steel for approval;*
>
> *22. Include all disciplines & scope required for a project of this nature, including design/engineering/reporting that may not have been completed to date;*
>
> ***The Contractor is to carry out the design and construction of the retention works***. *The Contractor will submit all D&C documentation to OSKA the project design structural & civil engineers) for review and approval and will be required to ensure all form 15's & 16's are supplied as required by the project certifier and OSKA.*

159. It is clear from the express words of the Contract that the Respondent was required to provide drawings and specifications that could be used for construction in sufficient time to permit the Claimant to plan, schedule, procure materials and subcontractors in accordance with the agreed construction program as defined in clause 32 of the Contract.

160. I note that the Australian Standard AS4000 default provision provides the Superintendent 14 days within which to respond to matters, such as errors and inconsistencies. This amended form of Contract provided 3 business days for design related items on the critical path and 5 business days for all other design related items.

161. Furthermore, the Respondent warranted that the design could be used for construction as it was issued as evidenced by Pat H of the Annexure as follows; "***Ensuring that the design & engineering deliverables are coordinated and free from clashes".***

162. I have considered the alleged breaches of Part H of the Annexure of the Respondent and have summarised below my decisions about the delays for each RFI suffered by the Claimant.

RFI	Description	Design requested	Design provided	Delay - days
457	Provide amended design as there is clash of HV Pit and Sewer alignment	16/2/2024	2/4/2024	41
528	Provide ventilation duct details	15/5/2024	18/7/2024	59
530	Request to proceed with core holes for fast flow as per Claimant's proposed sketch	17/5/2024	18/7/2024	57
280	Provide stair/ladder access details	6/7/2023	23/8/2024	409
362	Provide specification for sliding doors at entry to GF turntables	5/10/2023	7/12/2023	58
477	Provide coordinated design for installation of car stacker doors	11/3/2023	16/3/2024	366
496	Provide details of entry and reception bespoke light fittings	4/4/2024	19/8/2024	132
498	Provide coordinated design for installation of glass roof and gutter	4/4/2024	19/8/2024	132
540	Provide details for installation of glass roof and gutter	7/6/2024	23/8/2024	72
551	Provide coordinated concrete set-out drawings	17/6/2024	23/7/2024	31
554	Request for approval of shop drawings to enable commencement of fabrication	18/6/2024	11/8/2024	49
602	Provide specification for surface finish of driveway and loading area	24/7/2024	21/8/2024	23
614	Provide design for installation of traffic lights to level 1	5/8/2024	20/8/2024	10
618	Amend level 3 glazing design	6/8/2024	26/8/2024	15
622	Provide soffit drain details at level 1	9/8/2024	21/8/2024	7
249	Provide wall framing details	2/5/2023	23/8/2024	474
254	Provide level 5 wall types, balcony, HC and gas details	17/5/2023	21/8/2024	457

423	Provide coordinated drawings of services and partitions	10/1/2024	28/8/2024	226
462	Provide details of access panels to wet areas	20/2/2024	10/6/2024	106
484	Provide mounting details of wall hung vanities etc..	22/3/2024	25/8/2024	151
493	Provide mounting details of gas and water cupboards etc..	2/4/2024	24/6/2024	78
520	Provide instruction about defective design of mixer	3/5/2024	10/6/2024	33
521	Provide coordinated drawings of services and partitions	3/5/2024	14/5/2024	6
556	*Provide coordinated concrete set-down drawings and partition layouts*	*18/6/2025*	*19/6/2025*	*-4*
560	Provide design of shadowbox spandrel within unit type E	20/6/2024	16/7/2024	21
564	Provide details of stud detail for back to back TV units	25/6/2024	4/7/2024	4
565	Provide approval of detail	25/6/2024	16/7/2024	16
572	*Provide installation detail for mixer*	*1/7/2024*	*1/7/2024*	*-5*
611	Provide detail of furring channel or boxed stud	30/7/2024	21/8/2024	17
414	Provide design showing location of A/C controller	8/12/2023	23/8/2024	254
599	Provide approval of shop drawings for internal door jambs	23/7/2024	23/8/2024	26
600	Provide GCCC approved drawings and Connect FW	23/7/2024	21/8/2024	24
627	Provide GCCC approved hydraulic drawings	14/8/2024	21/8/2024	2
612	Provide framing details of cavity sliding door assemblies	31/7/2024	20/8/2024	15
617	Provide design for shower heights	6/8/2024	21/8/2024	10
426	Inspect and confirm design of balcony in anticipation of waterproofing	15/1/2024	25/8/2024	218
506	Inspect and confirm design of balcony in anticipation of waterproofing	8/4/2024	21/8/2024	130
546	Inspect and confirm design of balcony in anticipation of waterproofing	12/6/2024	25/8/2024	69

570	Inspect and confirm design of balcony in anticipation of waterproofing	28/6/2024	21/8/2024	49
487	*Provide design for window wall*	*26/3/2024*	*26/6/2024*	*87*
507	Provide design for waterproofing	8/4/2024	25/8/2024	134
532	*Provide design for waterproofing*	*20/5/2024*	*30/5/2024*	*5*
511	*Provide design of balcony louvre*	*23/4/2024*	*24/4/2024*	*-4*
539	Provide sealing details of services through penetrations	30/5/2024	21/8/2024	78
545	Provide curtain wall to concrete sealing details	12/6/2024	25/8/2024	69
568	Provide details of Exotec lining to Juliet balcony walls	26/6/2024	16/7/2024	15
578	Provide details of Keksia rapid flow joists	8/7/2024	24/8/2024	42
505	Provide details of timber floor	8/4/2024	21/8/2024	130
569	*Provide details of shower screen door*	*2/7/2024*	*4/7/2024*	*-3*
590	Provide details of benchtop	16/7/2024	21/8/2024	31
594	Provide location of IOs in non wet areas	16/7/2024	21/8/2024	31
497	Provide design of penthouse sauna	4/4/2024	19/8/2024	132
562	Provide design resolving L18 mechanical and hydraulics clash	24/6/2024	21/8/2024	53
608	Provide coordinated mechanical / hydraulics drawings	29/7/2024	21/8/2024	18
619	Provide level 18 ST04 detail	6/8/2024	21/8/2024	10
620	Provide wall detail of level 18 ST01 with D122	6/8/2024	21/8/2024	10
626	Provide detail of level 18 study glass sliding door	12/8/2024	21/8/2024	4
624	Provide details of level 18 EW02 wall	12/8/2024	20/8/2024	3
628	*Provide design of bulkhead above entry joinery*	*14/8/2024*	*19/8/2024*	*0*
629	*Provide design of level 18 cupboard*	*14/8/2024*	*19/8/2024*	*0*
524	Provide sub-duct design	13/5/2024	21/8/2024	95
345	Provide update FER for fire rating to chilled water pipe	12/9/2023	21/8/2024	339
436	Provide updated mechanical drawings as per agreed design changes	24/1/2024	21/8/2024	205
500	Provide mechanical plant room construction drawings	8/4/2024	25/8/2024	134
514	Provide details of condenser unit support frame	26/4/2024	26/7/2024	86

519	Provide corrosion protection details for façade support steelwork	2/5/2024	21/8/2024	106
534	Provide details of roof top capping plates	23/5/2024	23/7/2024	56
548	Provide concrete set- out for level 36	13/6/2024	21/8/2024	64
579	Provide details of structural steel supporting curtain wall	9/7/2024	21/8/2024	38
604	Provide details of rooftop steel	24/7/2024	7/8/2024	9
609	Provide design of sizing of Fast Flows	29/7/2024	23/8/2024	20
613	*Provide details of roof top/wall connections*	*5/8/2024*	*7/8/2024*	*-3*
615	Provide design of roof top balustrade	6/8/2024	21/8/2024	10
616	Provide design of rood top cappings around curvature of building	6/8/2024	21/8/2024	10
297	Provide irrigation plan	28/7/2023	21/8/2024	385
298	Provide coordinated pool design	31/7/2023	21/8/2024	382
577	Provide coordinated pool design	5/7/2024	21/8/2024	42
555	*FER Revision*	*18/6/2024*	*24/6/2024*	*1*
526	*Scott Schedule issues*	*13/5/2024*	*20/5/2024*	*2*

163. The responses provided in the Respondent's reply dated 28 August 2024 to the Claimant's 21 August 2024 Notice to Show Cause confirmed that the Respondent failed to;

(a) Produce suitable documentation for procurement and construction, including adoption into the documentation of anything that is agreed between the Principal & Contractor.

(b) Ensure that the design & engineering deliverables were coordinated and free from clashes;

(c) Failed to ensure the designs required for construction were provided in accordance with the construction program and procurement schedule supplied by the Claimant;

(d) Failed to respond to the RFI indicated above within 3working days for RFI's where relates to a critical path activity and 5 working days for non-critical path activities;

(e) Failed to ensure all proprietary items were fully specified; and or

(f) Failed to ensure all elements were fully described, dimensioned. & setout.

164. I do not consider the rows highlighted grey were breaches of Contract.

165. However, 68 cited requests for information or requests for design identified above were not provided in accordance with the terms of Part H of the Annexure to the Contract.

No substantial breaches of contract

166. The Respondent asserts, if failing to perform its obligations in accordance with Part H of the Annexure were breaches of Contract, which it denies, none of them were substantial breaches. Further, the Respondent argues that the Contract provides the agreed remedies in the event of encountering the type of breaches complained of by the Claimant.

167. The Claimant argues that the Respondent's failure to answer a large number of RFI's for very long periods of time was the substantial breach of contract. Furthermore, the Respondent failed to explain how it would rectify the substantial breach and the Claimant exercised its right under clause 39.9 and terminated the Contract.

168. The Claimant relies on the *Stojanovski v Australian Dream Homes Pty Ltd [2015] VSC 404* as authority for its conclusion that the

Respondent's multiple breaches that were allowed to stand for long periods of time were substantial breaches of contract.

169. In *Stojanovski v Australian Dream Homes Pty Ltd [2015] VSC 404* Dixon J held;

> *"…*
>
> *42. "**The question whether the builder was in substantial breach of the contract is to be evaluated at the time that the notice was sent**. That the party in default might subsequently remedy a substantial breach is self-evident. The language of the contract contemplates the prospect of remediation because the parties have plainly agreed that the right to immediately terminate the contract is dependent upon the opportunity to remedy the breach not having been taken. The opportunity to remedy an existing breach merely by completing the works free of defects by the agreed completion date does not address whether there was a substantial breach at the time when the notice was given. Thus, the prospect that a breach might be remediated after service of a default notice cannot resolve the question of whether the builder was in substantial breach when the notice was served. In this respect, the tribunal's reasoning was in error.*
>
> *43. The tribunal ought to have determined on the evidence whether the builder was in breach of the contract on 17 April 2012 in the particular respects asserted by the notice and whether such breach was a substantial breach. **The task involved identifying the terms of the contract that were breached. Assessing whether the alleged circumstances of breach were substantial involved the proper construction of the phrase 'substantial breach' as used in cl 20.1**.*
>
> *44. Although the tribunal did consider the analysis of the phrase 'substantial breach' in Serong,[3] the test identified in that case was*

not applied by the tribunal in determining whether the owner was entitled to serve the default notice. The tribunal made no finding that the defects particularised in the default notice constituted a substantial breach of the builder's obligation under cl 10.1 at the time that the default notice was served.

> *[3] Serong v Dependable Developments Pty Ltd [2009] VCAT 760, [77].*

45. The word 'substantial' is protean, which no doubt explains the propensity for the drafters of standard form terms and conditions for building contracts to identify what breaches are to be regarded as substantial. It is not uncommon for building contracts to contain an inclusive definition of 'substantial breach'.[4] ***However, the term 'substantial breach' is not defined in this contract.*** *Neither party addressed the court as to the proper meaning of 'substantial breach'.*

> *[4] For example, AS4300-1995, cl 44.2; AS2124-1992, cl 44.2. In those standard form contracts the failure to use the standard of materials or provide the standards of workmanship required by the contract is generally defined as a substantial breach of the contract.*

46. Its meaning in a variety of contexts has been considered by courts.

47. ***In Wong v Silkfield Pty Ltd,[5] the High Court said that the term 'substantial' may have various shades of meaning. Having regard to the context,[6] it may mean 'large or weighty' or 'real or of substance as distinct from ephemeral or nominal'.*** *In that case, the meaning dictated by the statutory context was that 'substantial' did not indicate that which is 'large' or 'of special significance' or would 'have a major impact on the ... litigation' but, rather, was directed to issues which were 'real or of*

substance'. The court's reasoning permitted context to determine where on the continuum the intended meaning was to be found.

[5] [1999] HCA 48, (1999) 199 CLR 255, 267, [27].

[6] See also Ice TV Pty Limited v Nine Network Australia Pty Limited [2009] HCA 14; (2009) 83 ALJR 585, 617, [154] (Gummow, Hayne and Heydon JJ).

48. The term 'substantial' appears in s 9A of the Workers Compensation Act 1987 (NSW), in the context '… a worker's employment is not to be regarded as a substantial contributing factor to a worker's injury merely because of either or both of the following …'. The word is employed to evaluate a notion of causation. In Dayton v Coles Supermarkets Pty Limited,[7] the trial judge found that the worker's employment constituted a 'rather minor' factor in the aetiology of the worker's injury. Meagher JA opined that:

> *many judges have spent a great deal of time and difficulty analysing and pondering the meaning of the word "substantial". But this word is a plain English word which is understood by anyone who is not a judge. Nor have the endless judicial lucubrations on the word contributed to anyone's understanding of it. And nobody in their senses would regard a cause which could be correctly categorised as very "minor" as "substantial".*

[7] [2001] NSWCA 153, [16].

49. By 2009, there were conflicting judgments of the NSW Court of Appeal about the proper construction of s 9A, and in Badawi v Nexon Asia Pacific Pty Limited trading as Commander Australia Pty Limited[8] a five member bench of the Court of Appeal considered its proper construction. The majority stated:[9]

First, and perhaps most importantly, the word "substantial", must be given effect. It is a word of ordinary English meaning. It is a word of evaluative concept. The word substantial has been said to be not only susceptible of ambiguity, but also to be a word calculated to conceal a lack of precision. Which of the various possible shades of meaning the word bears is determined by the context: Here, the concept and purpose of the introduction of s 9A was to remove the possibility of compensation for injury with only a "remote or tenuous connection with work". This was the purpose the amendment: see the Second Reading Speech at [34] above. We would endorse the separate comments of Meagher JA and Davies AJA in Dayton v Coles Supermarket. As Meagher JA said, something which is minor is not substantial, or, as Davies AJA said, "substantial" as it appears in s 9A means "in a manner that is real and of substance" and does not apply where, as a matter of practical reality, the contribution of the employment to the injury was of, or had, "little substance". We agree with his Honour that it is not useful to search for or use other terms, such as "large", or "weighty", or by way of further example, other concepts such as "predominant". We consider that to do so may carry the vice of introducing concepts with different nuances from the words used by the legislature and which would take the meaning of the word beyond that needed to fulfil the purpose of the provision in its legislative context. In this respect, we prefer the views of Davies AJA in Dayton to the views in the extempore judgment in Bulga, which did not refer to Dayton and to the views of Mason P in Mercer. The words of the statute should be adhered to: "a substantial contributing factor". The "proper link" in the legislative context was a causal connection expressed by the words "a substantial contributing factor", meaning one that was real and of substance. Given the conflict in the existing authority

(Mercer, Bulga and Dayton), we think it important to clarify this issue.

[8] [2009] NSWCA 324.

[9] Ibid [82] (Mason P, Beazley and McColl JJA).

50. Had it followed the reasoning in Serong, the tribunal may not have fallen into error. The tribunal appears to have approved of that reasoning but distinguished its application. In Serong, the Deputy President said:[10]

> *His Honour's analysis refers to a number of interpretations which have been applied to the word substantial over the years in different contexts. In broad terms the two strands of meaning are on the one hand "of substance as distinct from ephemeral or nominal". If applied in the present context this would mean that any breach going beyond the de minimis would be a substantial breach. The view which I think was espoused by Mr Gurr, counsel for the Serongs and the view adopted by Viscount Simon in the case referred to by Deane J in the passage quoted above, namely "considerable, solid or big" in the context of a building contract would mean that only really important breaches would count. In my view, in the context of a building contract, the latter meaning is the one which should be given to the word "substantial" or the phrase "substantial breach".*

Experience sitting in the Domestic Building List and a reading of judgments in building disputes demonstrates that building is a complex process and this complexity and human frailty mean that defects in a structure are common and sometimes, at least on a temporary basis, unavoidable. The evidence before me in this case was for instance that the existence of defects in a building frame would not render it inappropriate for a builder to claim payment for the frame

stage. Given that it is difficult to avoid some defects and that the process of rectification may take some time it seems inherently unlikely that a standard form building contract prepared by a builders' association (The Master Builders' Association of Victoria) would intend to leave a builder at risk of contract cancellation for failure to rectify within 14 days of a notice any defect which was more than ephemeral or de minimis.

[10] [2009] VCAT 760 [78]-[79].

51. I do not entirely agree with this passage, at least as a statement of the proper approach to construing this clause of the contract. By analogy with the cases that have construed the word 'substantial' in a statutory context, the proper approach to construing the term in the contract requires identifying the contractual context to assess the intended evaluative meaning of 'substantial' in connection with breach of the contract.

52. Although I agree that ***a substantial breach is one that is more than ephemeral or de minimis in its character, the concept and purpose of evaluating, and limiting, the kind of breach that enlivens the owner's right to serve a default notice is given context by reference to the terms of the contract as a whole.*** *It is unhelpful to paraphrase the qualifying condition introduced by the word 'substantial' by using the phrase 'only really important breaches' because that is not the language.*

53. In some applications of cl 20.1, but perhaps not where cl 10.1 is breached, that evaluative concept may be too narrow. Because the qualifier is applied to the phrase 'breach of this contract', the concept of 'substantial' could apply to a breach of any term of the contract, across the range of the differing obligations cast on the builder by the contract. In that context, its protean quality serves a purpose and the precise meaning intended by the use of the word will be revealed by the nature of the breach. Whether a breach of the contract is a

substantial breach is a question of fact and the answer to the legal question what was intended by 'substantial ' is that the nature and the consequences of the breach must satisfy that description and, in the present context, be ample or considerable or important.

54. It is relevant to notice the object or purpose of cl 20, which is to define the circumstances in which the owner may terminate the contract and engage another builder to complete the works. That right is very important and of great consequence to the parties and the reasonable reader of the contract would not assume otherwise. I broadly agree with the observation in the last paragraph extracted from Serong. ***In effect, judicial notice is taken of the nature of the building process, the frequency of the incidence of work that does not meet the requisite standard and the frequency of disputes about standards of workmanship and thus read the text of the contract against the background of the purposes and objects of the transaction****. It is of fundamental importance to an owner that the builder carry out the works in a proper and workmanlike manner.*

55. What is difficult is to assess where the parties, on the continuum from 'real or of substance as distinct from ephemeral or nominal' to 'considerable, solid, big, or really important,' intended the word 'substantial' to operate in order to evaluate the seriousness of the breach for the purpose of enlivening the owner's rights. Each of the grounds set out in cl 20.1[11] that enlivens the owner's right to serve a default notice is a significant matter that a reasonable reader would understand to involve a real and significant risk that the owner will not get what he bargained for from the builder's performance of the contract. There is not a ground that could be characterised as being of minor significance to the risk that the owner is not receiving what he bargained for. ***However, although I do not think that the contractual context limits the qualification of a breach which is substantial to only those breaches considered to be***

'considerable, solid, big, or really important', because it is preferable to apply the language chosen by the parties rather than a synonym with different nuances. *In any event it matters little in this case, as I will in due course explain, given the nature of the builder's breach of cl 10.*

> *[11] I have not set out all of the grounds above at [7] but I have considered them all in reaching this conclusion.*

56. ***The proper approach in determining whether the builder was in substantial breach of the contract requires that the court should first identify the term or terms breached, and the breach must then be evaluated by considering its nature and the consequences of the breach****. Here, the term in question was cl 10.1, in particular the requirement that the works be carried out in a proper and workmanlike manner. About that obligation, it should be noted that the builder has agreed by cl 10.1 to carry out, as opposed to complete, the works to a particular standard. It is irrelevant that the builder may later complete the works to the requisite standard because the obligation under consideration is to carry out the works in a proper and workmanlike manner. The contractual term reflects an important statutory warranty, incorporated by legislation intended to provide protection to owner. That the works are carried out in a proper and workmanlike manner will ordinarily be fundamental to the owner and failure to do so is what is contemplated as enlivening the power to serve a default notice.*

57. That the works are 'completed' in distinction to 'carried out' in a proper and workmanlike manner will also be fundamental to the owner, but the performance of that obligation is regulated by the contract in other ways. The builder must serve a Notice of Completion stating that the works are complete and ready for final inspection (cl 17). The owner may, following inspection serve a written list specifying defective, incomplete and non-compliant work that the builder must complete within 21 days. The builder may

become liable to pay liquidated damages (cl 18). Further, there is a defects liability period (see cl 19) during which the builder may be obliged to rectify defects.

58. The contractual purpose of the default notice is to inform the builder that something is amiss with the works that requires its immediate attention. The right to terminate the contract is exercised after service of a default notice by a notice served under the power reserved by cl 20.2. That power to terminate the contract is constrained by cl 20.3 and may not be exercised unreasonably or vexatiously or if the owner is in substantial breach of the contract. Different considerations arise when the court assesses whether the owner has served a valid termination notice from those that arise where the default notice is contested. For example, the language of the contract does not show that the parties intended that an owner in substantial breach cannot serve a default notice on a builder in substantial breach.

59. The evidence before the tribunal compelled the finding that the default notice specified a substantial breach of the contract. I do not think that the tribunal determined otherwise, but all it said was that the defective brickwork constituted a significant defect in the works. For the reasons I have stated, the tribunal fell into error when it continued to reason that the significant defects were not a substantial breach of the contract because the time for completion had not arrived. Before the tribunal, the building consultants agreed that demolition and reconstruction of the exterior brick walls of a brick veneer home was required. The exterior brick walls are a major feature of a brick veneer home. Even if the tribunal had held that the works had reached lockup stage, demolition of the brickworks would necessarily regress considerably the stage that the works had reached, a further indicia that the builder was in substantial breach of his obligation to carry out the works in a proper and workmanlike manner. The value of the rectification works was assessed by the

tribunal at $67,466.47, which finding is not now challenged. Of that sum, more than two thirds was attributable specifically to the brickwork. The value of rectification was approximately 60% of the progress claim being sought by the builder and more than a third of the value of the as constructed works (assuming no defects).

170. The Claimant argues that the breaches of Part H of the Annexure were substantial breaches because the Contract was a construct only contract and the number of unresolved design issues and the period of time that they remained unanswered severely disrupted or affected the Claimant's;

- Planning processes;
- Procurement processes;
- Reputation in the market;
- Retention of staff; and
- Its ability to secure future credit.

171. I have considered the fact that the Respondent produced a very large amount of design documentation during the course of the works. Specifically, the Respondent issued 436 drawings in addition to the 597 drawings identified in Part G of the Annexure over the course of the works. The increases in the numbers of drawings by discipline is set out in the table below;

Discipline	# Drawings in Part G of the Annexure	# Additional drawings issued	Percentage Increase
Architectural	322	202	63%
Fire protection	21	35	167%

Electrical	41	42	102%
Hydraulics	52	54	104%
Mechanical	22	42	191%
Structural	94	54	57%

172. Additionally, I have considered the report of the Claimant's expert Mr Jeffs about the design provided per Part G of the Annexure to the Contract and the further design provided during the course of the works and its appropriateness for a construct only contract.

173. Mr Jeffs indicates that many of those drawings were amended and re-issued up to 5 times.

174. The RFI acronym is used in relation to the Respondent's design obligations that are particularised in section 4.2 of Part H of the Annexure to the Contract. It is not a defined term in the Contract. However, that term is well understood in the construction industry and means a "request for information".

175. The RFI process is for the Claimant to request information from the Respondent about minor information not disclosed on a particular drawing or to alert the Respondent of minor errors and or clashes with other disciplines' drawings and seek a direction about how to proceed.

176. In addition, I have reviewed each of the RFI's identified by the Claimant in its Notice to Show Cause and each of the Respondent's replies in its response to that Notice dated 28 August 2024. It is clear that the RFI process was frequently used as a "convenient mechanism" to request additional entire designs. It was also often used by the Respondent to request the Claimant to provide design information that it would subsequently incorporate into its design and issue that back to the Claimant. Many of those RFI's requested entire designs that should have

been provided without request by the Respondent given the design obligations it accepted that are set out in Part H of the Annexure.

177. I also note that as of the date of termination, the Claimant argues the Contract sum ($128,310,000.00) had increased by $51,823,849.15 due to variations. The Claimant claimed it completed works valued at $110,475,896.65, being about 61.3% complete.

178. The Respondent asserts the Claimant's adjusted contract sum with variations was $130,461,491.88 and the Superintendent certified the completed work as $59,404,829.05 (excluding claimed defect rectification costs), being about 45.5% complete.

179. The Contract indicates the Claimant was to complete the works within 36 months of 12 August 2021, being about 12 August 2024.

180. It is clear that there were very substantial delays encountered by the parties because 50% progress should have been achieved at about 50% of the period provided for construction on or about 13 February 2023.

181. When considering the large numbers of drawings issued after commencement and the RFIs provided to me, I am not persuaded that the expert's statement that "*design by the consultants was developed to an advanced stage and the drawings were ready for construction*".

182. Considering the large numbers of drawings issued after commencement and the RFIs relied upon by the Claimant and other incidental effects asserted by the Claimant, I am persuaded that the failure to provide design in a timely manner, which included responding to RFI's in accordance with Part H of the Annexure, were substantial breaches of contract.

Insufficient particulars provided in the Notice to Show Cause

183. The Respondent also argues that the Claimant cannot simply argue that the Respondent breached its design obligations, it must provide specific details of each breach and one of more of those must be a substantial breach of Contract.

184. *Dura* provides guidance about what constitutes an appropriate response to a notice to show cause as follows;

> *"..387. In Brenmar Building Co Pty Ltd v University of Newcastle,[43] the NSW Court of Appeal held that 'both authority and commonsense … fully support the view that to inform a builder that he has not been proceeding with the general task which he has been given – not with a particular item – in a competent manner or with reasonable diligence is a sufficient specification'. In Re Stewardson Stubbs & Collett Pty Ltd & Bankstown Municipal Council[44] Moffat J dispatched a contention, that Dura advanced in this proceeding about the expedition notice - that it was not sufficient, in order to specify a default, to merely state that the contractor had failed to proceed with reasonable diligence. His Honour stated:*
>
> 185. *It has been argued it is not sufficient merely to refer to the failure to proceed with reasonable diligence.* ***A default can be specified in two ways; one is by directing attention to the provision in the contract in respect of which default is made. The other is by giving particulars of the manner in which a breach has occurred.*** *In order to specify the default, I think at least the former must be pointed out. But each case will depend on its own circumstances as to whether in order to specify the default there must be added some particulars as will identify the particular breach alleged. Thus a default under sub-clause (3) [failure to comply with notices] may well require some further specification so that the builder*

> *is put in the position to discontinue the default which is complained of. Somewhat different considerations apply with regard to sub-clauses (1) [suspending work] and (2) [failing to proceed with reasonable diligence or in a competent manner] where the mere reference to the clause] said to be in breach may be sufficient to specify the default … what is called for is not a repair of the consequences of past lack of diligence but compliance in a substantial and commercial sense with the general obligations under the contract.* ***Accordingly, I think a notice which is in general terms referring to the breach of the general obligation is a notice which does specify the default****.*

186. Accordingly, I am satisfied that the Claimant provided sufficient description and particulars of the breaches of Contract and required the Respondent's response including how it intended to ensure it would comply with its design obligations set out in Part H of the Annexure.

Clause 4.2 of Part H of the Annexure and the meaning of; "reasonably endeavoured"

187. The Respondent asserts it, at all times, "*reasonably endeavoured*" to perform its obligations under clause 4.2 of Part H of the Annexure. Accordingly, it discharged its obligations properly.

188. The Claimant rejects the Respondent's assertion and points to its expert's report about failure to comply and to the specific obligations set out in Part H such as the times within which the Respondent must reply to a RFI.

189. Part H of the Annexure provides;

*"The Principal will **reasonably endeavour to ensure that all activities by the Principal's consultants are carried out in a timely manner and in accordance with timeframes set out in the Contract** where applicable. For clarity. the definition of timely, where not expressly stated in the contract terms &/or schedules, shall be;*

> ***1. in accordance with the construction program and procurement schedule supplied by Tomkins;***
>
> ***2. in accordance with the Contractor's demonstrable advice with regards to required timeframes so as not to delay the WUC** (including procurement processes);*
>
> ***3. 3working days for RFI's where relates to a critical path activity and 5 working days for non-critical path activities;***
>
> ***4. 2 working day (48 hours) notice period** requirement for structural engineering inspections; and*
>
> *5. for any other activity, in the absence of specific mention in the Contract (incl contract program) or **any other direction, then 5 working days**.*

*The Principal will **reasonably endeavour** to ensure that the Principal's design & engineering documentation is completed to a sufficient level of detail, accuracy & completeness to facilitate construction of the works. For clarity this means, amongst other things. That;*

> ***6. All elements shall be fully described**, dimensioned. & setout;*

> ***7. All proprietary items shall be fully specified****. Contractor to supply shop drawings for custom items such as façade and structural steel for approval;*
>
> *8. Include all disciplines & scope required for a project of this nature, including design/engineering/reporting that may not have been completed to date;*

190. Part H of the Annexure clearly sets out the time-frames within which the Respondent must perform its design obligations enunciated in clause 4.2 of Part H of the Annexure to the Contract.

191. It would be a curious contract if after having negotiated for the inclusion of these specific design obligations to be borne by the Respondent, the mere inclusion of the words; "*reasonably endeavour*" renders the Respondent blameless for failing to comply with the enunciated design responsibilities set out in clause 4.3 of Part H of the Annexure to the Contract.. I have not been persuaded that was the intention of the parties and, therefore, do not accept the Respondent's interpretation.

192. Accordingly, I prefer the Claimant's arguments on this point, which is that the Respondent was responsible for delivering a design (including responding to RFI's in a timely manner) in accordance with Part H of the Annexure and, in breach of its obligations, failed to do so.

Respondent replied to RFI's

193. The Respondent asserts that it always replied to the RFI's but there were other extenuating circumstances where the response did not satisfy the Claimant such as; where it was a response to a solution required to remedy defective work, where the response had not been provided in the contractually specified timeframe even though the Claimant had been kept apprised of the progress

and the unresolved RFIs were not affecting the progress of the works.

194. The Claimant asserts that even if the statements of the Respondent are true, which it denies, that has nothing to do with whether the Respondent was in breach of clause 4.2 of Part H of the Annexure.

195. I accept the Claimant's position on that point. Part H of the Annexure to the Contract provides a strict timetable for the performance of the Respondent's design obligations and in particular responding to RFIs within; "***3working days for RFI's where relates to a critical path activity and 5 working days for non-critical path activities".***

Issue estoppel

196. The Respondent reminds me that many of the issues, such as the state of the design for the partitions and ceilings, have been determined in 3 previous adjudication decisions arising from the Contract.

197. Section 87 of the Act provides;

> *"87 Valuation of work etc. in later adjudication application*
>
> *(1) This section applies if, in deciding an adjudication application, an adjudicator has decided the value of—*
>
> *(a) any construction work carried out under a construction contract; or*
>
> *(b) any related goods and services supplied under a construction contract.*
>
> *Note—*
>
> *See section 72 for the valuation of construction work and related goods and services.*
>
> *(2) Any adjudicator must, in any later adjudication application that involves the working out of the value of the construction work or of the related goods and services, give the work, or the goods and services, the same value as that previously decided by the adjudicator unless the claimant or respondent satisfies the adjudicator concerned*

that the value of the work, or the goods and services, has changed since the previous decision.

(3) However, if a decision or order of a court changes the value of the construction work or of the related goods and services, the adjudicator must give the work, or the goods and services, the same value as changed by the decision or order unless the claimant or respondent satisfies the adjudicator concerned that the value of the work, or the goods and services, has changed since the decision or order.

198. Section 87 of the Act makes it clear that I must follow the decision of a previous adjudication in relation to any claim brought to adjudication and determined pursuant to that section by an adjudicator.

199. In *Dualcorp Pty Ltd v Remo Constructions Pty Ltd [2009] NSWCA 69*, Macfarlan J interpreted section 22(4) as follows;

> *"…*
>
> *67 I do not consider however that s 22(4) should be regarded as an exhaustive statement of the matters determined by an earlier adjudication which are binding on a subsequent adjudicator. For reasons I have given, I consider that the Act when read as a whole manifests an intention to preclude reagitation of the same issues. Thus, if questions of entitlement have been resolved by an adjudication determination, those findings may not in my view be reopened upon a subsequent adjudication. Likewise, if no subsequent adjudication occurs but a claimant proceeds (as here) to seek judgment following upon the failure of the other party to serve a Payment Schedule the claimant should be denied judgment to the extent that what it seeks is inconsistent with findings of the adjudicator.*
>
> *…*

69 As pointed out in Kuligowski, for the principle of issue estoppel to apply, the same issue must have been earlier determined as is later sought to be reagitated (at [40]). Thus, if a progress claim were rejected by an adjudicator because it was premature by reason of the date stipulated for payment by the contract, a later claim made on a timely basis would not be precluded. However (to take as an example the issue which was before McDougall J in John Goss Projects) if a progress claim were rejected because it was not made in accordance with express requirements of the contract, that determination would be binding on a subsequent adjudicator before whom the same issue arose. Similarly, it would be an abuse of process for the claimant to rely upon a later progress claim in response to which no Payment Schedule was served to obtain judgment on a basis conflicting with issues resolved in the earlier determination.

70 I thus disagree with the view ultimately arrived at by McDougall J in John Goss Projects that s 22(4) defines the extent to which an adjudicator is bound by an earlier adjudication. The view that the claimant once disappointed by an adjudicator can seek a different determination from another, or indeed from a succession of others, until a favourable decision is reached would in my view conflict with the policy of the Act to render adjudicators' determinations final on issues which they resolved, subject only to provisions of the Act conferring limited rights of correction of determinations.

71 Dualcorp asserts that this approach could produce unfair outcomes where a claim has not been the subject of adjudication on the merits but has been rejected for want of evidence. It was submitted that because of the unfairness that would flow from precluding a claimant bolstering its evidence on another adjudication, it cannot have been intended that adjudications would be conclusive.

72 I do not agree. It is not at all unusual that persons seeking remedies in courts or other forums have a once only opportunity to bring forward evidence and submissions in support of their claim. This is in fact the usual situation and is consistent with what the High Court in D'Orta referred to as the "central and pervading tenet of the judicial system … that controversies, once resolved, are not to

be reopened except in a few, narrowly defined, circumstances" (at [34]).

200. In that same case Allsop P supported Macfarlan's judgment as follows;

> *…I agree with Macfarlan JA that the Act was not intended to permit the repetitious use of the adjudication process to require an adjudicator or successive adjudicators to execute the same statutory task in respect of the same claim on successive occasions. A party in the position of the applicant (Dualcorp), here, should not be able to re-ignite the adjudication process at will in order to have a second or third or fourth go at the process provided by the Act merely because it is dissatisfied with the result of the first adjudication.*

201. In the decision of adjudication application referenced; # 2573125 in relation to a dispute about a payment claim made on 28 March 2024, the adjudicator decided the Claimant's claim for an extension of time referenced; "*HCV 171 NOD#94 & EOT47 Delay in fit out works*".

202. In that adjudication application, the Claimant indicated its claim had arisen "*as a result of deficient design documentation for ceilings and partitions.*" The adjudicator considered the parties' expert opinions and decided; "*I accept that the contractual design and specification for the partitions and ceilings was complete*."

203. The design may have been complete in the context of what is normally expected under a standard form AS 4000. However, Part H of the Annexure creates far more onerous design obligations on the Respondent that the standard form AS 4000 form of contract. The adjudicator did not consider or decide whether the contractual design and specification for the partitions had taken account of the services etc… sharing the same space and made provision accordingly. In other words, that decision did not consider whether the Respondent had satisfied its obligations under Part H of the Annexure.

204. In the decision at paragraph 192(1), the adjudicator relies on the report of Andrew Corrigan and has quoted the following in the decision;

> *"4. I am informed that, at Midwater, clashes of services and dimensional problems occurred. I am informed that the rooms of the apartments particularly the bathrooms are small in size and the set out of partitions has been designed by the consultants with above average precision.* ***This has made it unacceptable for solutions of small modifications to location and set out. Hence, the designer consultants need to consider and provide solutions where clashes occur along with a site instruction***.
>
> *5. I have perused the drawings of partitions and I confirm that the dimensions are depicted with a high level of precision.* ***Hence, I would expect detailed examination of clashes and dimensional problems by the Architect***.

6. The clashes and dimensional problems are issues of detail and I can understand that the Contractor would first become aware of the problems when installation of partitions was underway.

205. In that report, Mr Corrigan makes it clear that the Partition and Ceiling Design was not co-ordinated to take account of extant services, which was in breach of the Respondent's design obligations under Part H of the Annexure to the Contract.

206. Accordingly, it appears to me that adjudicator was only asked to determine whether the Partitions and ceiling design was sufficiently complete and whether it could be used for construction.

207. The Respondent's consultants recognised the design did not comply with Part H of the Annexure and offered the following remedy; "***Hence, the designer consultants need to consider and provide solutions where clashes occur along with a site instruction***."

208. Unfortunately, that was a different approach to that required by the Contract because the Respondent was supposed to provide designs that were free of all clashes between architectural and all services designs pursuant to Part H of the Annexure.

209. In this Adjudication Application, I have been asked to consider whether the Respondent complied with its obligations under Part H of the Annexure to the Contract.

210. The Partitions and Ceilings Design may have been able to be used for construction and clashes with services could have been rectified as the construction proceeded but the Respondent was required to do more than just provide a set of drawings that could be used for construction in that way.

211. The Respondent was required to provide Partitions and Ceilings drawings;

(a) that could be used for construction; and

(b) are coordinated and free from clashes.

212. Accordingly, the issue decided by the adjudicator of adjudication application # 2573125 was whether the Partition and Ceiling drawings could be used for construction.

213. In this Adjudication Application, I am required to consider a different issue. Specifically, I am asked to decide whether the Respondent provided the Claimant drawings and information in accordance with Part H of the Annexure, which is an entirely different issue.

214. Accordingly, I am not restrained by previous adjudication decisions in relation to whether the Respondent properly discharged its design obligations under Part H of the Annexure to the Contract.

215. Accordingly, I have decided that the Claimant lawfully terminated the Contract on 10 September 2024.

216. In the 21 August 2024 Notice to Show Cause, the Claimant also demands the Respondent show cause in relation to two other substantial breaches of Contract, which are;

(a) Breach No. 2 - Principal's, failure to ensure the Superintendent performs its role "*honestly, and in good faith*"; and

(b) Breach No. 3 - Principal's, failure to make payment due and payable to the Contractor.

217. I have decided that the Respondent was responsible for delivering a design (including responding to RFI's in a timely manner) in accordance with Part H of the Annexure and, in breach of its obligations, failed to do so in a timely manner.

218. I have determined above that the Claimant lawfully terminated the Contract because the Respondent failed to show cause about its failure to perform its design obligations pursuant to Part H of the Annexure, which the Claimant refers to "Breach No. 1".

219. Accordingly, there is no need for me to decide whether the Claimant was entitled to rely on Breach No. 2 and Breach No. 3 because I have decided that the Claimant was entitled to terminate regardless of any findings I may make about the second and third alleged substantial breaches of Contract.

220. I have, therefore, decided, I have jurisdiction to determine this Adjudication Application.

REQUEST FOR AN EXTENSION OF TIME TO DETERMINE THE ADJUDICATION APPLICATION

221. On 21 February 2025, I requested the parties' consent to an extension of time of 15 business days to make the decision of this Adjudication Application.

222. The Claimant and Respondent agreed to my request to an extension of time of 15 business days to make the decision of this Adjudication Application on 1 April 2025.

223. On 25 March 2025, I requested the parties' consent to an extension of time of 5 business days to make the decision of this Adjudication Application.

224. The Claimant and Respondent agreed to my request to an extension of time of 5 business days to make the decision of this Adjudication Application on 8 April 2025.

REASONS FOR THE DECISION

225. In making this decision, section 88(2) of the Act, provides I have had regard only to the following matters:

(a) the provisions of the Act and, to the extent they are relevant, the provisions of the Queensland Building and Construction Commission Act 1991, part 4A;

(b) the provisions of the construction contract (the Contract) from which the application arose;

(c) the Payment Claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the Claimant in support of the claim;

(d) the Payment Schedule, if any, to which the Adjudication Application relates, together with all submissions, including relevant documentation, that have been properly made by the Respondent in support of the schedule;

226. The limits of the Adjudicator's task in deciding an adjudication were explained in the recent decision of the New South Wales Court of Appeal in *Ceerose Pty Ltd v A-Civil Aust Pty Ltd [2023] NSWCA 215* (***Ceerose***).

227. *Ceerose* is an appeal from a decision of the New South Wales Supreme Court declaring that an adjudicator had committed jurisdictional error. Specifically, the adjudicator had rejected the respondent's reasons for withholding payment for certain claims. The adjudicator then awarded those claims to the claimant. The primary judge decided that the adjudicator had committed a jurisdictional error because, even though they had rejected the

respondent's reasons for withholding payment, the adjudicator had not considered the "merits" of the claims[4].

228. The Court of Appeal held that **an adjudicator does not need to go any further than rejecting the respondent's reasons for withholding payment set out in the payment schedule. If the adjudicator does so, the adjudicator can award the amount claimed.** There is no obligation on the adjudicator to determine the "merits" of the claims.

229. At [75], the Court (Payne JA, with whom Ward ACJ and Basten AJA agreed) stated:

> *"75. For the following reasons I am unable to agree with Hodgson JA's dicta in [52] of Hargreaves. The essence of [52] of Hargreaves is that the "adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim" (emphasis added). There is a potential difficulty in this reasoning, at least in so far as it is being used as a test to identify jurisdictional error. The "true construction of the contract" and the "true merits" of the payment claim are, by reason of the structure of the Security of Payment Act I have set out above, matters where an error by an adjudicator will not be jurisdictional. As Basten JA explained at [66] of Hargreaves itself, in the light of the express restriction in s 20(2B) of the Act, there is merit in the conclusion that the adjudicator is not entitled to go beyond the terms of the adjudication response in rejecting part or all of the payment claim. Certainly, it is not a jurisdictional error for an adjudicator, having decided all the reasons advanced by the respondent were invalid, to then and without more, determine the amount of the progress payment in favour of the claimant based on the payment claim. "*

[4] *Ceerose Pty Ltd v A-Civil Aust Pty Ltd [2023] NSWCA 215 at [70] – [71].*

230. The Court explained (at [76]-[77]) that this is because the payment claim and payment schedule set the scope of the dispute to be determined by the adjudicator. At [77], the Court said:

> *76. This is because, in addition to s 22(2), which provides a limit on what an adjudication is obliged to take into account, sub-section 14(3) requires that where a payment schedule indicates an amount of a payment which is less than the amount of the claim, the schedule must indicate why the amount is less and, if a respondent is withholding payment, the reason for that action. The recipient of the payment claim is obliged to explain the reason why the payment claim (or any part of it) is disputed. Where the payment schedule indicates an amount which is less than the amount claimed, the claimant may apply for adjudication of its payment claim: s 17(1)(a). Where such an application is made, the respondent may lodge a response to the claimant's adjudication application. That response may contain relevant submissions (s 20(2)(c)), but, as I have said, s 20(2B) provides:*
>
> *The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant. (italics added)*
>
> ***It is the dispute between the maker of the payment claim and the recipient of that claim which is referred for adjudication. In the light of this express restriction on the contents of the adjudication response, an adjudicator is not required to go beyond the terms of the payment schedule, repeated in an adjudication response, in accepting all or part of the payment claim**. The requirement in s 22(1), that the adjudicator is to determine "the amount of the progress payment (if any) to be paid" by the respondent to the claimant, in context, is a requirement to determine the amount of the progress payment arising from the dispute submitted by the parties for adjudication. The notion that it is jurisdictional*

error for an adjudicator to fail to address what the adjudicator considers to be the "true construction of the contract" and the "true merits of the claim" outside the limited issues presented by the parties for determination is an invitation for the reviewing court to embark on an impermissible merits review.

231. The Court said further, at [84]:

81. In Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd (2018) 98 NSWLR 712; [2018] NSWCA 276, Basten JA (with whom Leeming and White JJA agreed) explained some of the principles involved in a claim that an adjudicator has failed to "grapple with" a mandatory consideration:

> *"23 It is significant that, in the next section of the reasons in Laing O'Rourke, McDougall J addressed the language of s 22(2) and the obligation imposed on the adjudicator by the words 'is to consider' the identified matters. Where there is apparently credible and relevant material before the decision-maker, which appears to engage with a mandatory consideration, and there is no reference to that material in the reasons provided by the decision-maker, it may be inferred that no regard was had to it. That may allow for the inference that no regard at all was had to the mandatory consideration. That must be distinguished from the situation where, while there is no reference to that material, it cannot be inferred that the decision-maker must have referred to it, if it had been properly considered. It is well established that judges are not required to refer to all the evidence before the court; so it is true that a decision-maker is not required to refer to all the material supplied by one party before rejecting the party's claim.*
>
> *24 Furthermore, saying that the decision-maker must 'grapple with' particular material reflects statements that*

> *the decision-maker must give 'proper, genuine and realistic consideration' to such material. As the High Court noted in Minister for Immigration and Citizenship v SZJSS [at][25] this language can invite a slide into impermissible merit review. Finally, a refusal to give any weight to particular material does not demonstrate that the decision-maker failed to have regard to a mandatory consideration [citing SZJSS at [33]-[36]]."*

82. Section 22(1) does not create a free-standing jurisdictional obligation to consider the merits of a payment claim, and in particular whether the construction work identified in the payment claim has been carried out, and what is its value. The only matters an adjudicator is required to consider in determining an adjudication application are set out in s 22(2)*. As explained at [69] above, there are likely to be few cases in which an applicant for judicial review can establish a breach of the duty to consider the matters set out in s 22(2). Only sometimes is a failure to refer to relevant material evidence of a failure to refer to a mandatory relevant consideration. A fortiori, where there is no relevant material before the adjudicator, it cannot be a jurisdictional error to fail to refer to it. Paragraph [52] of Hargreaves, insofar as subsequent cases have understood that it suggests that s 22(1) provides a free-standing jurisdictional obligation to consider the merits of a payment claim, and in particular whether the construction work identified in the payment claim has been carried out, and what is its value, is not correct and should not be followed.*

83. At paragraph [34], the primary judge also relied upon the first instance decision of Brereton J in Pacific General Securities Ltd v Soliman & Sons Pty Ltd (2006) 196 FLR 388; [2006] NSWSC 13 where his Honour said this at [82]:

*"...**the absence of [material put forward by the respondent] does not entitle the adjudicator simply to award the***

> ***amount of the claim without addressing its merits, which as a minimum will involve determining whether the construction work identified in the payment claim has been carried out, and what is its value."***
>
> ***84. This conclusion is inconsistent with the text, subject matter and purpose of the Security of Payment Act. It should not be followed.*** *It is not a jurisdictional error for an adjudicator to fail to consider a matter outside the scope of the dispute presented by the parties as required by the statute. The absence of material, including a reason put forward by the respondent for not paying the payment claim, entitles an adjudicator to award the amount of the claim without "addressing its merits". The "dispute" which the Act has provided a mechanism for identifying and resolving is non-existent in such a case. A requirement that an adjudicator must determine "whether the construction work identified in the payment claim has been carried out", in circumstances where a recipient of a payment claim has not made any suggestion that it has not, despite the statutory requirements of s 14, subverts the statutory scheme for the swift payment of progress claims and speedy determination of disputes about those progress payments. The person best able to address the question of "whether the construction work identified in the payment claim has been carried out", namely the recipient of the payment claim, has not, in the example posited by Brereton J, suggested the work was not carried out, as it was required to do by the Act if it wished not to pay the claim. The statutory task of an adjudicator is to determine the claimant's entitlement within the framework of the dispute that was propounded by the parties. The conclusion in Pacific General Securities is incorrect and should not be followed.*

232. In making its decision, the Court overruled previous decisions in which it had been said or decided that an adjudicator was bound to determine the "merits" of a claim even if it was not disputed,

or the adjudicator had rejected the respondent's reasons for disputing the claim: *Ceerose* at [82], [84]-[86].

233. The Court went on to consider an argument by the respondent that the effect of an adjudicator's jurisdictional error in respect of a claim for demolition work was that the full amount awarded for that claim should be removed from the determination, including the amount which the respondent accepted should be payable. The claimant claimed 85% of the item for demolition work. The respondent accepted, in the adjudication and in Court, that only 65% of the demolition work was payable. The adjudicator awarded the sum claimed by the claimant. The Court rejected the respondent's argument that the entire sum should be removed from the adjudication. The Court decided (at [101]-[102]):

> *101. As I have explained, the adjudicator was not, in the absence of any reason advanced by the recipient of a claim why a payment should not be made, nonetheless obliged to investigate and give written reasons for a conclusion about the "true merits of the claim" (including parts of the claim already paid for), lest he or she fall into jurisdictional error.*
>
> *102. To be clear, the adjudicator here was not obliged to determine whether the 65% of the demolition work Ceerose had accepted in its payment schedule had been completed or what the value of that work was. The effect of the Security of Payment Act was that, having taken the position in its payment schedule that 65% of the demolition work had been completed and the value of that work was $29,158.10 more than the amount already paid, [the respondent] was not permitted to complain in judicial review proceedings that the adjudicator, without error, could have awarded a lesser amount.*

234. The guidance provided by *Ceerose* is that the Adjudicator is not required to determine the "merits" of The Claimant's' claims. The

Adjudicator is only required to consider the dispute between the parties.

235. If the Adjudicator dismisses the respondent's reasons for withholding payment, then the Adjudicator can award the claimed amount.

236. *Ceerose* was decided by the New South Wales Court of Appeal. It represents the current law in New South Wales and has been followed in Queensland. The adjudicator is bound to follow that decision.

ISSUES IN DISPUTE

237. The Payment Claim and Payment Schedule are summarised in the TABLE 1 below. The high-lighted rows are pressed in this Adjudication Application.

238. The Respondent has provided its reasons for withholding payment in its Payment Schedule against the items claimed and are considered below.

239. The Claimant has reduced or abandoned a number of its claims made in the Payment Claim in the Adjudication Application.

240. The issues and revised amounts in dispute now pursued by the Claimant in this Adjudication application are set out in TABLE 2 below.

241. The Respondent claims I am restrained by issue estoppel concerning the claim for the original work under the Contract.

242. I have considered the 3 preceding decisions of adjudication applications referenced # 2573124, # 2602454, # 2671069.

243. Furthermore, I am persuaded by the Claimant that the value of the work claimed under each item of the Payment Claim has changed in this Adjudication Application. There were no findings of fact relating to the claimed items and, therefore, issue estoppel does not apply to the claim for each item of the original work under the Contract.

244. I am not restrained by issue estoppel in relation to the amounts claimed for the original Contract works and pursuant to section 87(2) of the Act I have decided each of the amounts claimed below.

TABLE 1 THE AMOUNTS CLAIMED AND SCHEDULED

Item	Description	Previously claimed	Claimed 16/10/2024	Respondent scheduled amount
1.1	Preliminaries	$7,030,697.70	$11,169,287.03	$7,030,697.70
1.2	Consultant Fees	$55,290.00	$57,000.00	$55,290.00
1.3	Basement Retention	$14,508,524.13	$14,547,552.49	$14,508,524.13
1.4	Dewatering System	$190,000.00	$200,000.00	$190,000.00
1.5	Formwork	$9,627,422.14	$9,806,619.19	$9,627,422.14
1.6	Reinforcement (Supply & Install)	$6,902,836.65	$6,940,138.77	$6,902,836.65
1.7	Concrete	$7,827,222.75	$7,829,206.78	$7,827,222.75
1.8	Post Tensioning	$1,108,770.50	$1,120,770.50	$1,108,770.50
1.9	Waterproofing System	$220,099.50	$278,004.52	$220,099.50
1.10	Masonry / Precast Walls	$660,960.02	$665,460.02	$660,960.02
1.11	Structural Steel	$278,650.00	$278,650.00	$278,650.00
1.12	Roofing Safety	$4,500.00	$4,500.00	$4,500.00
1.13	Metalwork and Balustrade	$0.00	$419,749.55	$0.00
1.14	Doors & Door Frames	$82,436.78	$113,146.36	$82,436.78
1.15	Hardware Systems	$8,673.85	$8,673.85	$8,673.85
1.16	Roller Shutter	$0.00	$0.00	$0.00
1.17	Curtain walls, Aluminium Windows and Doors	$0.00	$11,858,432.54	$0.00
1.18	Joinery / Benchtop / Appliances	$1,000.00	$80,000.00	$1,000.00
1.19	Electrical Services	$3,083,419.30	$4,145,415.99	$3,083,419.30
1.20	Hydraulic Services	$2,075,844.65	$2,459,735.05	$2,075,844.65
1.21	Mechanical Services	$2,109,789.18	$2,764,761.36	$2,109,789.18
1.22	Fire Services	$505,525.00	$655,775.00	$505,525.00
1.23	Lift Services	$953,600.00	$6,133,518.57	$953,600.00
1.25	Refuse Chute	$7,500.00	$7,500.00	$7,500.00
1.26	Ceilings, Partitions & Carpentry	$982,389.05	$1,959,459.15	$982,389.05
1.27	Floor covering- Carpet & Timber	$0.00	$0.00	$0.00
1.28	Tiling Wall & Floor	$2,500.00	$104,501.43	$2,500.00
1.29	Painting & Rendering	$156,844.24	$161,700.57	$156,844.24
1.30	Hard & Soft Landing	$0.00	$0.00	$0.00
1.31	External works including cable park	$0.00	$0.00	$0.00
1.32	External works including cable park	$0.00	$0.00	$0.00
1.33	Provisional Sums	$0.00	$0.00	$0.00

	SUBTOTAL ORIGINAL CONTRACT	**$58,384,495.44**	**$83,769,558.72**	**$58,384,495.44**

	Variations	Previously claimed	Claimed 16/10/2024	Respondent scheduled amount
HCV001 to HCV057	Variations	$0.00	$0.00	$0.00
HCV100	Lift Finishes Upgrade	$0.00	$7,095.00	$0.00
HCV101	Latent Condition 01 - Asbestos Removal from Western Boundary	$252,109.21	$331,748.26	$252,109.22
HCV102	HCV102 included in HCV101 - WITHDRAWN	$0.00		$0.00
HCV103	Increase of Balcony Sizes	$369,462.91	$591,140.66	$370,415.24
HCV104	Levels 20-22 Type M Unit	$0.00	$28,981.27	$0.00
HCV105	Latent Condition 02 - ACM Sampling - WITHDRAWN	$0.00	$0.00	$0.00
HCV106	Energex Access Hatch - Upgrade of Finishes	$4,518.61	$4,518.61	$4,518.61
HCV107	Latent Condition 03	$77,910.36	$89,087.98	$77,910.36
HCV108	Revised Electrical Drawings for B1 to B7	$27,588.00	$28,415.64	$27,588.00
HCV109	B1 Slab Recesses for Future Car Chargers	$0.00	$6,038.89	$0.00
HCV110	Revised Hydraulic Drawings for B1 to B7	$33,225.23	$308,760.15	$33,225.23
HCV111	Revised Fire Services Drawings for B1 to B7	$2,310.00	$24,821.17	$2,310.00
HCV112	Changes to Level 19	$0.00	$11,052.16	$0.00
HCV113	Revised Mechanical Drawings for B1 - M03 [A] to M2010 [C2]	$2,310.00	$20,253.00	$2,420.00
HCV114	Revised Fire Services Drawings for L01 to L03	$17,963.72	$18,562.50	$18,562.51
HCV115	Revised Mechanical Drawings - LO1 to L03- WITHDRAWN	$0.00	$0.00	$0.00

HCV116	Revised B1 Electrical Drawing - from C3 to CA	$525.00	$1,133.00	$525.00
HCV117	Missing SC1 Columns - WITHDRAWN	$0.00	$0.00	
HCV118	Level 2 - Extra Over Concrete Wall - Rev D	$0.00	$79,699.88	$0.00
HCV119A	Fastflow Drainage - Hydraulic Specification	$53,130.28	$336,208.68	$53,130.28
HCV119B	Geberit Drainage - Hydraulic Specification	$0.00	$141,686.67	$0.00
HCV120	Hydraulic Changes Ground to Level 3	$0.00	$140,194.70	$0.00
HCV121	Electrical Changes Level 01 to Level 03	$0.00	$0.00	$0.00
HCV122	Updated Door Hardware Schedule	$2,937.18	$3,327.82	$2,937.18
HCV123	Submittal #37 Revision 2: In-Style- Main Switch Board- IFA	$15,580.31	$22,053.71	$15,580.31
HCV124	Revised Door Schedule	$0.00	$0.00	$0.00
HCV125	Hobs and Setdowns to Wet Areas	$0.00	$301,846.65	$0.00
HCV126	Jackhammer CW1 for FS03 Construction - RFI162	$0.00	$13,273.42	$0.00
HCV127	B1 Coordination	$0.00	$0.00	$0.00
HCV128	Hob to L3	$0.00	$0.00	$0.00
HCV129	Service Rebates added L5 to L38	$0.00	$162,482.28	$0.00
HCV130	Updated Acoustic Report	$0.00	$0.00	$0.00
HCV131	Bondek Slab to Lift Pit	$14,417.70	$17,556.22	$14,417.70
HCV132	Value Management - Alternative Lighting - Rejected	$0.00	$0.00	$0.00
HCV133	Value Management - Alternative Sanitaryware - Rejected	$0.00	$0.00	$0.00
HCV134	Value Management - Tiling - Rejected	$0.00	$0.00	$0.00
HCV135	CPA Specification - 0181 Adhesives, Sealants & Fasteners	$0.00	$0.00	$0.00
HCV136	Sliding Door and Window Wall PMU Test AS4284	$0.00	$0.00	$0.00
HCV137	Updated Facade Specification - WITHDRAWN	$0.00	$0.00	$0.00
HCV138	MSB Drip Tray - Tundish	$0.00	$0.00	$0.00

HCV139	Basement 7 - Revised Sika Specification and details provided	$0.00	$143,961.93	$0.00
HCV140	Window to Bathroom TYPE 12 obby Relief Riser Catch Mesh	$0.00	$0.00	$0.00
HCV141	Loby Relief Riser Catch Mesh	$0.00	$0.00	$0.00
HCV142	Infill Redundant Penetration to Level 3 Siab	$0.00	$5,041.12	$0.00
HCV143	Extra Over Access Panels	$0.00	$0.00	$0.00
HCV144	Speed Panel - From Galv to Colourbond Façade Pockets from Level 4 to Level 38	$20,000.00	$44,342.64	$19,821.54
HCV145	Façade pockets from level 4 to level 38	$0.00	$614,462.37	$0.00
HCV145.1	Concrete Works to Facade Pockets and Cast Ins	$0.00	$310,901.87	$0.00
HCV146	Site Instruction 26 - Façade (EOT29) NOV35	$0.00	$0.00	$0.00
HCV 148	ED Strip Lighting to Common Areas	$0.00	$0.00	$0.00
HCV149	Building Access Safety System - 3rd Party Inspection	$0.00	$0.00	$0.00
HCV150	Energex Works	$0.00	$26,452.45	$0.00
HCV151	SI33 Joinery Finishes	$0.00	$0.00	$0.00
HCV152	Home Automation	$0.00	$0.00	$0.00
HCV153	Additional Fastflow Design Changes - Ground to Level 6	$0.00	$183,178.61	$0.00
HCV154	Geberit Supertube	$0.00	$0.00	$0.00
HCV155	Unit B - Kit Type2 & Mech Ductwork	$0.00	$0.00	$0.00
HCV156	Balcony Tiles	$0.00	$0.00	$0.00
HCV157	Level 4 Bulkhead introduced to capture services form level 5 in unit 403	$0.00	$0.00	$0.00
HCV158	Level 4 PW08 wall tag added between units 401 & 402 changed from a PW01 on Contract set	$0.00	$0.00	$0.00
MCV 159	Blinds to areas not previously documented. Curtains as provisional sum.	$0.00	$0.00	$0.00
HCV160	Level 4 Wall change from EW02 - PW09 between balcony of unit 403 and Master Bedroom of unit 404	$0.00	$0.00	$0.00

HCV161	Glazing post added to balcony walls to support glazing Various architectural document changes.	$0.00	$0.00	$0.00
HCV162	Various architectural document changes	$0.00	$0.00	$0.00
HCV163	Revised documentation	$0.00	$0.00	$0.00
HCV165	Updated curtain wall details	$0.00	$0.00	$0.00
HCV166	Fire Rating Chilled Water Lines	$0.00	$0.00	$0.00
HCV167	Electrical Changes to Blinds in Apartments	$0.00	$9,854.54	$0.00
HCV168	Revised Documents & Fastflow	$0.00	$0.00	$0.00
HCV171	NOD #94 & EOT #47 Delay in Fit-out Works	$0.00	$3,308,151.00	$0.00
HCV172	NOD #98 & EOT #48 Balcony Waterproofing	$0.00	$0.00	$0.00
HCV173	NOD #101 & EOT #52 Mechanical Works Delay	$0.00	$0.00	$0.00
HCV174	NOD #102 & EOT #53 Design for Pools, Spa and Water Features Balcony Waterproofing change SI #35 to SI #144	$0.00	$0.00	$0.00
HCV175	Balcony Waterproofing change SI#35 to SI#144	$0.00	$22,633.75	$0.00
HCV176	Landscape Protection	$0.00	$6,886.76	$0.00
HCV177	Structural Window Posts	$0.00	$154,382.08	$0.00
HCV178	NOD # 81 & 85 & EOT #40 & 42 Delay Costs	$0.00	$1,086,963.90	$0.00
HCV179	Slab Deflection - as built survey	$0.00	$44,187.30	$0.00
HCV180	Tile Trims	$0.00	$54,295.39	$0.00
HCV181	Type M Finishes	$0.00	$0.00	$0.00
HCV182	Wet Area Set Down Design Coordination Clashes	$0.00	$146,943.87	$0.00
HCV184	Change to Steel Stud Guage		$247,038.70	$0.00
HCV187	Basement Plunge Columns		$99,557.17	$0.00
HCV193	Basement Cast in Angles		$111,006.99	$0.00
HCV194	Lobby Mechanical Penetration Infills	$30,406.92	$78,181.21	$30,406.92

HCV195	Silica		$1,892,930.79	$0.00
HCV195.1	Silica Preliminaries		$2,147,130.06	$0.00
HCV196	Structural Connection Detail Additions		$573,900.61	$0.00
HCV197	Hydraulic Design Changes - Level 5 - Level 17		$37,849.34	$0.00
HCV198	Additional Support TV Joinery		$35,820.34	$0.00
HCV199	Internal Walls to C & C1 Units		$75,709.06	$0.00
HCV201	Basement 07 Stormwater Pump Station		$49,116.86	$0.00
HCV202	Concrete Strength Changes		$106,547.29	$0.00
HCV203	Substation Stairs and Step Ladder		$20,901.82	$0.00
HCV204	Balcony Tiling Joists - Prototype		$19,284.78	$0.00
HCV205	Levels 28 - 35 - Additional floor wastes		$2,841.07	$2,007.10
HCV206	Basement 01 Stormwater Tank Slab and Block Walls		$40,029.24	$0.00
HCV207	Levels 18 - 22 steam shower tundish and floor wastes		$10,294.77	$924.00
HCV208	PW03 Wall Custom Niches and Boxed Studs		$137,141.01	$0.00
HCV209	150mm backflow device		$13,604.11	$0.00
HCV210	Hydraulic design change - Level 18 to 35		$72,830.54	$30,220.68
HCV211	Fridge taps		$11,519.16	$0.00
HCV212	Hydraulic design change - Level 36		$6,145.50	$0.00
HCV213	Level 38 Mezzanine Upstand Wall		$0.00	$0.00
HCV214	SI42 Misc Works / Works to L2 and L5		$19,445.63	$0.00
HCV215	Roof void level drainage - Design change		$0.00	$0.00
HCV216	PW03 Niche hydraulic coordination - design error		$0.00	$0.00
HCV217	Powder room basin change		$1,371.88	$0.00
HCV218	PW03 Unit 3 & 4 fire wall prototype		$0.00	$0.00

HCV219	Basement B07 Earthing Pits		$7,995.98	$0.00
HCV220	Screed to Balconies		$195,923.07	$0.00
HCV221	Level 2 Mezzanine Structure Changes		$1,343.82	$3,110.37
HCV222	Level 2 Infill Slab Over Garbage Room		$12,095.60	$0.00
HCV223	Additional Floor Boxes to Level 21		$3,184.12	$0.00
HCV224	High Pressure Gas Main Services Location		$2,675.31	$815.37
HCV225	Additional 4N28 Reinforcement to FS04		$2,380.15	$1,835.03
HCV226	Chemical Fixings to Balcony Sliders and Windows		$28,439.16	$0.00
HCV227	Lobby Relief Slab Extension		$30,144.53	$0.00
HCV228	50Mpa to Door Ways		$10,479.50	$0.00
HCV229	Lobby Relief Duct Work		$11,312.75	$0.00
HCV230	HDG Remaining Window Posts		$0.00	$0.00
HCV231	Basement Speed Panel to Supply Air Riser		$23,707.02	$0.00
HCV232	HWU Locations		$8,000.00	$0.00
HCV233	Level 38 Waterproofing		$0.00	$0.00
HCV234	Additional waterproofing to lightweight balcony walls		$73,135.36	$0.00
HCV235	Rooftop design issues, refer Tomkins letter 2 July 2024, plus many finishes details to be resolves		$0.00	$0.00
HCV236	18 Additional louvres L02, L02 mez. L03 and L38 mez, and increased louvres sizes		$0.00	$0.00
HCV237	Window wall PMU		$38,390.00	$0.00
HCV238	Podium PMU		$0.00	$0.00
HCV239	Drop ceilings for 60mm curtain pelmet		$62,355.70	$0.00
HCV240	B1 speed panel to HV and air plenum		$0.00	$0.00
HCV241	Joinery cabinets to laundries (delete skinny mini)		$0.00	$0.00

HCV242	Corrosion category		$0.00	$0.00
HCV243	PW03 walls change from 92 stud to 92 Rondo QuietStud		$10,699.59	$0.00
HCV244	Balcony pedestal height change 50mm to 150mm refer comparison CD6351 rev 1 to		$0.00	$0.00
HCV245	Various ceiling height and bulkhead changes		$0.00	$0.00
HCV246	Block airlocks added to pump room and MSB on L02		$4,412.22	$3,008.88
HCV247	Topping to timber floor areas due to planned deflection of post tensioned slabs.		$0.00	$0.00
HCV248	HDG added to all external steel in the amendment to the external finishes schedule issues with Site instruction #30		$0.00	$0.00
HCV249	Demolish Diaphragm wall for Energex pit construction. Rebuild slab around pit.		$0.00	$0.00
HCV250	Basement B1 syphonic stormwater drainage system including shift GPT from east to west end of site		$0.00	$0.00
HCV251	Compensable Delay Cost - Approved EOT21		$47,259.30	$0.00
HCV252	Termination Claim		$11,469,628.92	$0.00
PSA01	Provisional Sum Adjustment - Entry & Reception bespoke light fittings			$0.00
PSA02	Provisional Sum Adjustment - Swimming pools, spas and ground floor water feature			$0.00
	SUBTOTAL VARIATIONS	$924,395.43	$26,706,337.93	$967,799.53
	Adjustment per payment schedule			$52,534.08
	TOTAL CONTRACT + VARIATIONS	**$59,308,890.87**	**$110,475,896.65**	**$59,404,829.05**
	Previously paid		*$58,164,663.55*	***$56,118,385.16***
	CLAIMED / DETERMINATION BY SUPERINTENDENT EXCL DEDUCTIONS		**$52,311,233.10**	**$3,286,443.89**

	SUPERINTENDENT'S DEDUCTIONS			
	Structural Work			-$696,500.00
	Defective pipework installation			-$85,000.00
	Defective works			-$2,212,480.00
	Defective Works - Diaphragm Wall			-$205,000.00
	Fastflow Pipework			-$588,420.16
	Rectification Works _ Swiss Park			-$300,000.00
	Temporary Services			-$28,830.92
	Topping & Grinding of existing slabs			-$1,436,000.00
	Ceilings			-$280,000.00
	Partitions			-$150,000.00
	Consultants			-$167,694.78
	SUBTOTAL SUPERINTENDENT'S DEDUCTIONS			**-$6,149,925.86**
	DETERMINATION BY SUPERINTENDENT			**-$2,863,481.97**

	RESPONDENT'S ADDITIONAL DEDUCTIONS			
	Non specified deduction	$0.00	$0.00	-$52,534.08
	Extra over costs+C207:I209 to complete			-$44,590,744.77
	SUBTOTAL RESPONDENT'S ADDITIONAL DEDUCTIONS			**-$44,643,278.85**

	TOTAL CLAIMED /SCHEDULED		**$52,311,233.10**	**-$47,506,760.82**

TABLE 2 THE AMOUNTS CLAIMED IN THE ADJUDICATION APPLICATION AND THE AMOUNTS SCHEDULED

	Description	Adjusted in this Application Claimed 16/10/2024	Amount in dispute	*Respondent scheduled amount*
1.6	Reinforcement (Supply & Install)	$37,302.12	$37,302.12	*$0.00*
1.8	Post Tensioning	$12,000.00	$12,000.00	*$0.00*
1.9	Waterproofing System	$25,646.89	$25,646.89	*$0.00*
1.10	Masonry / Precast Walls	$4,500.00	$4,500.00	*$0.00*
1.13	Metalwork and Balustrade	$74,200.17	$74,200.17	*$0.00*
1.14	Doors & Door Frames	$30,709.58	$30,709.58	*$0.00*
1.17	Curtain Walls, Aluminium Windows and Doors	$1,697,875.17	$1,697,875.17	*$0.00*
1.19	Electrical Services	$319,245.81	$319,245.81	*$0.00*
1.21	Mechanical Services	$330,275.11	$330,275.11	*$0.00*
1.23	Lift Services	$4,104,148.57	$4,104,148.57	*$0.00*
1.26	Ceilings, Partitions & Carpentry	$714,674.14	$714,674.14	*$0.00*
1.28	Tiling Wall & Floor	$97,250.00	$97,250.00	*$0.00*
1.29	Painting & Rendering	$4,896.32	$4,896.32	*$0.00*
	Sub-total original Contract works	**$7,452,723.88**	**$7,452,723.88**	***$0.00***

	Variations	Subject of PC36 Claimed 16/10/2024	Amount in dispute	*Respondent scheduled amount*
HCV113	Revised Mechanical Drawings for B1 - M03 [A] to M2010 [C2]	$17,943.00	$17,943.00	*$0.00*
HCV126	Jackhammer CW1 for FS03 Construction - RFI162	$13,273.42	$13,273.42	*$0.00*
HCV177	Structural Window Posts	$154,382.08	$154,382.08	*$0.00*
HCV179	Slab Deflection - as built survey	$44,187.30	$44,187.30	*$0.00*
HCV197	Hydraulic Design Changes - Level 5 - Level 17	$37,849.34	$37,849.34	*$0.00*

HCV207	Levels 18 - 22 steam shower tundish and floor wastes	$10,294.77	$9,370.77	*$924.00*
HCV208	PW03 Wall Custom Niches and Boxed Studs	$137,141.01	$137,141.01	*$0.00*
HCV209	150mm backflow device	$13,604.11	$13,604.11	*$0.00*
HCV210	Hydraulic design change - Level 18 to 35	$72,830.54	$42,609.86	*$30,220.68*
HCV211	Fridge taps	$11,519.16	$11,519.16	*$0.00*
HCV212	Hydraulic design change - Level 36	$6,145.50	$6,145.50	*$0.00*
HCV214	SI42 Misc Works / Works to L2 and L5	$19,445.63	$19,445.63	*$0.00*
HCV219	Basement B07 Earthing Pits	$7,995.98	$7,995.98	*$0.00*
HCV220	Screed to Balconies	$195,923.07	$195,923.07	*$0.00*
HCV222	Level 2 Infill Slab Over Garbage Room	$12,095.60	$12,095.60	*$0.00*
HCV226	Chemical Fixings to Balcony Sliders and Windows	$28,439.16	$28,439.16	*$0.00*
HCV227	Lobby Relief Slab Extension	$30,144.53	$30,144.53	*$0.00*
HCV228	50Mpa to Door Ways	$10,479.50	$10,479.50	*$0.00*
HCV231	Basement Speed Panel to Supply Air Riser	$23,707.02	$23,707.02	*$0.00*
HCV234	Additional waterproofing to lightweight balcony walls	$73,135.36	$73,135.36	*$0.00*
HCV243	PW03 walls change from 92 stud to 92 Rondo QuietStud	$10,699.59	$10,699.59	*$0.00*
HCV251	Compensable Delay Cost - Approved EOT21	$47,259.30	$47,259.30	*$0.00*
HCV252	Termination Claim	$11,469,628.92	$11,469,628.92	*$0.00*
	Sub-total Variations	**$12,448,123.89**	**$12,416,979.21**	***$31,144.68***
	TOTAL CONTRACT + VARIATIONS PURSUED IN THIS ADJUDICATION APPLICATION	$19,900,847.77	$19,869,703.09	*$31,144.68*

	Superintendent's deductions			
	Defective Works - Diaphragm Wall	$0.00	$205,000.00	*-$205,000.00*
	Fastflow Pipework	$0.00	$588,420.16	*-$588,420.16*
	Rectification Works _ Swiss Park	$0.00	$300,000.00	*-$300,000.00*
	Topping & Grinding of existing slabs	$0.00	$1,436,000.00	*-$1,436,000.00*
	Ceilings	$0.00	$280,000.00	*-$280,000.00*
	Partitions	$0.00	$150,000.00	*-$150,000.00*
	Consultants	$0.00	$47,957.50	*-$47,957.50*
	Sub-total Superintendent's deductions	$0.00	$3,007,377.66	***-$3,007,377.66***

CLAIM ITEM 1.6 REINFORCEMENT (SUPPLY & INSTALL)

Payment Claim

245. The Claimant claims $37,302.12 in the Payment Claim. That claim is comprised of the following;

(a) unfixed reinforcement, being the steel reinforcement to complete Basement 1 and Levels 37, 38, 39 and 40 in the amount of $35,132.08;

(b) $2,170.04 for completed work of an item referred to as "*Level 2 Slab*". The Claimant claimed $70,887.81 for completed work in the Payment Claim and the Respondent valued the work as $68,717.78 complete in the Payment Schedule. The Respondent, however, failed to provide any reason for withholding payment and the Claimant asserts it is, therefore entitled to payment of the claimed amount.

246. The Claimant asserts it is entitled to payment of unfixed materials for one or more of the following reasons;

(a) The Respondent instructed the Claimant to leave the unfixed materials on site on 30 August 2024. Those unfixed materials formed a part of the WUC pursuant to that instruction. Furthermore, clause 3(b) of the Formal Instrument of Agreement (the **FIA**) requires the Respondent to pay the Claimant the contract sum for completion of the WUC. As clause 3.2(b) the FIA takes precedence over 37.3 of the General Conditions, the Respondent cannot rely on clause 37.3 to withhold payment. It must pay pursuant to clause 3.2(b) the FIA.

Therefore, the Respondent must pay for the completed WUC, which includes the unfixed reinforcement.

(b) The Respondent instructed the Claimant to leave the unfixed materials on site on 30 August 2024 and thereby acquired the unfixed materials. Section 70 of the Act requires the Respondent to pay the Claimant for related goods and services. The Claimant asserts the Respondent instructed it to leave on site the unfixed materials, which included the reinforcement (related goods and services), for the future construction of the WUC. Accordingly, to the extent the Respondent relies on clause 37.3 to reject payment for the unfixed goods, it amounts to an attempt to contract out of the Act and, therefore, is void by the operation of section 200 of the Act.

(c) The Claimant suspended all works under clause 39.9 of the Contract on 29 August 2024. The Respondent gave the Claimant a written instruction to leave the reinforcement (and other unfixed materials) on site on 30 August 2024, which was caused by the suspension. Pursuant to clauses 39.9 and 39.10, the Respondent's direction caused the Claimant to suffer loss and expense. Under clause 39.9, the Superintendent was required to assess all damages caused by the suspension and adjust the contract sum accordingly. The loss and damages suffered included the value of the unfixed materials it was instructed to be left on site.

Payment Schedule

247. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this claimed Item.

(a) The Respondent asserts it took the works out of the hands of the Claimant pursuant to clause 39.5 of the Contract on 12 September 2024.

(b) The Respondent further asserts the Claimant is not entitled to claim payment for unfixed materials pursuant to clause 37.3 of the Contract.

(c) The Respondent also asserts that pursuant to clause 39.5, it is entitled to use the unfixed materials without payment until the final certification has been made by the Superintendent at completion of the works.

Decision

248. I have decided above at paragraphs 88) to 218) that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

249. The Claimant has provided 3 arguments for its claimed entitlement to payment for unfixed materials. I will consider each below.

Claimant's 1st argument as to entitlement to payment for unfixed materials

250. I refer to the Claimant's first argument as to entitlement for payment for unfixed materials on the basis that clause 3(b) of the FIA indicates the Respondent would pay for the unfixed materials.

251. Specifically, clause 3(b) of the FIA states;

*"**In consideration of the execution and completion of WUC, in accordance with the Contract,** the Principal must pay the contract sum to the Contractor in accordance with the Contract."*

252. The Claimant relies on the definition of "*work*" provided in clause 1 of the Contract as;

"*includes the provision of materials*".

253. Furthermore, the definition of "*WUC*" is given in clause 1 as;

> "*means the work, which the Contractor is or maybe required to carry out and complete under the contract and includes variations, remedial, work, construction, plant, retention, works, and temporary works.*"

254. The meaning of "*completed WUC*", for which the Respondent must pay under clause 3(b) of the FIA, must be construed by considering the entire Contract.

255. Clause 3(b) of the FIA indicates payment will be made for;

> "…*execution and* ***completion of the work under the Contract***".

256. However, part of a sentence is not sufficient to conclude whether the entire work must be completed or parts of the work must be completed or anything else before payment must be made. The part sentence only informs the parties that the Respondent's payment obligations accrue upon completion of the work in accordance with the Contract. The entire Contract must therefore be considered to ascertain the meaning of that sentence.

257. The Contract indicates the Respondent must make progress payments for partly completed WUC following a valid claim made under clause 37.1 and assessed under clause 37.2. However, clause 37.3 of the Contract provides the Respondent must pay for unfixed materials if the conditions precedent set out in clause 37.3 are satisfied and the unfixed materials the subject of the payment are specifically identified in Item 29 of Part A of the Annexure otherwise, the Respondent has no obligation to pay for unfixed materials.

258. Unless the conditions precedent set out in clause 37.3, clause 37.3(b) indicates the unfixed materials remain the property of the Claimant and, it otherwise follows, the Respondent has no right over those unfixed materials until they have been incorporated into the WUC.

259. Regardless that definition in clause 1 of the Contract provides that the Claimant must provide materials and construction plant, labour and supervision, clause 1 does not require the Respondent to pay the Claimant for any of those provided items. The Respondent is only required to pay once the materials form a part of the completed WUC.

260. The Claimant, however, refers to and relies on the Respondent's instruction of 30 August 2024 to leave the unfixed materials onsite. Clause 20 of the Contract authorised the Superintendent to give the 30 August 2024 direction to leave the unfixed materials on site, which was a direction to increase a part of the WUC. In other words, it became a part of the WUC. At that point in time, I accept that clause 3(b) of the FIA operated to accrue to the Respondent an obligation to pay for the completed WUC which included the un-fixed materials the subject of the 30 August 2024 instruction.

261. The Respondent's instruction of 30 August 2024 discloses that at about 30 August 2024, the Claimant had commenced packing and removing its unfixed materials and equipment from the site. It appears that both the Respondent and the Superintendent instructed the Claimant to stop removing any materials from the site as follows:

> *"…1. We refer to the Contractor's notice of full suspension dated 29 August 2024.*
>
> *…*
>
> *5.* ***The Principal notes that the Superintendent has directed the Contractor to cease removing materials from the site****. We trust that the Contractor will comply with this direction.*, however, the Respondent

262. The Respondent submits it has no obligation to pay for the unfixed reinforcement pursuant to clause 37.3 of the Contract, which states;

> *"37.3 Unfixed plant and materials*
>
> ***The Principal will not be liable to pay for unfixed plant and materials unless they are listed in Item 29 and the Contractor**:*
>
> *a) provides the additional security in Item 13(e): and*
>
> *b) satisfies the Superintendent that the subject plant and materials have been paid for, properly stored and protected, and labelled the property of the Principal.*
>
> *Upon payment to the Contractor and the release of any additional security in paragraph (a), the subject plant and materials will be the unencumbered property of the Principal.*

263. In the normal course of events, the Respondent had no claim over the unfixed materials because nothing in the Contract provided the Respondent any possessory or ownership rights over the unfixed materials nor did it have any obligation to pay for the unfixed materials pursuant to Item 29 of Part A of the Annexure and clause 37.3 of the Contract. Similarly, the Claimant had no entitlement to claim payment for unfixed materials pursuant to clause 37.3 of the Contract.

264. I acknowledge that if the Respondent had given its direction under clause 39.4 of the Contract to take the work out of the hands of the Claimant before it gave the 30 August 2024 instruction, the Respondent would have accrued the right to demand that those materials be left on site until the WUC had been completed pursuant to clause 39.5. If that had happened,

the Superintendent would have been required to undertake a final assessment pursuant to clause 39.6 of the Contract considering the value of the unfixed materials and the Respondent's costs (including additional costs) required to complete the WUC and paid any money owing to the Claimant at completion of the WUC.

265. The Claimant terminated the Contract on 10 September 2024 before the Respondent issued its instruction under clause 39.5 on 12 September 2024. Furthermore, up to 10 September 2024, the Claimant was bound to follow the instructions given by the Superintendent.

266. In those circumstances, the Respondent had accrued no right over the unfixed materials prior to 30 August 2024 and there was nothing preventing the Claimant from removing its unfixed materials from the site before the Respondent directed otherwise.

267. The Respondent's instruction the Claimant to leave the unfixed material on site was in effect was an instruction to vary the Contract by providing to the Respondent the unfixed materials including the unfixed reinforcement. The 30 August 2024 instruction was a variation under clause 36.1 of the Contract.

268. Upon issuing the instruction to leave all unfixed materials on site, the unfixed reinforcement became the property of the Respondent, and the Respondent accrued an obligation to the Claimant for the payment of the unfixed material it had provided.

269. The direction to leave the unfixed materials on site was a direction to perform a variation under clause 36.1 of the Contract, which provides;

> *"36.1 Directing variations*
>
> *The **Contractor will not vary WUC except as directed in writing under this clause 36**.*
>
> *The Superintendent, before the date of practical completion, **may direct the Contractor to vary WUC** by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the Contract (including being within the warranties in clause 2A):*
>
> *a) increase, decrease or omit any part:*
>
> *b) change the character or quality:*
>
> *b) change the levels, lines, positions or dimensions:*
>
> *d) carry out additional work:*
>
> *If the Contractor considers that a direction constitutes a variation, it must, as a condition precedent to any entitlement, give the superintendent notice within 10 business days of the direction, and in any event before commencing any work, the subject of the direction.*

270. The operation of the last paragraph of clause 36.1 is not clear.

271. The term; "*variation*" is defined in clause 1 as; "*has the meaning in clause 36*." Unhelpfully, clause 36 does not provide a definition of that term and it must be construed from the words of that term.

272. The first paragraph of clause 36.1 provides; "*The **Contractor will not vary WUC except as directed in writing under this clause 36**.*"

273. The second paragraph of clause 36.1 provides; "*The Superintendent, before the date of practical completion, **may direct the Contractor to vary WUC** by any one or more of the following…"*

274. It appears to me that the first paragraph makes it clear that the Claimant is instructed to perform a variation provided it satisfies the definition of a variation described in the second paragraph and it is given in writing by the Superintendent.

275. The second paragraph authorises the Superintendent to issue a variation as defined in the second paragraph.

276. In that context the last paragraph appears, at first blush, redundant as the Claimant is instructed to perform a variation if it is given in writing by the Superintendent and it satisfies the form for a variation provided in the second paragraph.

277. The last paragraph does not operate in those circumstances given above.

278. If, however, the Respondent gives a direction, that does not satisfy the form requirements set out in the second paragraph of clause 36.1, then it is not necessarily a direction concerning a variation. In those circumstances, the Claimant must notify the Superintendent that it considers such a direction to cause it to carry out more work than it was required to under the Contract and inform the Respondent that it will pursue payment for the performance of that direction. That paragraph further provides that the notice must be given within 10 business days of receipt of the direction and before it commences the performance of the work under the direction. If, however, it does not give such notice, then it will be deemed to have unilaterally waived its right to claim payment by its conduct.

279. The Claimant performed a variation to the Contract by following the written direction of the Respondent to leave the unfixed materials, the reinforcement on site. At the time of the instruction was given, the unfixed materials became part of the WUC and the Claimant became entitled to payment for the unfixed reinforcement.

280. Clause 36.4 requires the Superintendent to value the variation, "as soon as possible" after it gives the Claimant a direction to perform a variation. In other words, the Respondent was required to value the unfixed materials at the time it directed the Claimant to leave the unfixed reinforcement on site. Clause 36.4 provides;

> *"36.4 Pricing*
>
> ***The Superintendent wilt, as soon as possible, price each variation using the following order of precedence:***
>
> *a) prior agreement;*
>
> *b) applicable rates or prices in the Contract;*
>
> *c) rates or prices in a priced bill of quantities, schedule of rates or schedule of prices, even though not Contract documents, to the extent that it is reasonable to use them; and*
>
> *d) reasonable rates or prices, which will include a reasonable amount for profit and overheads,*
>
> *and any deductions will include a reasonable amount for profit but not overheads.*
>
> *That price will be added to or deducted from the contract sum."*

281. The obligation on the Superintendent to price the variation arose at the time the Respondent and or the Superintendent instructed the Claimant to leave its unfixed materials on the site. At that point in time the unfixed materials became part of the WUC and the Respondent became liable to pay for the unfixed materials valued in accordance with clause 36.4 of the Contract.

282. In the normal course of events, if the Claimant had requested payment for unfixed materials, the Respondent was under no obligation to pay an such claim pursuant to clause 37.3 because the unfixed materials were the property of the Claimant.

283. Given the Respondent's 30 August 2024 direction, I accept the Claimant's 1st argument that it was entitled to payment for the unfixed materials.

Claimant's 2nd argument as to entitlement to payment for unfixed materials

284. The Claimant's 2nd argument is that it is entitled to payment for unfixed materials because those are "*Related Goods and Services*" (as defined in the Act) that were provided under the Contract pursuant to a direction of the Respondent and the Claimant is entitled to claim payment for the unfixed materials under the Act.

285. The Respondent asserts that the unfixed reinforcement is not; "*Related Goods and Services*" for the purposes of the Act and the Claimant's argument must fail.

286. The Respondent relies on *Patrick Stevedores Operations No. 2 Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* as authority as follows;

> "…
>
> *33. "The first question, then, is whether the items that are the subject of a claim under cl 39A.2 can be described as construction work under the contract or the supply of related goods or services. The second is, if they can, whether the contract makes provision for progress payments in respect of them and, if so, the precise terms on which it does so. If the contract does not, then provision is made by s 8(2)(b) for the fixing of reference dates and by s 9 for the amount payable.*
>
> *34. Clearly, construction work done pursuant to the contract, including construction work performed between the last reference date before termination and termination, is construction work performed under the contract. The same is true of related goods and services supplied during that time.*
>
> *35. However,* ***I do not think that plant and materials ordered by McConnell Dowell in order to comply with its contractual obligations, or the costs of removing equipment from the site, can be described as construction work under the contract or the supply of related goods or services****. If plant and materials were ordered by McConnell Dowell, then that was done to put McConnell Dowell in a position where it could comply with its contractual obligations. It was not itself construction work or the supply of related goods or services. It is true that s 39A.2 states that title to the plant and materials vests in Patrick on payment. But the Security of Payment Act is concerned with supply before payment, not with a transfer of title consequent on payment. Similarly, the removal of equipment from the site is not construction work under the*

contract. It is an activity that follows that construction work coming to an end as a result of termination of the contract. The payment specified in Item 31A is minimal. It bears no relationship to construction work.

287. I do not accept the Respondent's argument because this case, turns on different facts and cannot be applied in these circumstances. The distinguishing fact that leads to a different conclusion is that on 30 August 2024, the Respondent instructed the Claimant to leave all unfixed materials on site.

288. The Respondent's instruction of 30 August 2024 discloses that at about 30 August 2024, the Claimant had commenced packing and removing its unfixed materials and equipment from the site. It appears that both the Respondent and the Superintendent instructed the Claimant to stop removing any materials from the site as follows:

> *"…1. We refer to the Contractor's notice of full suspension dated 29 August 2024.*
>
> *…*
>
> *5.* ***The Principal notes that the Superintendent has directed the Contractor to cease removing materials from the site****. We trust that the Contractor will comply with this direction.*, however, the Respondent

289. The Respondent submits it has no obligation to pay for the unfixed reinforcement pursuant to clause 37.3 of the Contract, which states;

> *"37.3 Unfixed plant and materials*
>
> ***The Principal will not be liable to pay for unfixed plant and materials unless they are listed in Item 29 and the Contractor****:*
>
> *a) provides the additional security in Item 13(e): and*

> *b) satisfies the Superintendent that the subject plant and materials have been paid for, properly stored and protected, and labelled the property of the Principal.*
>
> *Upon payment to the Contractor and the release of any additional security in paragraph (a), the subject plant and materials will be the unencumbered property of the Principal.*

290. In the normal course of events, the Respondent had no claim over the unfixed materials because nothing in the Contract provided the Respondent any possessory right over the unfixed materials nor did it have any obligation to pay for the unfixed materials pursuant to Item 29 of Part A of the Annexure and clause 37.3 of the Contract. Similarly, the Claimant had no entitlement to claim payment for unfixed materials pursuant to clause 37.3 of the Contract.

291. I acknowledge that if the Respondent had given its direction under clause 39.4 of the Contract to take the work out of the hands of the Claimant before it gave the 30 August 2024 instruction, the Respondent would have accrued the right to demand that those materials be left on site until the WUC had been completed pursuant to clause 39.5. If that had happened, the Superintendent would have been required to undertake a final assessment pursuant to clause 39.6 of the Contract considering the value of the unfixed materials and the Respondent's costs (including additional costs) required to complete the WUC and paid any money owing to the Claimant at completion of the WUC.

292. The Claimant terminated the Contract on 10 September 2024 before the Respondent issued its instruction under clause 39.5 on 12 September 2024. Furthermore, up to 10 September 2024, the Claimant was bound to follow the instructions given by the Superintendent.

293. In those circumstances, the Respondent had accrued no right over the unfixed materials prior to 30 August 2024 and there was nothing preventing the Claimant from removing its unfixed materials from the site before the Respondent directed otherwise.

294. The Respondent's instruction the Claimant to leave the unfixed material on site was in effect was an instruction to vary the Contract by providing to the Respondent the unfixed materials including the unfixed reinforcement. The 30 August 2024 instruction was a variation under clause 36.1 of the Contract.

295. Upon issuing the instruction to leave all unfixed materials on site, the unfixed reinforcement became the property of the Respondent, and the Respondent accrued an obligation to the Claimant for the payment of the unfixed material it had provided.

296. The direction to leave the unfixed materials on site was a direction to perform a variation under clause 36.1 of the Contract, which provides;

> *"36.1 Directing variations*
>
> *The Contractor will not vary WUC except as directed in writing under this clause 36.*
>
> *The Superintendent, before the date of practical completion, may direct the Contractor to vary WUC by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the Contract (including being within the warranties in clause 2A):*
>
> *a) increase, decrease or omit any part:*

b) change the character or quality:

b) change the levels, lines, positions or dimensions:

d) carry out additional work:

…

297. The operation of the last paragraph of clause 36.1 is not clear.

298. The term; "*variation*" is defined in clause 1 as; "*has the meaning in clause 36*." Unhelpfully, clause 36 does not provide a definition of that term and it must be construed from the words of that term.

299. The first paragraph of clause 36.1 provides; "*The* ***Contractor will not vary WUC except as directed in writing under this clause 36****.*"

300. The second paragraph of clause 36.1 provides; "*The Superintendent, before the date of practical completion,* ***may direct the Contractor to vary WUC*** *by any one or more of the following…"*

301. It appears to me that the first paragraph makes it clear that the Claimant is instructed to perform a variation provided it satisfies the definition of a variation described in the second paragraph and it is given in writing by the Superintendent.

302. The second paragraph authorises the Superintendent to issue a variation as defined in the second paragraph.

303. In that context the last paragraph appears, at first blush, redundant as the Claimant is instructed to perform a variation if it is given in writing by the Superintendent and it satisfies the form for a variation provided in the second paragraph.

304. The last paragraph does not operate in those circumstances given above.

305. If, however, the Respondent gives a direction, that does not satisfy the form requirements set out in the second paragraph of clause 36.1, then it is not necessarily a direction concerning a variation. In those circumstances, the Claimant must notify the Superintendent that it considers such a direction to cause it to carry out more work than it was required to under the Contract and inform the Respondent that it will pursue payment for the performance of that direction. That paragraph further provides that the notice must be given within 10 business days of receipt of the direction and before it commences the performance of the work under the direction. If, however, it does not give such notice, then it will be deemed to have unilaterally waived its right to claim payment by its conduct.

306. The Claimant performed a variation to the Contract by following the written direction of the Respondent to leave the unfixed materials, the reinforcement on site. At the time of the instruction was given, the unfixed materials became part of the WUC and the Claimant became entitled to payment for the unfixed reinforcement.

307. Clause 36.4 requires the Superintendent to value the variation, "as soon as possible" after it gives the Claimant a direction to perform a variation. In other words, the Respondent was required to value the unfixed materials at the time it directed the Claimant to leave the unfixed reinforcement on site. Clause 36.4 provides;

> *"36.4 Pricing*
>
> ***The Superintendent wilt, as soon as possible, price each variation using the following order of precedence:***

a) prior agreement;

b) applicable rates or prices in the Contract;

c) rates or prices in a priced bill of quantities, schedule of rates or schedule of prices, even though not Contract documents, to the extent that it is reasonable to use them; and

d) reasonable rates or prices, which will include a reasonable amount for profit and overheads,

and any deductions will include a reasonable amount for profit but not overheads.

That price will be added to or deducted from the contract sum."

308. The obligation on the Superintendent to price the variation arose at the time the Respondent and or the Superintendent instructed the Claimant to leave its unfixed materials on the site. At that point in time the unfixed materials became part of the WUC and the Respondent became liable to pay for the unfixed materials valued in accordance with clause 36.4 of the Contract.

309. In the normal course of events, if the Claimant had requested payment for unfixed materials, the Respondent was under no obligation to pay an such claim pursuant to clause 37.3 because the unfixed materials were the property of the Claimant.

310. Given the Respondent's 30 August 2024 direction, I accept the Claimant's 1st argument that it was entitled to payment for the unfixed materials.

311. Furthermore, section 66 of the Act defines "*Related goods and services*" as follows;

(1) ***Related goods and services***, *in relation to construction work, means any of the following—*

(a) *goods of the following kind—*

(i) *materials and components to form part of any building, structure or work arising from construction work;*

(ii) *plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;*

(b) *services of the following kind—*

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

(ii) *architectural, design, surveying or quantity surveying services relating to construction work;*

(iii) *building, engineering, interior or exterior decoration or landscape advisory services relating to construction work;*

(iv) *soil testing services relating to construction work;*

(c) *goods and services, relating to construction work, of a kind prescribed by regulation.*

(2) *In this chapter, a reference to related goods and services includes a reference to related goods or services.*

312. Accordingly, I accept that the unfixed materials became "*Related goods and services*" upon issuing the 30 August 2024 instruction and, therefore, the Claimant became entitled to submit a payment claim under the Act upon providing the unfixed materials.

313. Given the Respondent's 30 August 2024 direction, I accept the Claimant's 2nd argument that it was entitled to payment for the unfixed materials.

Claimant's 3rd argument as to entitlement to payment for unfixed materials

314. The Claimant's 3rd argument is that the Respondent gave the Claimant a written instruction to leave the unfixed reinforcement (and other unfixed materials) on site on 30 August 2024.

315. Furthermore, the Claimant accrued the right to payment for the unfixed materials pursuant to clauses 39.9 and 39.10.

316. Under clause 39.9, the Superintendent was required to assess all "*damages*" suffered by the Claimant arising from the suspension, which was notified by the Claimant on 29 August 2024.

317. The Respondent's instruction of 30 August 2024 discloses that at about 30 August 2024, the Claimant had commenced packing and removing its unfixed materials and equipment from the site. It appears that both the Respondent and the Superintendent instructed the Claimant to stop removing any materials from the site as follows:

> *"…1. We refer to the Contractor's notice of full suspension dated 29 August 2024.*
>
> *…*

5. ***The Principal notes that the Superintendent has directed the Contractor to cease removing materials from the site***. *We trust that the Contractor will comply with this direction.*

318. In the normal course of events, the Respondent had no claim over the unfixed materials because nothing in the Contract provided the Respondent any possessory right over the unfixed materials nor did it have any obligation to pay for the unfixed materials pursuant to Item 29 of Part A of the Annexure and clause 37.3 of the Contract.

319. The Respondent submits it has no obligation to pay for the unfixed reinforcement pursuant to clause 37.3 of the Contract, which states;

> *"37.3 Unfixed plant and materials*
>
> ***The Principal will not be liable to pay for unfixed plant and materials unless they are listed in Item 29 and the Contractor**:*
>
> *a) provides the additional security in Item 13(e): and*
>
> *b) satisfies the Superintendent that the subject plant and materials have been paid for, properly stored and protected, and labelled the property of the Principal.*
>
> *Upon payment to the Contractor and the release of any additional security in paragraph (a), the subject plant and materials will be the unencumbered property of the Principal.*

320. I acknowledge that if the Respondent had given its direction under clause 39.4 of the Contract to take the work out of the hands of the Claimant before it gave the 30 August 2024 instruction, the Respondent would have accrued the right to demand that those materials be left on site until the WUC had been completed pursuant to clause 39.5. If that had happened, the Superintendent would have been required to undertake a final assessment pursuant to clause 39.6 of the Contract

considering the value of the unfixed materials and the Respondent's costs (including additional costs) required to complete the WUC and paid any money owing to the Claimant at completion of the WUC.

321. The Claimant terminated the Contract on 10 September 2024 before the Respondent issued its instruction under clause 39.5 on 12 September 2024. Furthermore, up to 10 September 2024, the Claimant was bound to follow the instructions given by the Superintendent.

322. In those circumstances, the Respondent had accrued no right over the unfixed materials prior to 30 August 2024 and there was nothing preventing the Claimant from removing its unfixed materials from the site before the Respondent directed otherwise.

323. The Respondent's instruction the Claimant to leave the unfixed material on site was in effect was an instruction to vary the Contract by providing to the Respondent the unfixed materials including the unfixed reinforcement. The 30 August 2024 instruction was a variation under clause 36.1 of the Contract.

324. Upon issuing the instruction to leave all unfixed materials on site, the unfixed reinforcement became the property of the Respondent, and the Respondent accrued an obligation to the Claimant for the payment of the unfixed material it had provided.

325. The direction to leave the unfixed materials on site was a direction to perform a variation under clause 36.1 of the Contract, which provides;

> *"36.1 Directing variations*
>
> *The Contractor will not vary WUC except as directed in writing under this clause 36.*
>
> *The Superintendent, before the date of practical completion, may direct the Contractor to vary WUC by any one or more of the*

following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the Contract (including being within the warranties in clause 2A):

a) increase, decrease or omit any part:

b) change the character or quality:

b) change the levels, lines, positions or dimensions:

d) carry out additional work:

…

326. The operation of the last paragraph of clause 36.1 is not clear.

327. The term; "*variation*" is defined in clause 1 as; "*has the meaning in clause 36*." Unhelpfully, clause 36 does not provide a definition of that term and it must be construed from the words of that term.

328. The first paragraph of clause 36.1 provides; "*The* ***Contractor will not vary WUC except as directed in writing under this clause 36****.*"

329. The second paragraph of clause 36.1 provides; "*The Superintendent, before the date of practical completion,* ***may direct the Contractor to vary WUC*** *by any one or more of the following…*"

330. It appears to me that the first paragraph makes it clear that the Claimant is instructed to perform a variation provided it satisfies the definition of a variation described in the second paragraph and it is given in writing by the Superintendent.

331. The second paragraph authorises the Superintendent to issue a variation as defined in the second paragraph.

332. In that context the last paragraph appears, at first blush, redundant as the Claimant is instructed to perform a variation if it is given in writing by the Superintendent and it satisfies the form for a variation provided in the second paragraph.

333. The last paragraph does not operate in those circumstances given above.

334. If, however, the Respondent gives a direction, that does not satisfy the form requirements set out in the second paragraph of clause 36.1, then it is not necessarily a direction concerning a variation. In those circumstances, the Claimant must notify the Superintendent that it considers such a direction to cause it to carry out more work than it was required to under the Contract and inform the Respondent that it will pursue payment for the performance of that direction. That paragraph further provides that the notice must be given within 10 business days of receipt of the direction and before it commences the performance of the work under the direction. If, however, it does not give such notice, then it will be deemed to have unilaterally waived its right to claim payment by its conduct.

335. The Claimant performed a variation to the Contract by following the written direction of the Respondent to leave the unfixed materials, the reinforcement on site. At the time of the instruction was given, the unfixed materials became part of the WUC and the Claimant became entitled to payment for the unfixed reinforcement.

336. Clause 36.4 requires the Superintendent to value the variation, "as soon as possible" after it gives the Claimant a direction to perform a variation. In other words, the Respondent was required to value the unfixed materials at the time it directed the Claimant to leave the unfixed reinforcement on site. Clause 36.4 provides;

> *"36.4 Pricing*
>
> ***The Superintendent wilt, as soon as possible, price each variation using the following order of precedence:***
>
> *a) prior agreement;*

b) applicable rates or prices in the Contract;

c) rates or prices in a priced bill of quantities, schedule of rates or schedule of prices, even though not Contract documents, to the extent that it is reasonable to use them; and

d) reasonable rates or prices, which will include a reasonable amount for profit and overheads,

and any deductions will include a reasonable amount for profit but not overheads.

That price will be added to or deducted from the contract sum."

337. The obligation to price the variation arose at the time the Respondent and Superintendent instructed the Claimant to leave its unfixed materials on the site.

338. The Claimant notified the suspension of all works under the Contract on 29 August 2024 and lawfully terminated the Contract on 10 September 2024.

339. As of 10 September 2024, the Respondent had not valued the variation it had instructed on 30 August 2024.

340. Clause 39.9 required the Superintendent to value the damages suffered by cause of the suspension.

341. On 30 August 2024, the Respondent instructed to leave the unfixed materials on the site, which was a variation to increase the WUC under clause 36.1. The Superintendent should have, as soon as possible, valued that variation pursuant to clause 36.4 of the Contract.

342. The Claimant terminated the Contract on 10 September 2024 and as at that time, the Superintendent had not, in breach of its

obligations under clause 36.1 valued the variation to leave the unfixed materials on site under clause 36.4.

343. In those circumstances, the Superintendent's failure to value the unfixed materials became a loss or damage arising from the suspension and clause 39.9 of the Contract required the Superintendent to value that loss or damage and adjust the Contract sum after the termination;

> *"39.9 Contractor's rights*
>
> *If the Principal fails to show reasonable cause by the stated date and time, the Contractor may, by written notice to the Principal, suspend the whole or any part of WUC.*
>
> *The Contractor will remove the suspension if the Principal remedies the breach.*
>
> *The Contractor may. by written notice to the Principal, terminate the Contract, if within 7 days of the date of suspension under this subclause the Principal fails:*
>
> *a) to remedy the breach: or*
>
> *b) if the breach is not capable of remedy, to make other arrangements to the reasonable satisfaction of the Contractor.*
>
> ***Damages suffered by the Contractor by reason of the suspension will be assessed by the Superintendent, who will certify them as moneys due and payable to the Contractor**.*
>
> *39.10 Termination*
>
> *If the Contract is terminated pursuant to subclause 39.4(b) or 39.9. the parties' remedies, rights and liabilities will be the same as they would have been under the law governing the Contract had the defaulting*

> *party repudiated the Contract and the other party elected to treat the Contract as at an end and recover damages.*
>
> *If the Principal has terminated the Contract, the Principal may also without payment or compensation, take possession of the design documents.*

344. Clause 39.10 preserves each party's common law rights in respect to damages for breach of the Contract. It provides that if the Contract is terminated, each party's rights, remedies and liabilities are the same as they would have been under the law governing the Contract had the defaulting party repudiated the Contract and the other party had elected to treat the Contract as at an end and to recover damages.

345. Clause 39.10 is necessary otherwise a party terminating the Contract pursuant to clause 39 may not be able to recover damages because of such breach. A party terminating the Contract under subclause 39.4(b) or 39.9, as the case may be, may also at the same time exercise its common law rights to terminate the Contract.

346. Common law rights to terminate the Contract are expressly preserved by subclause 39.1, which states;

> *"If a party breaches (including repudiates), the Contract, nothing in this clause will prejudice the right of the other party to recover damages or exercise any other right or remedy."*

347. Clause 39.10 also makes it clear that clause 39.9 survives termination. Specifically, it ensures the preservation of the terminating party's rights to payment for damages and the defaulting party's liability for damages arising from the suspension. Furthermore, it requires the Superintendent to

assess such damages following the suspension within a reasonable time.

348. I accept the Claimant's argument that the damages payable under the clause 39.9 of the Contract include all damages arising from the suspension and should have been valued under clause 39.9 by the Superintendent following termination.

349. I therefore accept the Claimant's 3rd argument in so far as it relates to these facts. I do not, however, accept the Claimant's interpretation of clause 39.10 as a general rule.

Valuation of the claims for unfixed materials

350. The Claimant asserts I should accept the claimed amount without inquiry as to entitlement or valuation and relies on the authority of *Ceerose*.

351. In circumstances, where the Respondent makes no submission as to quantum, I accept that legal principle.

352. I have also referred to guidance from the Supreme Court of Queensland in circumstances where the Respondent fails or is prevented by the operation of the Act from providing reasons for withholding payment and or fails to provide a submission as to quantum asserted by a claimant. I refer to *Insite Construction Services Pty Ltd v Daniels Civil Pty Ltd & Anor [2023] QSC 33*. In that case, the Court held as follows;

> …
>
> *99. **In Bezzina, the Court of Appeal considered whether an adjudicator had erred by adopting the amount stated by the claimant in a payment claim as the value of the construction work in question**. In that case, there had been two separate adjudication applications and decisions in respect of successive payment claims given by the claimant. The second payment claim included a claim in respect of some of the same work that had been included in the earlier payment claim. On each occasion, the respondent had given a payment schedule in which it stated a nil amount was payable for the subject work. **Neither payment schedule expressly challenged the amount claimed for the value of the work**. Rather, each listed a series of deductions which the respondent claimed reduced the payment claims to nil.*
>
> *100. Although the first adjudication application had been decided by the time the second adjudicator's decision was pending, the second*

adjudicator was not informed of the fact of the first adjudicator's decision. The second adjudicator's valuation of the subject work was higher than that of the first adjudicator. The respondent subsequently brought an application for judicial review in respect of each adjudication decision.

101. At first instance, the trial judge upheld the respondent's contention that the second adjudicator had contravened the BCIPA by failing to adopt the valuation in the first adjudication decision for that part of the claim covered by the first payment claim. However, the trial judge rejected the respondent's further argument that the second adjudicator had also erred by failing to make a bona fide attempt to value the work in the manner required by the BCIPA.

102. On appeal, the respondent sought to support the judgment in its favour on the ground that the trial judge had erred in rejecting its application for judicial review on this further basis.

103. Before setting out the Court of Appeal's conclusion on this issue, it is pertinent to first note the relevant conclusions of the trial judge:

> *[27] Had the only argument available to Bezzina been that the second adjudicator did not approach his task properly by valuing the work before considering the defects alleged by Bezzina, I would not have been disposed to interfere with his decision. Bezzina, apart from drawing my attention to the obligation to value construction work in s. 14 of the Payments Act, also relied upon the reasons of Brereton J in Pacific General Securities Ltd v Soliman & Sons Pty Ltd [2006] NSWSC 13 where his Honour, at [82]-[86], found that the adjudicator's duty was to come to a view as to what was properly payable on what the adjudicator considered to be the true construction of the contract and the Act and the true merits of the claim. He treated the obligation to determine whether the construction*

work identified in the payment claim had been carried out and its value as part of the basic and essential requirements of validity. In reaching that conclusion he said that if an adjudicator allowed a claim in full just because a respondent's submissions were rejected, without determining whether the construction work had been performed and without valuing it, that would bespeak a misconception of what was required by an adjudicator, leading to jurisdictional error resulting in invalidity.

[28] In these circumstances, however, there was no issue raised by Bezzina about whether the work had been performed or about the value claimed by Deemah. Bezzina's submissions focussed more upon the alleged defects. Had that been the only problem associated with the second adjudication decision I would not have been inclined to exercise my discretion to review it. Nor would I have been inclined to grant the extension of time necessary to review the decision under s. 26 of the JR Act in respect of the relief claimed for a statutory order of review under that Act.

[29] It seems to me, however, to be a significant issue that the exercise apparently required by s. 27(2) of the Payments Act has not occurred, namely the second adjudicator did not give the same value to the work, goods or services as that previously assessed by the first adjudicator. The first adjudicator approached her task as one requiring her to value the work in arriving at her views as to the appropriate progress payments to order; see, e.g., paras 37, 46, 64, 87 and 119 of the first adjudication decision.

[30] It was argued that the second adjudication did not decide the value of the construction work but examined whether there should be a deduction from the price claimed for alleged defects and some other matters dealt with in detail by the adjudicator.

The consequence argued was that his adjudication did not involve 'the working out of the value of that work' to use the language of s. 27(2). Reference was also made to the decision of Mullins J in ACN 060 559 971 Pty Ltd v O'Brien [2007] QSC 91 at [32]-[34] where her Honour considered two decisions of the New South Wales Supreme Court dealing with the interpretation of their statute's equivalent section; Rothnere Pty Ltd v Quasar Constructions NSW Pty Ltd [2004] NSWSC 1151 and John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd [2006] NSWSC 798 ('Goss Projects'). McDougall J in Goss Projects drew a distinction at [40] 'between the calculation of the amount of a progress payment (which is, ultimately, what the adjudicator is required to do) and the valuation of construction work.' Her Honour applied that approach, correctly in my respectful view, to conclude that a deduction for liquidated damages, was 'distinct from the value of work carried out by the contractor in the performance of the contract'; see at [34].

[31] It seems to me, however, that the exercise engaged in by the second adjudicator here of examining the possible deduction of claimed defects from the price claimed for work done does involve the 'working out of the value of that work' to use the words of s. 27(2). Here the only evidence of value was the price claimed which was not itself put in issue and alleged defects in that work, if established, must be matters that are involved in working out its value.

104. The Court of Appeal endorsed the trial judge's conclusion and rejected the respondent's further argument. In doing so, Fraser JA (with whom McMurdo P and Keane JA agreed) relevantly stated:[25]

[26] Bezzina's argument is that the second adjudicator contravened the obligation in s 26(1)(a) 'to decide, the amount of the progress payment,' by simply accepting the sum claimed

by Deemah rather than embarking upon a valuation of the work. The primary judge rejected the same argument, correctly in my respectful opinion, for the reason that the valuation of the relevant work was not in issue.

[32] It is apparent that the adjudicator construed Bezzina's payment schedule as implicitly admitting Deemah's valuation of the work, subject only to the particular 'reasons why the revised schedule amount = nil' which are then set out in the schedule.

[34] Whilst a particular adjudication might involve a valuation, the express obligation imposed by s. 26 is 'to decide', not 'to inquire'. Paragraphs (c) and (d) of subsection 26(2) required the second adjudicator, in deciding the adjudication application, to consider the payment claim and submissions as well as any payment schedule and any submissions in support of it. The valuation ascribed by Deemah in its payment claim being implicitly admitted by Bezzina in its payment schedule, the adjudicator was entitled to adopt Deemah's valuation.

[35] Bezzina's counsel referred to Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd. In that case, Hodgson JA expressed the 'tentative view' that an adjudicator was not entitled automatically to determine a progress claim at the amount claimed by the claimant if a respondent to a payment claim did not raise any relevant ground for denying or reducing it. His Honour was not there concerned with a case such as this, where a respondent does raise relevant grounds for denying a claim and confines the dispute to those particular grounds. Other decisions relied upon by Bezzina are similarly distinguishable.

> *[36] I would reject Bezzina's contention that the adjudicator erred in law in failing to value the work in the manner required by the Act.*

105. In my view, the reasoning and rationale for the Court of Appeal's decision in Bezzina on this issue is apposite in the present case. Accordingly, if it was open to the Adjudicator to conclude that there was no dispute that the work had been performed by Daniels and that the valuation ascribed to that work by Daniels was not challenged, then there can be no substance to Insite's various complaints under Grounds 2, 3 and 4. In such circumstances, the Adjudicator could permissibly 'decide' the adjudicated amount by adopting the unchallenged (and implicitly accepted) valuation. There would be no obligation upon the Adjudicator to 'inquire' and undertake his own valuation exercise.

106. In my view, it was open to the Adjudicator to take such an approach in this case. Insite's Payment Schedule did not challenge Daniels' valuation of the claimed work it had performed. Rather, Insite sought (in reasons that it was precluded from advancing and which were ultimately not considered) to argue that the Payment Claim should be reduced to nil because the costs it had incurred, or would incur, under the contract and other set-off amounts Daniels was liable to pay because of its apparent breach of contract, would exceed the amount of the Payment Claim. In the absence of any reasons advanced to challenge the valuation contained in the Payment Claim, the Adjudicator was permitted to accept Daniels' valuation.

107. It is, of course, a point of factual distinction that the respondent in Bezzina had given a payment schedule which set out reasons for its nil valuation of the subject work, whereas Insite gave an invalid payment schedule. Nevertheless, given the statutory obligation imposed on the respondent by s 69(c) of the Payment Act, I consider it is open to an adjudicator in the performance of his or her function under s 88 of the Payment Act to conclude from the failure by a

respondent to give a payment schedule setting out reasons that challenge either the fact that the work was done, or a claimant's valuation of the work, that those matters are not disputed and are impliedly admitted.

108. That, of course, was the situation in the present case. The Adjudicator concluded that the purported Payment Schedule given by Insite was invalid because it failed to provide any reasons at all for assessing the payment due to Daniels as nil. Indeed, the Adjudicator found that no payment schedule at all had been given in accordance with s 69. In the absence of a payment schedule containing reasons for not paying the amount claimed, the Adjudicator was not permitted to consider any new reasons for withholding payment of the Payment Claim contained in Insite's adjudication response.[26]

109. It was for that reason the Adjudicator concluded no valid reasons had been given by Insite to not pay the full amount of the Payment Claim. That being so, it was open to the Adjudicator to accept the uncontested valuation put forward by Daniels. I see no error in the Adjudicator approaching his task and performing his function in that way, nor in citing Epoca in support of that approach. The Adjudicator did not misdirect himself.

110. Before leaving this issue, it is pertinent to note that during the course of oral submissions in this matter, counsel for Insite cross-referenced various entries in the 'Schedule of Additional Works' attachment to Daniels' Payment Claim with entries in the 'Continuation Sheet' attached to Insite's Payment Schedule, to submit that the differences between these entries demonstrated that this was not a case where the claimant's valuation was unchallenged. I do not accept that argument or the validity of that exercise. Quite apart from the fact that the figures in Insite's Continuation Sheet do not contain any accompanying reasons or explanations for its supposed 'valuations', the simple fact is that the Adjudicator found that no Payment Schedule had been given. Pursuant to s 88(2), the purported

Payment Schedule and its attachments was therefore not a matter that the Adjudicator was permitted to consider in deciding the adjudicated amount. Similarly, it is not a matter that I may now have regard to in deciding whether jurisdictional error is established.

111. Having regard to the issues in dispute and nature of Insite's arguments opposing the Adjudication Application, it was not necessary in the circumstances for the Adjudicator to provide extensive reasons on the issue of the adjudicated amount. Insite did not challenge the valuation of the work contained in Daniels' Payment Claim. Rather, it challenged the Adjudicator's jurisdiction to decide the Adjudication Application. Once those issues had been decided adversely to Insite, it was not necessary for the Adjudicator to give extensive reasons for deciding the adjudicated amount. The reasons given, which referred to the Payment Claim and supporting documentation, were adequate and sufficient. They do not evidence a failure by the Adjudicator to perform his statutory function to decide the Adjudication Application under the Payment Act, nor any misconception or misapprehension of jurisdiction.

112. I should add that I do not accept Insite's argument on this point that the Adjudicator's reasons were inadequate as they failed to comply with the requirements of s 27B of the Acts Interpretation Act 1954 (Qld). Section 27B provides:

> *27B Content of statement of reasons for decision*
>
> *If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision (whether the expression 'reasons', 'grounds' or another expression is used), the instrument giving the reasons must also-*
>
> *(a) set out the findings on material questions of fact; and*

(b) refer to the evidence or other material on which those findings were based.

113. In my opinion, the Adjudicator complied with s 27B. The material questions of fact in issue before the Adjudicator concerned the first two key issues decided by the Adjudicator. On the first issue, Insite chose to challenge the validity of the Payment Claim by advancing the Reference Date Argument and thereby put in issue the Adjudicator's jurisdiction to decide the Adjudication Application. The Adjudicator rejected Insite's argument. In doing so, the Adjudicator sufficiently set out, in some detail, his finding on this issue and the evidence and other material on which his finding was made. The same may be said about the Adjudicator's finding and reasons with respect to the second issue concerning the validity of the purported Payment Schedule.

114. Although it was raised by the parties in the joint list of issues for determination, I do not consider it necessary nor desirable in determining this application to decide whether the statements of Hodgson JA in Coordinated Construction apply to the Payment Act. In that case, his Honour relevantly stated:[27]

> *[52] The task of the adjudicator is to determine the amount of the progress payment to be paid by the respondent to the claimant; and in my opinion that requires determination, on the material available to the adjudicator and to the best of the adjudicator's ability, of the amount that is properly payable. Section 22(2) says that the adjudicator is to consider only the provisions of the Act and the contract, the payment claim and the claimant's submissions duly made, the payment schedule and the respondent's submissions duly made, and the results of any inspection; but that does not mean that the consideration of the provisions of the Act and the contract and of the merits of the payment claim is limited to issues actually raised by submissions duly made. The adjudicator's duty is to come to a*

> *view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim. The adjudicator may very readily find in favour of the claimant on the merits of the claim if no relevant material is put by the respondent; but the absence of such material does not mean that the adjudicator can simply award the amount of the claim without any addressing of its merits.*
>
> *[53] Indeed, my tentative view is that, if an adjudicator determined the progress payment at the amount claimed simply because he or she rejected the relevance of the respondent's material, this could be such a failure to address the task set by the Act as to render the determination void.*

115. These remarks were made in respect of the Building and Construction Industry Security of Payment Act 1999 (NSW) ('NSW Act'). His Honour's statements were purely obiter dicta and were 'tentative views' that were not endorsed by the other members of the Court.[28] For those reasons alone, I would be reluctant to apply them as an analogous authoritative interpretation of s 88 of the Payment Act.

116. Further, whilst it may be accepted that s 22 of the NSW Act, which deals with an adjudicator's determination, is materially similar in certain respects to s 88 of the Payment Act, there is an obvious, and perhaps significant, difference in the respective statements of the adjudicator's statutory task. Section 22(1)(a) of the NSW Act requires an adjudicator to 'determine' the amount of the progress payment, if any, to be paid, whereas s 88(1)(a) of the Payment Act requires an adjudicator to 'decide' the amount of the progress payment, if any, to be paid. To my mind, the difference is perhaps similar to the distinction drawn by the Court of Appeal in Bezzina between 'to decide' and 'to inquire'. Irrespective, it seems to me to be a potentially important distinction, and that is a further reason why I would be reluctant to

> *apply Hodgson JA's statements to the proper interpretation of s 88 of the Payment Act.*
>
> *117. In any event, I consider I am bound to apply the law in accordance with the Court of Appeal's decision in Bezzina.*

353. In this case, the Respondent took no issue in the Payment Schedule with the valuation provided by the Claimant for the unfixed reinforcement set out in the Payment Claim.

354. The Respondent merely asserted that the Respondent has no liability to pay for the reinforcement and relied on clauses 37.3 and 39.5 of the Contract and for the reasons set out above, I do not accept that assertion.

355. Accordingly, I will follow the decisions of *Ceerose* and *Insite* as authority permitting me to accept the Claimant's stated valuation for the reinforcement work completed to date.

Failure to place reinforcement on deck at Level 37

356. The Respondent asserts that the Claimant has no entitlement to make this claim for reinforcement because it failed to place the unfixed reinforcement on the formwork deck at level 37.

357. I do not accept the Respondent's reason for withholding payment in relation to the claim for unfixed materials or for completed installation of the reinforcement because the Claimant claimed no payment for that work. The Claimant has only claimed the cost of supplying the unfixed reinforcement as directed on 30 August 2024.

358. Accordingly, I have decided the Claimant is entitled to payment of $35,132.08 for the unfixed reinforcement as claimed in its Claim Item 1.6 in the Payment Claim.

Claim for installation of reinforcement

359. In relation to the claim for completed reinforcement works claimed by The Claimant, the Respondent has provided no reasons for withholding payment.

360. For the avoidance of doubt, section 69 of the Act provides;

> *"69 Meaning of payment schedule*
>
> *…*
>
> *A **payment schedule**, responding to a payment claim, is a written document that—*
>
> *(a)identifies the payment claim to which it responds; and*
>
> *(b)states the amount of the payment, if any, that the respondent proposes to make; and*

*(c)**if the amount proposed to be paid is less than the amount stated in the payment claim—states why the amount proposed to be paid is less, including the respondent's reasons for withholding any payment**; and*

(d)includes the other information prescribed by regulation.

…

361. Section 82 of the Act further provides;

"82 Adjudication response

…

*(1) After being given notice of an adjudicator's acceptance of an adjudication application under section 81, the respondent may give the adjudicator a response to the adjudication application (the **adjudication response**).*

(2) However, the respondent must not give an adjudication response if the respondent failed to give the claimant a payment schedule as required under section 76.

(3) The adjudication response—

(a) must be in writing; and

(b) must identify the adjudication application to which it relates; and

(c) may include the submissions relevant to the response the respondent chooses to include.

*(4) **However, the adjudication response must not include any reasons (new reasons) for withholding payment***

that were not included in the payment schedule when given to the claimant.

(5) The adjudicator may require the respondent to resubmit the adjudication response without the new reasons.

362. In *Multiplex Constructions Pty Ltd v Luikens & Anor [2003] NSWSC 1140*, Palmer J explained that prohibition as follows:5

> *[67] The evident purpose of s.13(1) and (2), s.14(1), (2) and (3), and s.20(2B) is to* ***require the parties to define clearly, expressly and as early as possible what are the issues in dispute between them****; the issues so defined are the only issues which the parties are entitled to agitate in their dispute and they are the only issues which the adjudicator is entitled to determine under s.22.* ***It would be entirely inimical to the quick and efficient adjudication of disputes which the scheme of the Act envisages if a respondent were able to reject a payment claim, serve a payment schedule which said nothing except that the claim was rejected, and then "ambush" the claimant by disclosing for the first time in its adjudication response that the reasons for the rejection were founded upon a certain construction of the contractual terms or upon a variety of calculations, valuations and assessments said to be made in accordance with the contractual terms but which the claimant has had no prior opportunity of checking or disputing****. In my opinion, the express words of s.14(3) and s.20(2B) are designed to prevent this from happening.*
>
> *[68] Section 14(3) requires that if the respondent to a payment claim has "any reason" for "withholding payment", it must indicate that reason in the payment schedule. To construe the phrase "withholding payment" as meaning "withholding payment only by reason of a set-off or cross claim" is to put a gloss on the words which their plain meaning cannot justify. The phrase, in the context of the subsection as a whole, simply means "withholding payment of all or any part of the claimed amount in the payment claim". If the respondent has any reason whatsoever for withholding payment of all or any part of the payment claim, s.14(3) requires that that reason be indicated in the*

[5] *Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC 1140, [67]-[68], [70] (Palmer J). See also *G W Enterprises Pty Ltd v Xentex Industries Pty Ltd & Ors* [2006] QSC 399, [37] (Lyons J).

payment schedule and s.20(2B) prevents the respondent from relying in its adjudication response upon any reason not indicated in the payment schedule. Correspondingly, s.22(d) requires the adjudicator to have regard only to those submissions which have been "duly made" by the respondent in support of the payment schedule, that is, made in support of a reason for withholding payment which has been indicated in the payment schedule in accordance with s.14(3).

…

[70] For a respondent merely to state in its payment schedule that a claim is rejected is no more informative than to say merely that payment of the claim is "withheld": the result is stated but not the reason for arriving at the result. Section 14(3) requires that reasons for withholding payment of a claim be indicated in the payment schedule with sufficient particularity to enable the claimant to understand, at least in broad outline, what is the issue between it and the respondent. This understanding is necessary so that the claimant may decide whether to pursue the claim and may know what is the nature of the respondent's case which it will have to meet if it decides to pursue the claim by referring it to adjudication.

363. Sections 82(4) and 88(3) makes it clear an adjudicator must not consider any new decision in the Response that was not provided in the Payment Schedule as follows;

"…

82. Adjudication Response

…

> *(4) However, the adjudication response must not include any reasons (**new reasons**) for withholding payment that were not included in the payment schedule when given to the claimant.*

…

88. Adjudicator's decision

…

> *(3)However, the adjudicator must not consider any of the following—*
>
> > *(a)an adjudication response, to which the adjudication application relates, that was not given to the adjudicator within the time required under section 83;*
> >
> > *(b)a reason included in an adjudication response to the adjudication application, if the reason is prohibited from being included in the response under section 82.*
> >
> > *…"*

364. Accordingly, I am not permitted by the Act to consider the Respondent's new reasons for withholding payment that are set out in the Response.

365. The Respondent has not provided any objections to the quantum claimed by the Claimant.

366. Accordingly, I will follow the decisions of *Ceerose* and *Insite* as authority permitting me to accept the Claimant's stated valuation for the reinforcement work completed to date.

Issue estoppel

367. Furthermore, the Respondent claims I am restrained somehow by Issue Estoppel concerning the claim for Item 1.6 Reinforcement (Supply & Install).

368. I cannot find in any of the 3 preceding decisions of adjudication applications that the above issues and valuation were considered by the adjudicators.

369. Furthermore, I am persuaded by the Claimant that the value of the work claimed under each item of the Payment Claim has changed in this Adjudication Application. There were no findings of fact relating to the claimed items and, therefore, issue estoppel does not apply to the claim for the original work under the Contract.

370. For the avoidance of doubt, section 87(2) of the Act makes it clear that I am not restrained by previous valuations as follows;

> *"87 Valuation of work etc. in later adjudication application*
>
> *(1) This section applies if, in deciding an adjudication application, an adjudicator has decided the value of—*
>
> *(a) any construction work carried out under a construction contract; or*
>
> *(b) any related goods and services supplied under a construction contract.*
>
> *Note—*
>
> *See section 72 for the valuation of construction work and related goods and services.*

> (2) ***Any adjudicator must, in any later adjudication application that involves the working out of the value of the construction work or of the related goods and services, give the work, or the goods and services, the same value as that previously decided by the adjudicator unless the claimant or respondent satisfies the adjudicator concerned that the value of the work, or the goods and services, has changed since the previous decision***.
>
> …"

371. Accordingly, I do not consider I am restrained by the principles of issue estoppel in regard to this claim item.

372. Accordingly, in addition to payment for the unfixed reinforcement claimed with this item, I have decided the Claimant is entitled to payment of to $2,170.04 for the reinforcement work completed to date.

373. In summary, the Claimant is entitled to the amount claimed of $37,302.12 for Claim Item 1.6.

CLAIM ITEM 1.8 POST TENSIONING

Payment Claim

374. The Claimant claims $12,000.00 in the Payment Claim. That is comprised of the following;

(a) unfixed materials, being 2 coils of tensioning strand left on site as directed at the eastern side of the concrete pump.

Payment Schedule

375. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this claimed Item.

(a) The Respondent asserts it took the works out of the hands of the Claimant pursuant to clause 39.5 of the Contract on 12 September 2024.

(b) The Respondent further asserts the Claimant is not entitled to claim payment for unfixed materials pursuant to clause 37.3 of the Contract.

(c) The Respondent also asserts that pursuant to clause 39.5, it is entitled to use the unfixed materials without payment until the final certification has been made by the Superintendent at completion of the works.

Decision

376. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

377. For the reasons set out above at paragraphs 250) to 349) I accept the Claimant's argument that it is entitled to payment for unfixed materials, the 2 coils of tensioning strand, it was instructed to leave on site on 30 August 2024.

378. The Respondent has not provided any objections to the quantum claimed by the Claimant.

379. The Claimant asserts I should accept the claimed amount without inquiry as to entitlement or valuation and relies on the authority of *Ceerose*.

380. For the reasons set out above at paragraphs 350) to 355) I will follow the decisions of *Ceerose* and *Insite* as authority permitting me to accept the Claimant's stated valuation for the 2 coils of tensioning strand left on site.

381. Accordingly, I have decided the Claimant is entitled to payment of $12,000.00 for the 2 coils of tensioning strands as claimed in its Claim Item 1.8 in the Payment Claim, which is.

CLAIM ITEM 1.9 WATERPROOFING SYSTEM

Payment Claim

382. The Claimant claims $57,905.02 in the Payment Claim. That is comprised of the following;

(a) $14,067.05 for unfixed waterproofing materials known as; "*Samafil G410*", "*Samafil Adhesive*" and "*Sika Inject 306*";

(b) $11,579.84 for work on levels 5, 6, 7 and that was additional to the amount claimed in the previous Payment Claim 35, which was subject of an adjudication application; and

(c) $32,258.13 for works under the Contract that are the subject of the adjudication application 2671069 in relation to payment claim PC35, which are not considered further in this Adjudication Application.

Payment Schedule

383. The Respondent has scheduled $0.00 for payment and provides the following reasons for withholding payment:

(a) The Respondent has no obligation to pay for unfixed materials pursuant to clause 37.3 until they are incorporated into the Works.

(b) The Respondent, pursuant to clause 39.5, is entitled to use the unfixed materials without payment until after the final certification has been made.

(c) The Respondent asserts - shop drawings have not been provided as required in the architectural specification.

Tower balcony waterproofing shop drawings details not submitted and approved by CPA as per specification 0411 Waterproofing – external and tanking. The Respondent referred to the breakdown appended to the Payment Schedule being the document titled "*Midwater progress certificate number 36 September 2024, 2024 - Breakdowns*", which it says forms part of the Payment Schedule.

(d) This is a claim for damages by the Claimant following its repudiation of the Contract and is not a claim that can be made under the Act.

Decision

384. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

385. The parties have pointed out that a claim for Waterproofing work was decided in the decision of the adjudication application referenced # 2671069.

386. The Claimant explains that the amount claimed in this Payment Claim was for work not previously claimed in previous adjudication applications relating to the Contract.

387. In adjudication application referenced # 2671069, the adjudicator determined the Claimant's claim for Waterproofing. However,

none of that claim relates to the new claim for unfixed waterproofing materials that I have considered above.

388. There is no evidence, and I am not persuaded that the Respondent ever intended that the requirement for shop drawings applied to unfixed waterproofing materials it acquired by its direction issued on 30 August 2024.

389. I have considered the Claimant's claim and evidence and the Respondent's reasons for withholding payment.

390. I have also considered the supporting costs evidence provided by the Claimant and have also considered that the Respondent made no opposing submission about those costs claimed.

391. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $14,067.05 for unfixed waterproofing materials for the reasons set out above at paragraphs; 250) to 349) and 350) to 355).

392. I now refer to the Claimant's claim for $11,579.84 for work on levels 5, 6, 7, which was additional to the amount claimed in the previous Payment Claim 35, which was subject of an adjudication application.

393. I have considered the evidence provided by the Claimant and have also considered that the Respondent made no opposing submission about those costs of completed work claimed.

394. In adjudication application referenced # 2671069, the adjudicator determined the Claimant's claim for Waterproofing.

395. I am bound the follow the issues determined by the adjudicator of adjudication application referenced # 2671069 relating to the claim for completed Waterproofing.

396. In particular, the adjudicator considered whether the shop drawings were a condition precedent to payment and considered the value of the shop drawings, which were not provided at the time of making the payment claim reference # 35.

397. At paragraphs 839 to 845 of adjudication application referenced # 2671069, the adjudicator determined, in the circumstances, the provision of the shop drawings were not a condition precedent to payment but since the shop drawings had not been provided, an appropriate deduction should be made from the amount claimed for Waterproofing.

398. The adjudicator determined the value of the shop drawings was the claimed amount less the value of the expert's valuation of that work (GCsqd), which was $253,357.63 - $234,050.40 = $19,307.23.

399. In other words, the adjudicator determined that 7.62% of the claimed amount for Waterproofing related to the production and provision of shop drawings, which had not been provide, and he deducted that amount from the claimed amount for Waterproofing.

400. Section 87 of the Act provides;

> *"87. Valuation of work etc. in later adjudication application*
>
> *(1) This section applies if, in deciding an adjudication application,* ***an adjudicator has decided the value of*** *—*
>
> *(a)* ***any construction work carried out under a construction contract;*** *or*

(b) any related goods and services supplied under a construction contract.

Note—

See section 72 for the valuation of construction work and related goods and services.

(2) ***Any adjudicator must, in any later adjudication application that involves the working out of the value of the construction work or of the related goods and services, give the work, or the goods and services, the same value as that previously decided by the adjudicator*** *unless the claimant or respondent satisfies the adjudicator concerned that the value of the work, or the goods and services, has changed since the previous decision.*

(3) However, if a decision or order of a court changes the value of the construction work or of the related goods and services, the adjudicator must give the work, or the goods and services, the same value as changed by the decision or order unless the claimant or respondent satisfies the adjudicator concerned that the value of the work, or the goods and services, has changed since the decision or order.

401. Pursuant to section 87 of the Act and the decision of Dualcorp cited above, I must apply that same rationale to valuing the completed work given that the Claimant has not provided any shop drawings.

402. I have considered the claim and evidence provided by the Claimant and have also considered that the Respondent made no opposing submission about those amounts claimed.

403. The adjusted claimed amount is, therefore, $11,579.84 less 7.62% for incomplete shop drawings as determined by the adjudicator of adjudication application referenced # 2671069, which amounts to; $10,697.46.

404. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $10,697.46 for Waterproofing work for the reasons set out above at paragraphs; 250) to 349) and 350) to 355).

405. In summary, the Claimant is entitled to the amount claimed of $24,764.51 for Claim Item 1.9.

CLAIM ITEM 1.10 MASONRY & PRECAST WALLS

Payment Claim

406. The Claimant claims $4,500.00 in the Payment Claim. That is comprised of the following;

(a) $3,000.00 for unfixed masonry materials, being 6 pallets of blocks; and

(b) $1,500.00 for work on levels B7, B6, B5, B4 & B3 and that was additional to the amount claimed in the previous Payment Claim 35, which was subject of an adjudication application.

Payment Schedule

407. The Respondent has scheduled $0.00 for payment and provides the following reasons for withholding payment:

(a) The Respondent has no obligation to pay for unfixed materials pursuant to clause 37.3 until they are incorporated into the Works.

(b) The Respondent, pursuant to clause 39.5, is entitled to use the unfixed materials without payment until after the final certification has been made.

(c) This is a claim for damages by the Claimant following its repudiation of the Contract and is not a claim that can be made under the Act.

(d) The blockwork is incomplete because the caulking has not been applied.

Decision

408. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

409. I have considered the Claimant's claim and evidence and the Respondent's reasons for withholding payment in relation to the unfixed masonry materials.

410. In relation to the unfixed masonry materials, the Respondent has not made any opposing submissions about the value of the unfixed masonry materials claimed by the Claimant.

411. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $3,000.00 for unfixed masonry materials for the reasons set out above at paragraphs; 250) to 349) and 350) to 355).

412. I now refer to the Claimant's claim for $1,500.00 for work on levels B7, B6, B5, B4 & B3, which was additional to the amount claimed in the previous Payment Claim 35, which was subject of an adjudication application.

413. The Respondent asserts the Claimant is not entitled to any payment for this item because the caulking is incomplete.

414. The Claimant is entitled to receive progress payments under the Contract and under the Act.

415. The Claimant acknowledges it has not completed the caulking, but explains that is why it has only claimed 96%.

416. The Respondent has not provided any opposing submission save for the argument the Claimant is not entitled to any payment.

417. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $1,500.00 for work relating to Masonry & Precast Walls for the reasons set out above at paragraphs; 350) to 355).

CLAIM ITEM 1.13 METALWORK & BALUSTRADES

Payment Claim

418. The Claimant claims $419,749.55 for Metalwork & Balustrades in the Payment Claim. That claim is comprised of the following;

(a) $50,597.03 for rooftop screening shop drawings; and

(b) $23,603.10 for fire stair handrails on levels B7, B6, B5, B4 and B3, which was additional to the amount claimed in the previous Payment Claim # 35.

(c) $345,549.42 for Metalwork & Balustrades in payment claim # 35, which is not pursued in this Adjudication Application as it has been determined by the adjudicator in adjudication application referenced # 2671069.

Payment Schedule

419. The Respondent has scheduled $0.00 for payment and provides the following reasons for withholding payment:

(a) Regarding; "*Screening Shop Drawings*" – the Respondent does not accept the value claimed for the shop drawings because it is not "reasonable". It asserts $6,000 is a reasonable amount.

(b) The Claimant's shop drawings do not address issues raised by the Respondent to date, including in response to RFI's and associated correspondence, including issues communicated in respect of level 40.

(c) The Claimant has not complied with the requirements of the Contract specification for metalwork, specifically it has not provided shop drawings and certification for the fire stair shop drawings, therefore no further amount is payable.

(d) The Claimant has failed to provide a Form 15 in relation to the shop drawings that were provided.

(e) The Respondent has identified some defects in the fire stair handrail, such as a gap required between the handrail and the speed panel and rust on the spigots of the handrails.

(f) The newels have not been completed, therefore the claim for 95% is not accurate.

Decision

420. I have decided above at paragraphs 88) to 218) that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's

assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

421. The Claimant asserts that the lack of specificity provided by the Respondent about non-compliant work in the Payment Schedule for the claimed items in this Adjudication Application, make it impossible for the Claimant to properly respond.

422. I do not accept this objection provided by the Claimant. Save for providing photographs and particulars of the claimed "*rusting*", the Respondent has provided sufficient reasons for withholding payment, which the Claimant understood and has criticised by way of a submission of 16 pages in length.

423. The Claimant also asserts that it did provide shop drawings for the fire stair handrails on 7 September 2022 and has provided evidence of same.

424. The Claimant also provided evidence that the shop drawings were approved by the Respondent's consultants on 16 September 2022 with one direction to site fix extra 4N28 bars into FS04 as shown on the basement 2 coils of unfixed tensioning strands plan.

425. I have reviewed the fire stair shop drawings and the structural engineer's approval of the stair design. I am satisfied the Claimant provided the requisite shop drawings for the fire stairs. Accordingly, I do not accept the Respondent's reason for withholding payment about this point.

426. The Claimant asserts it was not required to provide a Form 15 for the fire stair shop drawings because the Architectural Specification referenced # 0052 provided no such requirement.

427. I have reviewed Architectural Specification referenced # 0052 and I cannot see any obligation on the Claimant to provide a Form 15 for the fire stairs, which are a structural item. Accordingly, I do not accept the Respondent's reason for withholding payment about this point.

428. Additionally, I note that clause 4.2 of Part H of the Annexure required the Respondent to provide the following;

> "…
>
> ***RPEQ structural certification of all custom designed elements within the Contract design*** *(eg balustrades);*
>
> **…"**

429. Clause 4.2 of Part H of the Annexure requires the Respondent to procure RPEQ certification of all structural elements, which includes stair structures.

430. The Clamant advises that the objection about gaps between the fire stair handrail and the Speedwall panels are not relevant to this claim because there are no Speedwall panels in the basement levels.

431. Based on the description, drawings and the photographs provided by the Claimant, I accept its reason. Accordingly, I do not accept the Respondent's reason for withholding payment about this point.

432. The Claimant asserts it cannot respond to the alleged defect relating to rusting, because the Respondent failed to provide evidence or particulars of that defect.

433. I accept that the Respondent failed to provide sufficient particulars with that reason, such that it amounts to no more than a bald assertion.

434. Accordingly, I do not accept the Respondent's reason for withholding payment about this point.

435. The Respondent's reason for withholding payment relating to the newel posts are not relevant because the Claimant has only claimed that the B7 to B3 works were 50% complete, not 95% or 100% as stated by the Respondent in its reason for withholding payment.

436. Upon review of the particulars of the Payment Claim, I accept the Claimant's explanation. Accordingly, I do not accept the Respondent's reason for withholding payment about this point.

437. In relation to the rooftop screen installation, the Claimant asserts that it has made no claim for that work. The Claimant points out that it has only claimed payment for the shop drawings for the roof top screen.

438. The Claimant has provided evidence of concerns it raised about the structural adequacy of the roof plant structural steel (design of which was the responsibility of the Respondent).

439. There is no evidence that the Respondent answered the questions raised by Bernard Blom of the Claimant on 26 July 2024. The Claimant then produced shop drawings for the roof top screens but left out particulars of the connection roof plant

structural steel because it had not been provided that detail from the Respondent.

440. On 2 August 2024, the Respondent's architect reviewed the Claimant's shop drawings and advised that various elements of the structural steel supporting the rooftop louvres were not adequately documented. The objection raised by the Respondent relates to the architect's advice, which relates to missing details the Respondent should have provided.

441. The Claimant maintains that 15% of the item value for the shop drawings of the roof top screen value is reasonable given the complexity of design.

442. The Respondent provide its estimate of $6,000.00 but gave no explanation about that estimate. The Respondent should have supported its estimate by a quotation from a relevant contractor or an expert's opinion or some industry standard pricing guide. It provided no such substantiation. Accordingly, the Respondent's assessment is no more than a bald assertion.

443. Section 69 of the Act requires the Respondent to provide a reason for withholding payment as follows;

> *"69 Meaning of payment schedule*
>
> *A **payment schedule**, responding to a payment claim, is a written document that—*
>
> *(a) identifies the payment claim to which it responds; and*
>
> *(b) states the amount of the payment, if any, that the respondent proposes to make; and*

(c) ***if the amount proposed to be paid is less than the amount stated in the payment claim— states why the amount proposed to be paid is less, including the respondent's reasons for withholding any payment;*** *and*

(d) *includes the other information prescribed by regulation."*

444. In *Multiplex Constructions Pty Ltd v Luikens & Anor [2003] NSWSC 1140*, Palmer J explained that prohibition as follows:6

> *[67] The evident purpose of s.13(1) and (2), s.14(1), (2) and (3), and s.20(2B) is to* ***require the parties to define clearly, expressly and as early as possible what are the issues in dispute between them****; the issues so defined are the only issues which the parties are entitled to agitate in their dispute and they are the only issues which the adjudicator is entitled to determine under s.22.* ***It would be entirely inimical to the quick and efficient adjudication of disputes which the scheme of the Act envisages if a respondent were able to reject a payment claim, serve a payment schedule which said nothing except that the claim was rejected, and then "ambush" the claimant by disclosing for the first time in its adjudication response that the reasons for the rejection were founded upon a certain construction of the contractual terms or upon a variety of calculations, valuations and assessments said to be made in accordance with the contractual terms but which the claimant has had no prior opportunity of checking or disputing****. In my opinion, the express words of s.14(3) and s.20(2B) are designed to prevent this from happening.*
>
> *[68] Section 14(3) requires that if the respondent to a payment claim has "any reason" for "withholding payment", it must indicate that reason in the payment schedule. To construe the phrase "withholding*

[6] *Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC 1140, [67]-[68], [70] (Palmer J). See also *G W Enterprises Pty Ltd v Xentex Industries Pty Ltd & Ors* [2006] QSC 399, [37] (Lyons J).

payment" as meaning "withholding payment only by reason of a set-off or cross claim" is to put a gloss on the words which their plain meaning cannot justify. The phrase, in the context of the subsection as a whole, simply means "withholding payment of all or any part of the claimed amount in the payment claim". If the respondent has any reason whatsoever for withholding payment of all or any part of the payment claim, s.14(3) requires that that reason be indicated in the payment schedule and s.20(2B) prevents the respondent from relying in its adjudication response upon any reason not indicated in the payment schedule. Correspondingly, s.22(d) requires the adjudicator to have regard only to those submissions which have been "duly made" by the respondent in support of the payment schedule, that is, made in support of a reason for withholding payment which has been indicated in the payment schedule in accordance with s.14(3).

…

[70] For a respondent merely to state in its payment schedule that a claim is rejected is no more informative than to say merely that payment of the claim is "withheld": the result is stated but not the reason for arriving at the result. Section 14(3) requires that reasons for withholding payment of a claim be indicated in the payment schedule with sufficient particularity to enable the claimant to understand, at least in broad outline, what is the issue between it and the respondent. This understanding is necessary so that the claimant may decide whether to pursue the claim and may know what is the nature of the respondent's case which it will have to meet if it decides to pursue the claim by referring it to adjudication.

445. The authorities indicate, the Respondent must provide sufficient explanation of any reason for withholding payment so the Claimant can prepare its case for an adjudication application. That requires providing reasoning and or authoritative supporting evidence such as photographs, case law, expert opinion, quotations etc… Simply asserting $6,000.00 as being reasonable and no more is not a valid reason for withholding payment.

446. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $74,200.15 for work relating to Metalwork & Balustrades.

CLAIM ITEM 1.14 DOORS & DOOR FRAMES

Payment Claim

447. The Claimant claims $30,709.58 for Doors & Door Frames in the Payment Claim. That claim is comprised of the following;

(a) $469.22 for Basement 02;

(b) $1,407.61 for Basement Level 1;

(c) $5,451.12 for Level 2

(d) $3,567.53 for Level 2 Mezzanine;

(e) $7,636.49 for Level 3;

(f) $1,395.50 for Level 12;

(g) $5,860.32 for Level 13; and

(h) $5,860.33 for Level 17.

448. The items claimed are indicated as; "*Frame on site not installed*" or "*Frame in warehouse*" total $22,857.09. Additionally, the Claimant claimed $7,852.49 for work carried out on site.

Payment Schedule

449. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) The Respondent asserts it took the works out of the hands of the Claimant pursuant to clause 39.5 of the Contract on 12 September 2024.

(b) The Respondent further asserts that the Claimant is not entitled to payment for unfixed materials pursuant to clause 37.3 of the Contract.

(c) The Respondent also asserts that pursuant to clause 39.5, it is entitled to use the unfixed materials without payment until after the final certification has been made.

(d) The Claimant claimed that the installation of door frames constituted 50% of the total value of the installation of the door and the door frame. The Respondent asserts that the installation of door frames constituted 30% of the total.

Decision

450. I have decided above at paragraphs 88) to 218) that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

451. I have considered the Claimant's claim and evidence and the Respondent's reasons for withholding payment in relation to the unfixed door frames.

452. In relation to the value of the unfixed door frames, the Respondent has not made any opposing submissions about the value of the unfixed masonry materials claimed by the Claimant but merely asserts it considers those to be valued at 30% of the total cost for each door frame and door.

453. The Respondent's estimate of 30% should have been supported by the actual costs of the door and door frame or an expert's opinion about the door and door frame, such as the supplier. None was provided. Accordingly, the Respondent's assessment is no more than a bald assertion.

454. In *Multiplex Constructions Pty Ltd v Luikens & Anor [2003] NSWSC 1140*, Palmer J explained that prohibition as follows:7

> *[67] The evident purpose of s.13(1) and (2), s.14(1), (2) and (3), and s.20(2B) is to* ***require the parties to define clearly, expressly and as early as possible what are the issues in dispute between them****; the issues so defined are the only issues which the parties are entitled to agitate in their dispute and they are the only issues which the adjudicator is entitled to determine under s.22.* ***It would be entirely inimical to the quick and efficient adjudication of disputes which the scheme of the Act envisages if a respondent were able to reject a payment claim, serve a payment schedule which said nothing except that the claim was rejected, and then "ambush" the claimant by disclosing for the first time in its adjudication response that the reasons for the rejection were founded upon a certain construction of the contractual terms or upon a variety of calculations, valuations and assessments said to be made in accordance with the contractual terms but which the claimant has had no prior opportunity of checking or disputing****. In my opinion, the express*

[7] *Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC 1140, [67]-[68], [70] (Palmer J). See also *G W Enterprises Pty Ltd v Xentex Industries Pty Ltd & Ors* [2006] QSC 399, [37] (Lyons J).

words of s.14(3) and s.20(2B) are designed to prevent this from happening.

[68] Section 14(3) requires that if the respondent to a payment claim has "any reason" for "withholding payment", it must indicate that reason in the payment schedule. To construe the phrase "withholding payment" as meaning "withholding payment only by reason of a set-off or cross claim" is to put a gloss on the words which their plain meaning cannot justify. The phrase, in the context of the subsection as a whole, simply means "withholding payment of all or any part of the claimed amount in the payment claim". If the respondent has any reason whatsoever for withholding payment of all or any part of the payment claim, s.14(3) requires that that reason be indicated in the payment schedule and s.20(2B) prevents the respondent from relying in its adjudication response upon any reason not indicated in the payment schedule. Correspondingly, s.22(d) requires the adjudicator to have regard only to those submissions which have been "duly made" by the respondent in support of the payment schedule, that is, made in support of a reason for withholding payment which has been indicated in the payment schedule in accordance with s.14(3).

…

[70] For a respondent merely to state in its payment schedule that a claim is rejected is no more informative than to say merely that payment of the claim is "withheld": the result is stated but not the reason for arriving at the result. Section 14(3) requires that reasons for withholding payment of a claim be indicated in the payment schedule with sufficient particularity to enable the claimant to understand, at least in broad outline, what is the issue between it and the respondent. This understanding is necessary so that the claimant may decide whether to pursue the claim and may know what is the nature of the respondent's case which it will have to meet if it decides to pursue the claim by referring it to adjudication.

455. The authorities indicate, the Respondent must provide sufficient explanation of any reason for withholding payment so the Claimant can prepare its case for an adjudication application. That requires providing reasoning and or authoritative supporting evidence such as photographs, case law, expert opinion, quotations etc… Simply asserting 50% as being reasonable and no more is not a valid reason for withholding payment.

456. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $22,857.09 for unfixed door frames materials for the reasons set out above at paragraphs; 250) to 349) and 350) to 355).

457. I now refer to the Claimant's claim for $7,852.49 for work relating to doors and door frames on levels B7, B6, B5, B4 & B3, which was additional to the amount claimed in the previous Payment Claim 35, which was subject of an adjudication application.

458. The Respondent asserts the Claimant is not entitled to any payment for this item but provides no reasons save for those summarised above.

459. The Respondent has not provided any opposing submission save for the argument the Claimant is not entitled to any payment.

460. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $7,852.49 for work relating to Doors & Door Frames for the reasons set out above at paragraphs; 350) to 355).

CLAIM ITEM 1.17 CURTAIN WALL, ALUMINIUM WINDOWS & DOORS

Payment Claim

461. The Claimant claims $11,858,432.54 for Curtain Wall, Aluminium Windows & Doors in the Payment Claim. That claim is comprised of the following;

(a) $1,697,875.17 for Curtain Wall, Aluminium Windows & Doors, which was additional to the amount claimed in the previous payment claim # 35; and

(b) $10,160,557.37 for Curtain Wall, Aluminium Windows & Doors in payment claim # 35, which is not pursued in this Adjudication Application as it has been determined by the adjudicator in adjudication application referenced # 2671069.

462. The claimed amount in this Adjudication Application, relates to $495,682.01 for unfixed Curtain Wall materials and $1,202,193.16 for unfixed Window Wall materials.

Payment Schedule

463. The Respondent has scheduled $Nil in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) The Respondent asserts it took the works out of the hands of the Claimant pursuant to clause 39.5 of the Contract on 12 September 2024.

(b) The Respondent further asserts that the Claimant is not entitled to payment for unfixed materials pursuant to clause 37.3 of the Contract.

(c) The Respondent also asserts that pursuant to clause 39.5, it is entitled to use the unfixed materials without payment until after the final certification has been made.

Decision

464. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

465. The Respondent made no submissions about the compliance with specification or the value of unfixed materials claimed in this Payment Claim. It simply asserts, the Claimant is not entitled to any payment for unfixed materials.

466. I have considered the Claimant's claim and evidence and the Respondent's reasons for withholding payment in relation to the unfixed Curtain Wall material and Window Wall material.

467. I have considered the previous 3 decisions of adjudication applications and none of them traverse the issues covered in this claim.

468. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $1,697,875.17 for Curtain Wall, Aluminium Windows & Doors for the reasons set out above at paragraphs; 350) to 355).

CLAIM ITEM 1.19 ELECTRICAL SERVICES

Payment Claim

469. The Claimant claims $1,061,996.69 for Electrical Services in the Payment Claim. That claim is comprised of the following;

(a) $319,245.81 for Electrical Services, which was additional to the amount claimed in the previous payment claim # 35; and

(b) $742,750.88 for Electrical Services in payment claim # 35, which is not pursued in this Adjudication Application as it has been determined by the adjudicator in adjudication application referenced # 2671069.

470. The Electrical Services that are the subject of this Adjudication Application are comprised of the following;

(a) $253,500.00 for electrical switchboards that have been manufactured, which are currently in a warehouse but have not been installed;

(b) $47,575.00 for temporary electrical switchboards left on site;

(c) $18,170.81 for Energex associated work, which was additional to the amount claimed in the previous payment claim # 35.

Payment Schedule

471. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) The Respondent asserts it took the works out of the hands of the Claimant pursuant to clause 39.5 of the Contract on 12 September 2024.

(b) The Respondent further asserts that the Claimant is not entitled to payment for unfixed materials pursuant to clause 37.3 of the Contract.

(c) The Respondent also asserts that pursuant to clause 39.5, it is entitled to use the unfixed materials without payment until after the final certification has been made.

(d) This is a claim for damages by the Claimant following its repudiation of the Contract and is not a claim that can be made under the Act.

Decision

The electrical switchboards

472. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

473. The Respondent's instruction of 30 August 2024 discloses that at about 30 August 2024, the Claimant had commenced packing and removing its unfixed materials and equipment from the site. It appears that both the Respondent and the Superintendent

instructed the Claimant to stop removing any materials from the site as follows:

> *"…1. We refer to the Contractor's notice of full suspension dated 29 August 2024.*
>
> *…*
>
> *5. **The Principal notes that the Superintendent has directed the Contractor to cease removing materials from the site**. We trust that the Contractor will comply with this direction.*

474. The Respondent's claimed rights under clause 39.5 indicate to me that the Respondent's 30 August 2024 Instruction required the Claimant to leave on site (which includes the unfixed materials in the warehouse referred to by the Respondent) all unfixed materials procured for the project by the Claimant.

475. The Respondent made no objections about the electrical switchboards' compliance with the drawings and specification or the value of unfixed electrical switchboards claimed in this Payment Claim. It simply asserts, the Claimant is not entitled to any payment for unfixed materials.

476. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $253,500.00 for the unfixed electrical switchboards for the reasons set out above at paragraphs; 250) to 349) and 350) to 355)

The Temporary Electrical Switchboards

477. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's

assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

478. Furthermore, I have decided the Claimant is entitled to payment of the claimed amount of $47,575.00 for the temporary electrical switchboards because the Respondent instructed it to do so.

479. The 30 August 2024 Instruction was to "***cease removing materials from the site***" and the Claimant accrued a right to claim payment for the reasons set out above at paragraphs; 250) to 349) and 350) to 355).

The Energex associated work

480. I have decided above at paragraphs 88) to 218) that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

481. The Respondent provided no reasons for withholding payment an made no objections about the claimed Energex associated work.

482. For the reasons set out above at paragraphs 443) to 445) and 350) to 355)I have decided the Claimant is entitled to payment of $18,170.81 for Energex associated work.

483. In summary, the Claimant is entitled to the amount claimed of $319,245.81 for Claim Item 1.19.

CLAIM ITEM 1.20 HYDRAULIC SERVICES

484. In the Adjudication Application, the Claimant has advised that its claimed amount related to unfixed materials for Hydraulic Services.

485. Since submitting the Payment Claim, its hydraulic subcontractor QPC returned to site to perform work directly for the Respondent and withdrew its claim for unfixed materials against the Claimant.

486. Accordingly, the Claimant does not pursue its claim for claimed Item 1.20 Hydraulic Services.

CLAIM ITEM 1.21 MECHANICAL SERVICES

Payment Claim

487. The Claimant claims $654,972.18 for Mechanical Services in the Payment Claim. That claim is comprised of the following;

(a) $330,275.11 for Mechanical Services, which was additional to the amount claimed in the previous payment claim # 35; and

(b) $324,697.07 for Mechanical Services in payment claim # 35, which is not pursued in this Adjudication Application as it has been determined by the adjudicator in adjudication application referenced # 2671069.

488. The Mechanical Services that are the subject of this Adjudication Application are comprised of the following;

(a) $966,199.49 for passenger lifts; and

(b) $3,137,949.08 for automated car parking system.

Payment Schedule

489. The Respondent has scheduled $Nil in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) The Claimant failed to identify the construction work or the related goods and services to which the payment claim relates.

(b) The Respondent asserts it took the works out of the hands of the Claimant pursuant to clause 39.5 of the Contract on 12 September 2024.

(c) The Respondent further asserts that the Claimant is not entitled to payment for unfixed materials pursuant to clause 37.3 of the Contract.

(d) The Respondent also asserts that pursuant to clause 39.5, it is entitled to use the unfixed materials without payment until after the final certification has been made.

(e) This is a claim for damages by the Claimant following its repudiation of the Contract and is not a claim that can be made under the Act.

Decision

The chilled water plant, the stair pressurisation & lobby relief fans, the unfixed duct work materials at level B1 left on site and unfixed ground floor air conditioning materials

490. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's

assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

491. The Respondent's instruction of 30 August 2024 discloses that at about 30 August 2024, the Claimant had commenced packing and removing its unfixed materials and equipment from the site. It appears that both the Respondent and the Superintendent instructed the Claimant to stop removing any materials from the site as follows:

> *"…1. We refer to the Contractor's notice of full suspension dated 29 August 2024.*
>
> *…*
>
> *5.* ***The Principal notes that the Superintendent has directed the Contractor to cease removing materials from the site****. We trust that the Contractor will comply with this direction.*

492. The Respondent's claimed rights under clause 39.5 indicate to me that the Respondent's 30 August 2024 Instruction required the Claimant to leave on site (which includes the unfixed materials in the warehouse referred to by the Respondent) all unfixed materials procured for the project by the Claimant.

493. The Respondent made no objections about the chilled water plant, the stair pressurisation & lobby relief fans, the unfixed duct work materials at level B1 left on site and unfixed ground floor air conditioning materials' compliance with the drawings

and specification or the value of unfixed electrical switchboards claimed in this Payment Claim. It simply asserts, the Claimant is not entitled to any payment for unfixed materials.

494. The Respondent has also not provided any submission about the value of any of that unfixed equipment and materials.

495. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $330,275.11 for the chilled water plant, the stair pressurisation & lobby relief fans, the unfixed duct work materials at level B1 left on site and unfixed ground floor air conditioning materials for the reasons set out above at paragraphs; 250) to 349) and 350) to 355)

CLAIM ITEM 1.23 LIFT SERVICES

Payment Claim

496. The Claimant claims $5,179,918.57 for Lift Services in the Payment Claim. That claim is comprised of the following;

(a) $4,104,148.57 for Lift Services, which was additional to the amount claimed in the previous payment claim # 35; and

(b) $1,075,770.00 for Lift Services in payment claim # 35, which is not pursued in this Adjudication Application as it has been determined by the adjudicator in adjudication application referenced # 2671069.

497. The Lift Services that are the subject of this Adjudication Application are comprised of the following;

(a) $966,199.49 for passenger lifts, which cannot be cancelled and has been, will be delivered to site;

(b) $3,137949.08 for automated car parking system, which cannot be cancelled and has been, will be delivered to site;

Payment Schedule

498. The Respondent has scheduled $Nil in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) The Respondent asserts it took the works out of the hands of the Claimant pursuant to clause 39.5 of the Contract on 12 September 2024.

(b) The Respondent further asserts that the Claimant is not entitled to payment for unfixed materials pursuant to clause 37.3 of the Contract.

(c) The Respondent also asserts that pursuant to clause 39.5, it is entitled to use the unfixed materials without payment until after the final certification has been made.

(d) This is a claim for damages by the Claimant following its repudiation of the Contract and is not a claim that can be made under the Act.

(e) The Respondent also asserts; "*The Contractor's progress, claims, 1 & 2 provide no breakdown or substantiation to identify the construction works subject of this portion of the progress payment, and are invalid under the Act, as well as its claim for site labour to date, which provides no substantiation of this claim.*"

Decision

Lifts and automated car parking system

499. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

500. The Respondent asserts this part of the Payment Claim is invalid because it does not identify the construction work to which it relates.

501. I am not persuaded the Payment Claim did not adequately identify the construction work to which it related or that the Respondent did not understand that the claimed about for lift services related to unfixed offsite materials for the passenger lift and the automated carparking system.

502. The payment Claim indicates that this claim is for unfixed off site materials relating to the entire passenger lift and to the entire `automated car parking system. Specifically, the Claimant claims;

(a) For the lifts; the total value of work completed to date $1,680,760.40 less amounts previously certified $714,570.00 equals the amount claimed in this Payment Claim $999,199.49;

(b) For the automated car parking system; the total value of work completed to date $4,444,749.08 less amounts previously certified $1,306,800.00 equals the amount claimed in this Payment Claim $3,137,949.08;

503. Accordingly, the claim identifies the goods to which it relates. Furthermore, the Respondent previously understood similar claims for unfixed, offsite materials for the passenger lift and the automated carparking system and certified certain amounts.

504. Accordingly, I do not accept the Respondent's reason for withholding payment.

505. The Respondent argues that;

> *"We have previously been provided with a bank guarantee for the Schindler passionate passenger lift in the amount of $369,000, noting that the Contractor is not entitled to payment for unfixed plant and materials as per clause 37.3 and item 29. We note that this bank guarantee has expired, and was not in the name of the Principal, therefore no security has been provided for such works and the Contractor has not complied with clause 37.3."*

506. What the Respondent meant by that reason for withholding payment is not clear. It is clear that the Respondent complains about the bank guarantee provided by the Claimant which has now expired. However, regardless, that the Respondent may have other remedies under the Contract because the Claimant's bank guarantee provided as security for the lifts and the automated car parking system lapsed, for the reasons stated above, clause 37.3 of the Contract does not operate in the circumstances where the Respondent gave its instruction on 30 August 2024 about unfixed materials, and the Claimant terminated the Contract on 10 September 2024.

507. Accordingly, I do not accept the Respondent's reason for withholding payment.

508. The Respondent's refers to 2 previous payment claims, which it assert did not identify the construction work claimed. The Respondent, however, assessed those claims and made payment.

509. I do not understand what the Respondent intended by that statement. I am also not persuaded the Respondent did not understand the work it had certified for payment.

510. Accordingly, I do not accept the Respondent's reason for withholding payment.

511. The Respondent has also not provided any submission about the value of any of that unfixed equipment and materials.

512. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $4,104,148.57, for the unfixed offsite passenger lifts and automated car stacker materials for the reasons set out above at paragraphs; 250) to 349) and 350) to 355).

CLAIM ITEM 1.25 CEILINGS, PARTITIONS & CARPENTRY

Payment Claim

513. The Claimant claims $977,070.10 for Ceilings, Partitions & Carpentry in the Payment Claim. That claim is comprised of the following;

(a) $714,674.17 for Ceilings, Partitions & Carpentry, which was additional to the amount claimed in the previous payment claim # 35; and

(b) $262,395.93 for Ceilings, Partitions & Carpentry in payment claim # 35, which is not pursued in this Adjudication Application as it has been determined by the adjudicator in adjudication application referenced # 2671069.

514. The Ceilings, Partitions & Carpentry that are the subject of this Adjudication Application are comprised of the following;

(a) $586,133.74 for unfixed materials being CSR Gyprock sheeting, Rondo clips, battens etc…being pressed metal materials, Speed Panel, insulation material, timber mouldings such as skirting material, miscellaneous materials including consumables, which are on site; and

(b) $128,540.43 for completed work under the Contract that was additional to the amount claimed in the previous payment claim # 35. In particular, the Claimant has claimed for completed work on levels 4 to 12 (inclusive), levels 14-16 (inclusive) and levels 21 & 22. Each level is further particularised according to the following categories; Base build partitions, Fit out partitions, Ceilings, Speed Panel and Carpentry.

Payment Schedule

515. The Respondent has scheduled $Nil in the Payment Schedule for payment of this Item 1.25 Ceilings, Partitions & Carpentry and provides the following reasons for withholding payment;

(a) The Respondent asserts it took the works out of the hands of the Claimant pursuant to clause 39.5 of the Contract on 12 September 2024.

(b) The Respondent further asserts that the Claimant is not entitled to payment for unfixed materials pursuant to clause 37.3 of the Contract.

(c) The Respondent also asserts that pursuant to clause 39.5, it is entitled to use the unfixed materials without payment until after the final certification has been made.

(d) This is a claim for damages by the Claimant following its repudiation of the Contract and is not a claim that can be made under the Act.

(e) In relation to the claim for unfixed materials, the Respondent asserts;

> *"The principal also says the value of the materials claimed in the termination claim is unreasonable.*
>
> *In departing from the site and leaving the site exposed, the Contractor's materials have been exposed to wet weather and wind, resulting in potential damage by wind/rain to these materials, putting into question, the structural integrity of such materials.*
>
> *The Principal, therefore, considers the total value of these materials as claim to be $0.00."*

(f) The Respondent also asserts; no hold point inspections have been "approved" as required by Architectural Specifications 0522 & 0531, no shop drawings were submitted as required by Architectural Specifications 0522 & 0531 and the works did not comply with the required by Architectural Specifications 0522 & 0531 as notified in SI 75, 80, 97, 104, 109, 119,155,165, 185, 275 and 342.

(g) For levels 4-12 (inclusive) for the "*Fit out partitions*" work element, the Respondent scheduled $Nil and asserts; "*Sheeting ongoing, Set/sanding to be still completed*";

(h) For levels 9, 10, 11 14, 15 & 16 for the "*Base build partitions*" work element, the Respondent scheduled $Nil and asserts; "*Party wall/framing sheeting still progressing*";

(i) For levels 5, 6, 7, 8, 9 and 10 for the "*Ceilings*" work element, the Respondent scheduled $Nil and asserts; "*Ceilings not sheeted at time of inspection*";

(j) For levels 5, 6, 7 & 8 for the "*Carpentry*" work element, the Respondent scheduled $Nil and asserts; "*No works progressed onsite*";

(k) For levels 5, 6, 7 & 8 for the "*Carpentry*" work element, the Respondent scheduled $Nil and asserts; "*No works progressed onsite*";

(l) For levels 8, 12 for the "*Base build partitions*" work element, the Respondent scheduled $Nil and provided no reason for withholding payment;

(m) For levels 11, 14 & 15 for the "*Ceilings*" work element, the Respondent scheduled $Nil and provided no reason for withholding payment;

(n) For levels 14 & 15 for the "*Fit out partitions*" work element, the Respondent scheduled $Nil and provided no reason for withholding payment;

(o) For levels 21 & 22, the Respondent did not identify a work element claimed and scheduled $Nil and provided no

reason for withholding payment save for asserting "no external works completed".

Decision

Ceilings, Partitions & Carpentry – Unfixed materials

516. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

517. The Respondent asserts the Claimant failed to protect the unfixed materials, it further claims the unfixed materials were damaged due to exposure to the weather and the value of the unfixed materials is, therefore, $Nil.

518. The Claimant asserts the Respondent's reference to; "*potential damage*" is not based on any evidence and is no more than mere speculation.

519. The Claimant also asserts that it handed over the unfixed materials as instructed, the Respondent denied it access to the site from 13 September 2024 and, in any event, it had no ongoing obligations to protect the unfixed materials after the date of termination.

520. The Claimant points to the Superintendent's direction of 6 September 2024, which states;

"…

Item4

The request for removal of materials and equipment noted is tantamount to setting aside the Court order obtained by the Principal, and is therefore not approved.

…

Item 7

We note that the Contractor states that the removal of the construction plant and material is necessary to place the items in safe storage. We do not reasonably agree with this, noting:

. The site is secured and has security staff in place on site*;*

. Many of the items cannot be moved without cranes, or forklift/mobile cranes as noted by the Contractor in Item 6.

521. The Claimant points to the Respondent's direction of 13 September 2024, which states;

"…

2. Noting that the Contract remains on foot and the Principal has exercised its right pursuant to the Take Out Notice:

…

(c) ***Pursuant to clause 12.3(c), the Contractor is not to interfere with, disturb, impede, or obstruct***

the carrying out by the Principal of the principal contractor's obligations, and must cooperate and comply with any direction of the principal contractor.

3. Given the Contractor will not be carrying out WUC, there is no reason for the Contractor or it's representatives to access the site. ***Accordingly, as the principal contractor and pursuant to clause 12.3(c)(ii), the Principal directs the Contractor to not access the site without the Principal's prior written approval****."*

522. Accordingly, I do not accept that the Claimant is liable for damage to the unfixed materials for failing to provide protection from the weather because the Respondent directed the Claimant that moving the unfixed materials to safe storage was not necessary because the site had been secured and the Respondent further prevented the Claimant from accessing the site to carry out any work including protecting the unfixed materials.

523. The Claimant has also provided photographic evidence of the unfixed materials being undercover and wrapped in plastic.

524. Accordingly, I do not accept the Respondent's reason for withholding payment.

525. The Respondent has also not provided any submission about the value of any of the unfixed ceilings, partitions & carpentry materials. It only made the $Nil value unsupported determination and said the claimed amount was "*unreasonable*".

526. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $586,133.74 for unfixed materials being CSR Gyprock sheeting, Rondo clips, battens etc…being pressed metal materials, Speed Panel, insulation material, timber

mouldings such as skirting material, miscellaneous materials including consumables for the reasons set out above at paragraphs; 250) to 349) and 350) to 355).

Ceilings, Partitions & Carpentry – completed work

527. In relation to the Respondent's assertion concerning; no hold point inspections have been "approved" as required by Architectural Specifications 0522 & 0531, no shop drawings were submitted as required by Architectural Specifications 0522 & 0531 and the works did not comply with the required by Architectural Specifications 0522 & 0531 as notified in SI 75, 80, 97, 104, 109, 119, 155, 165, 185, 275 and 342.

528. Nothing provided to me persuades me any of those references to hold points and non-compliances were anything more than defects. There is nothing in the Contract that says that successful completion (including free of minor defects0 of the ceilings, partitions and carpentry defect is a condition precedent to payment. The Respondent makes no submission about the value of that completed work, it only asserts there are defects and, therefore, the value of the completed work is $Nil. Accordingly, I am not persuaded the value of completed work was $Nil.

529. In relation to the following work elements;

(a) For levels 4-12 (inclusive) for the "*Fit out partitions*" work element, the Respondent scheduled $Nil and asserts; "*Sheeting ongoing, Set/sanding to be still completed*";

(b) For levels 9, 10, 11 14, 15 & 16 for the "*Base build partitions*" work element, the Respondent scheduled $Nil and asserts; "*Party wall/framing sheeting still progressing*";

The Respondent acknowledges that work was carried out, but it failed to make an assessment of the completed work;

530. In relation to the following work elements;

(a) For levels 8, 12 for the "*Base build partitions*" work element, the Respondent scheduled $Nil and provided no reason for withholding payment;

(b) For levels 11, 14 & 15 for the "*Ceilings*" work element, the Respondent scheduled $Nil and provided no reason for withholding payment;

(c) For levels 14 & 15 for the "*Fit out partitions*" work element, the Respondent scheduled $Nil and provided no reason for withholding payment;

(d) For levels 21 & 22, the Respondent did not identify a work element claimed and scheduled $Nil and provided no reason for withholding payment save for asserting "no external works completed".

The Respondent has made no measure of completed work or given any reason for withholding payment.

531. In relation to the following work elements;

(a) For levels 5, 6, 7, 8, 9 and 10 for the "*Ceilings*" work element, the Respondent scheduled $Nil and asserts; "*Ceilings not sheeted at time of inspection*";

(b) For levels 5, 6, 7 & 8 for the "*Carpentry*" work element, the Respondent scheduled $0.00 and asserts; "*No works progressed onsite*";

(c) For levels 5, 6, 7 & 8 for the "*Carpentry*" work element, the Respondent scheduled $Nil and asserts; "*No works progressed onsite*";

I prefer the Claimant's and its subcontractor's evidence as it provides measures of the completed work. The Respondent did not provide any evidence that no further work was carried out after the date for making the payment claim # PC35. Based on the items identified in the previous subparagraph, I am not persuaded to Respondent made any attempt to inspect and assess the claimed completed work.

532. Pursuant to sections 69 and 82 of the Act and the judgments of *Ceerose* and *Insite* (See above at paragraphs 360) to 0) as authority, I am permitted to accept the Claimant's stated valuation for the ceilings, partitions and carpentry work completed to date.

533. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $128,540.43 for completed work under the Contract that was additional to the amount claimed in the previous payment claim # 35.

CLAIM ITEM 1.28 TILING WALL & FLOOR

Payment Claim

534. The Claimant claims $102,001.43 for Tiling in the Payment Claim. That claim is comprised of the following;

(a) $97,250.00 for unfixed Ground level lobby tiles, which was additional to the amount claimed in the previous payment claim # 35; and

(b) $4,751.43 for Tiling work.

535. The Claimant advised in the Adjudication Application[8] that it does not pursue the claim for Tiling work in excess of the amount scheduled.

[8] See paragraph 701 of Adjudication Application

Payment Schedule

536. The Respondent has scheduled $2,500.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) The Respondent asserts it took the works out of the hands of the Claimant pursuant to clause 39.5 of the Contract on 12 September 2024.

(b) The Respondent further asserts that the Claimant is not entitled to payment for unfixed materials pursuant to clause 37.3 of the Contract.

(c) The Respondent also asserts that pursuant to clause 39.5, it is entitled to use the unfixed materials without payment until after the final certification has been made.

(d) This is a claim for damages by the Claimant following its repudiation of the Contract and is not a claim that can be made under the Act.

Decision

Unfixed Ground Floor tiles

537. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September

2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

538. The Respondent has not provided any submission about the value of any of that unfixed Ground Floor tiles.

539. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $97,250.00, for the unfixed Ground Floor tiles for the reasons set out above at paragraphs; 250) to 349) and 350) to 355).

540. The Claimant is further entitled to the scheduled amount of $2,500.00 for Tiling Wall and Floor.

541. In summary, the Claimant is entitled to $99,750.00 for Claim Item 1.29.

CLAIM ITEM 1.29 PAINTING & RENDERING

Payment Claim

542. The Claimant claims $4,896.32 for Painting & Rendering in the Payment Claim. That claim is comprised of the following;

(a) $4,896.32 for unfixed paint materials, which was additional to the amount claimed in the previous payment claim # 35.

543. The Claimant advised in the Adjudication Application that it does not pursue the claim for Tiling work.

Payment Schedule

544. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) The Respondent asserts it took the works out of the hands of the Claimant pursuant to clause 39.5 of the Contract on 12 September 2024.

(b) The Respondent further asserts that the Claimant is not entitled to payment for unfixed materials pursuant to clause 37.3 of the Contract.

(c) The Respondent also asserts that pursuant to clause 39.5, it is entitled to use the unfixed materials without payment until after the final certification has been made.

(d) This is a claim for damages by the Claimant following its repudiation of the Contract and is not a claim that can be made under the Act.

Decision

Unfixed Paint materials

545. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

546. The Respondent has not provided any submission about the value of any of that unfixed Paint materials.

547. The Respondent has scheduled $2,500.00 for Tiling Wall and Floor.

548. Accordingly, in addition to the scheduled amount, I have decided the Claimant is entitled to payment of the claimed amount of $4,896.32, for the unfixed Paint materials for the reasons set out above at paragraphs; 250) to 349) and 350) to 355).

CLAIM ITEM HCV 113 UNFIXED MATERIALS – UPSIZED DUCTS

Payment Claim

549. The Claimant claims $17,943.00 for a variation pursuant to an instruction to change the ventilation layout for basement 1 in the Payment Claim.

Payment Schedule

550. The Respondent has scheduled $2,420.00 (being for an additional fan only) in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) The Respondent incorporates by reference its variation assessment dated 10 May 2024, which provides to the following reasons;

(i) "*Duct changed to plenum not upsizing of duct*"

(ii) "*As noted above, duct changed to Speed Panel plenum*".

Decision

551. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

552. The Contract includes a drawing showing the Basement 01 ventilation layouts referenced 18600 M03 Rev A.

553. On or about 5 August 2022, the Respondent issued a drawing showing the Basement 01 ventilation layouts referenced 18600 M2010 Rev C1, which was significantly different to the original Contract drawings. The Respondent made further changes and issued Rev C2 on 19 August 2022. The Rev C2 drawing required the Claimant to provide ducts that were significantly larger than those shown on the original Contract drawings.

554. The Claimant submitted, its price to perform the additional work shown on 18600 M2010 Rev C2 by way of its document referenced HCV 113 on 15 August 2023, which offered to carry out the additional work shown on 18600 M2010 Rev C2 for the lump sum of $118,219.26.

555. Before getting any answer from the Respondent to proceed or acceptance of its offer, the ducts were manufactured according to 18600 M2010 Rev C2 and delivered to site. The ducts have been delivered to site, but have not been installed.

556. On 10 May 2024, after the ducts had been manufactured and delivered to site, the Respondent responded to the Claimant's proposal, valuing it as $2,420.00. The Respondent referred to something not shown on those drawings and, therefore, I assume it considered something other than that which it asked the Contractor to perform on drawing 18600 M2010 Rev C2.

557. The Claimant claims the materials were provided as directed and it is now entitled to payment.

558. The Claimant has also claimed payment for the duct as unfixed ventilation materials.

559. I am persuaded the Claimant was directed (by way of an updated drawing) to vary the WUC. However, I am not persuaded the Claimant was entitled to be paid for performing a variation because it failed to comply with the condition precedent set out in clause 36.1. Specifically, Clause 36.1 provides;

> "…
>
> ***If the Contractor considers that a direction constitutes a variation, it must, as a condition precedent to any entitlement****, give the Superintendent notice within 10 business days of the direction,* ***and in any event before commencing any work, the subject of the direction****.*
>
> …"

560. However, for the reasons above, the Respondent instructed the Claimant to leave the unfixed duct on site on 30 August 2024.

561. I determined above, the Claimant is entitled to payment of unfixed materials in these circumstances.

562. The Respondent has made no submissions about the value of the unfixed Basement 01 ventilation duct materials.

563. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $17,943.00, for Basement 01 ventilation duct materials for the reasons set out above at paragraphs; 250) to 349) and 350) to 355).

CLAIM ITEM HCV 126 DEMOLISH CW1 AT FS03 LEVEL 01 TO LEVEL 02

Payment Claim

564. The Claimant claims $13,773.42 for a variation to reconstruct a finished structure due to a change of design.

565. In the Adjudication Application[9], and based on the Glover Report, the Claimant has changed its position and now claims; $9,266.92

[9] Paragraph 795 of the Adjudication Application

Payment Schedule

566. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) The Respondent provided a response in February 2023;

(b) The claim is time barred;

(c) *"The Principal relies on the Superintendent's reasons for rejecting HCV126, as per its variation assessment of HCV126. The amount claimed is not a variation to which the Contractor is entitled to costs where the work was directed by the Superintendent, via RFI 162, pursuant to clause 29.3 of the Contract or was otherwise works not in accordance with the Contract."*

Decision

567. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

568. The Claimant asserts this additional work was due to the Respondent's change of design in relation to which the work performed to execute that changed design is a variation.

569. The Claimant further asserts that the Respondent was put on notice and knew that the Claimant would claim payment for this additional work.

570. On 30 November 2022, the Claimant sent an RFI 162, informing the Respondent of an error in its design in the Fair Stair 03 between Levels 1 and 2.

571. On 6 December 2022, the Respondent's structural engineer provided a design that could be used to change the completed work.

572. On 10 August 2023, the Superintendent issued site instruction #17 under clause 36.1 of the Contract instructing the Claimant to proceed with its new design.

573. On 2 November 2023, the Claimant informed the Respondent that it had commenced the reconstruction due to the change of design as instructed by the Respondent's architect on 10 August 2023 and indicated it may submit a claim for payment in due course.

574. On 7 October 2024, the Claimant submitted its notice of intention to claim payment relating to the Respondent's change of design instructed on 10 August 2023, for which it claimed payment in the Payment Claim.

575. Following the changed design issued on 10 August 2023, the Superintendent correctly identified that the completed works were defective vis-à-vis the new design. It was also correct in issuing an instruction for the defective work to be demolished and for the reconstruction in accordance with its new design.

576. I accept the Respondent's assertion that that the works were defective because a new design was issued requiring the

Claimant to demolish and reconstruct in accordance with the new design issued by the Respondent on 10 August 2023.

577. However, the defect arose only because the Respondent was either negligent and issued a design that was not fit for purpose and or the Respondent elected to change its design. The Respondent was responsible for providing a design capable of being used for construction pursuant to Part H of the Annexure. The Contract further confirms that the Claimant was not liable for the risk of a defective design at clause 14.3(a) and clause 14.3 (f). In light of this, the Superintendent was wrong to say the Claimant was not entitled to payment for the variation it had instructed under clause 36.1.

578. In the normal course of events, the Claimant bears the risk of identifying which new designs issued are a variation for which it will claim payment. This is clear from the last paragraph of clause 36.1.

579. However, in circumstances where the Claimant has suffered damage or loss due to the Respondent, pursuant to clause 14.3(a) and clause 14.3 (f), the Claimant accrues an entitlement to payment and the condition precedent set out in the last paragraph of clause 36.2 does not operate.

580. In relation to the valuation, the Respondent asserts;

> *"The Contractor also claims office overheads, BWIC and allowance for Tomkins commercial team to assist, review and coordinate. In addition to margin in respect of this claim; per clause 36.4 the Contractor is not entitled to a double payment for overheads and margin, where a variation will include a reasonable rate for overheads and profit only. This applies the same to the Contractor's claim for site supervisor. Skip bins and labourers stated in the additional works portion of this claim. 10% is a reasonable rate for overhead and profit only."*

581. I accept that reason and accordingly, I do not accept the Claimant is entitled to claim payment for Office overheads and Allowance for the Tomkins commercial team.

582. The Claimant is, therefore, entitled to payment of $9,266.92 less $480.00 less $246.37, which equals; $8,540.55.

583. Accordingly, I have decided the Claimant is entitled to payment of $8,540.55 for its variation claim referenced; HCV126.

CLAIM ITEM HCV 177 STRUCTURAL STEEL WINDOW POSTS

Payment Claim

584. The Claimant claims $154,382.08 for a variation to supply and install structural steel window posts referenced SC2 arising from a change of design.

585. In the Adjudication Application the Claimant, having regard to the Glover Report, has changed its position and now claims; $149,829.19.

Payment Schedule

586. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) This is a part of the façade that the Claimant was required to provide under the Contract and is not a variation to the Contract pursuant to architectural specification 0431;

(b) The walls subject of this variation claim form part of the façade system;

(c) The Claimant failed to provide shop drawings;

(d) The claim is time barred by the operation of clause 36.1 of the Contract;

(e) The Claimant is not entitled to the 3% overhead allowance.

Decision

587. I have decided above at paragraphs 88) to 218) that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

588. The Claimant asserts this additional work was due to the Respondent's change of design, and the work performed to execute that changed design is a variation.

589. On 30 May 2024, the Respondent issued drawings that showed the inclusion of floor to ceiling 175 x 175 x 4 SHS columns on the perimeter and within the floor plate. The drawings provided to me disclose that the columns appear to have been located at the intersection of various partition walls on all levels and up to about 3 metres from the perimeter.

590. On 2 July 2024, the Respondent instructed the Claimant to proceed with the changed design.

591. On 29 July 2024, the Claimant submitted its notice of intention to claim for the additional columns in the amount of; $285,913.78.

592. Under Parts G and H of the Annexure to the Contract, the Respondent was liable to provide the design of the structure. The Claimant was then required to provide a detailed design where the Claimant's curtain wall and window walls would simply affix the structure designed by the Respondent. It is

implied by clause 9.6 and Parts G and H of the Annexure to the Contract (and is normal practice) that the curtain wall and window walls subcontractor(s) provide a detailed design that affixes to the structure. The curtain wall and window walls glass panels are supported by lightweight aluminium or cold formed sheet metal steel sections and these are specified by those subcontractor(s).

593. The Respondent's argument appears to be founded on the assertion that the window walls and curtain walls are required the new heavy steel columns for structural adequacy. In other words, the Claimant's detailed design for window walls and curtain walls was structurally deficient so the Respondent instructed the use of those heavy steel columns to be incorporated into the Claimant's detailed designs.

594. It is for the Claimant to prove that the columns it was instructed to use were not required for the detailed design for window walls and curtain walls design.

595. In relation to the claim for a variation, the Claimant bears the burden of proof to explain why it was not liable for the change of design necessitating the heavy steel columns instructed by the Respondent. Simply asserting there was a change of design, which is a variation, is not sufficient as it could have been that its detailed design was deficient.

596. The Claimant has failed to explain why the columns that were instructed, 34 months after the parties had entered into the Contract, that were designed by the Respondent for the Claimant to incorporate into its façade detailed design were not required for the structural adequacy of its detailed curtain wall design and detailed wall design.

597. The Claimant provided no such explanation, it only advised that new drawings were issued, which it was instructed to follow and, therefore, it is entitled to payment. Unfortunately, clause 36.1 of the Contact is not satisfied by that mere assertion and the Claimant accrued no entitlement to payment.

598. I do not accept the Respondent's explanations as they are superficial and do not explain why it instructed the use of the heavy steel columns. Simply asserting they form part of the façade is not a valid reason for withholding payment as that does not explain why it was required.

599. The Respondent also relies of the time bar of clause 36.1. The Claimant has not explained why the Respondent should be estopped from insisting on strict simply compliance with the time requirement of clause 36.1.

600. Accordingly, I accept that the Claimant has waived its right to claim payment for this item because it failed to explain why it was entitled to payment for this change of design and the Respondent's assertion was incorrect and it failed to submit its claim within the requisite period required under clause 36.1.

601. Accordingly, I have decided the Claimant is not entitled to payment of the claimed amount for its variation claim referenced; HCV177.

CLAIM ITEM HCV 179 SLAB DEFLECTIONS

Payment Claim

602. The Claimant claims $44,187.35 for a variation to carry out as-built surveys to measure slab deflections.

603. In the Adjudication Application the Claimant, has considered the Glover Report and has changed its position and now claims; $34,261.92.

Payment Schedule

604. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) "***Instructions SI 189 and 212 were issued under clauses 29 & 30***";

(b) "***As set out in the Scott schedules***, *there remains serious concerns on slab deflections. We have not been provided with sufficient substantiation to relieve the contract from these matters and pay for any testing provided in any way*";

Decision

605. I have decided above at paragraphs 88) to 218) that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

606. The Claimant asserts it is entitled to payment for carrying out a survey of slab deflections pursuant to an instruction of the Respondent.

607. The Respondent asserts the Claimant has no entitlement to payment because it issued a defects report (the Scott Schedules) on 15 April 2023 and instructed the Claimant to rectify the defects.

608. On 1 April 2022, the Claimant requested the Respondent to confirm the actual slab deflections by way of its RFI14. It required that information because its facade subcontractor's system could accommodate up to a maximum of slab deflection of 14mm. On 27 April 2022, the Respondent provided its deflection assessment report.

609. On 26 March 2024, the Claimant requested further direction from the Respondent. Specifically, it informed that Respondent that the window wall facade would not fit in the SW corner of the building. The Claimant asserted that the Respondent had failed in its obligation to;

> *"… Reviewing and approving the shop drawings, submitted by the Contractor and its Subcontractors for dimensional correctness and conformity to the Contract documents."*
>
> and the Claimant provided the Respondent 2 options to remedy the problem;
>
> *"1. Re-manufacture windows with suitable tolerance;*
>
> *2. Drop the base RL of the window, which would require modifying detailing to timber flooring threshold, balcony, tiling, and junction of balcony tiling to curtainwall."*

610. After some correspondence between the parties, the Respondent *instructed the Claimant;*

"Pursuant to clause 29, and 30, the Contractor is directed as follows:

Provide as built surveys, which show for each constructed level:

** as built levels;*

** the RL on the approved DA plans;*

** all areas of slab deflection clearly identified.*

The contractor is requested to provide this information by COB, Wednesday 1st May 2024"

611. The time for provision of that survey was extended to 17 May 2024 by the Respondent. The Claimant provided the surveys on 4 June 2024.

612. On 24 June 2024, the Respondent's architect requested the measurements the Claimant provided its Subcontractor to facilitate manufacture. The architect asserted the Claimant should have measured the as constructed opening sizes and manufactured accordingly as required by the façade specification.

613. On 24 June 2024, the Claimant again requested a direction on how to proceed and referred to its previous RFI proposing 2 options, which is explained above.

614. On 26 June 2024, the Respondent instructed the Claimant as follows;

"Please remove offsite and replace the sliding doors, while they are out, please issue the shop drawings for waterproofing to CPA (for approval) and ensure there are waterproofed behind

the sliding doors prior to proceeding as per the shop drawings once approved by CPA."

615. On 16 October 2024, the Claimant submitted its notice of intention to claim for the additional survey of the deflection of the slabs in the amount of $44,187.35.

616. The Respondent relies on clauses 29 and 30 as a basis for rejecting this claim.

617. Clauses 29 and 30 relate to quality of the work and testing as follows;

"29. Quality

29.1 Quality of material and work

Unless otherwise provided the Contractor shall use suitable new materials and proper and tradesmanlike workmanship.

**29.2 Quality assurance*

If the Contract elsewhere requires further quality assurance, the Contractor shall:

a) plan, establish and maintain a conforming quality system; and

b) ensure that the Superintendent has access to the quality system of the Contractor and subcontractors so as to enable monitoring and quality auditing.

Any such quality system shall be used only as an aid to achieving compliance with the Contract and to

document such compliance. Such system shall not discharge the Contractor's other obligations under the Contract.

29.3 Defective Work

If the Superintendent becomes aware of work done (including material provided) by the Contractor which does not comply with the Contract, the Superintendent shall as soon as practicable give the Contractor written details thereof. If the subject work has not been rectified, the Superintendent may direct the Contractor to do any one or more of the following (including times for commencement and completion):

a) remove the material from the site;

b) demolish the work;

c) reconstruct, replace or correct the work; and

d) not deliver it to the site.

If:

a) the Contractor fails to comply with such a direction; and

b) that failure has not been made good within 8 days after the Contractor receives written notice from the Superintendent that the Principal intends to have the subject work rectified by others,

the Principal may have that work so rectified and the Superintendent shall certify the cost incurred as moneys due from the Contractor to the Principal.

29.4 Acceptance of defective work

Instead of a direction pursuant to subclause 29.3, the Superintendent may direct the Contractor that the Principal elects to accept the subject work, whereupon there shall be a deemed variation.

29.5 Timing

The Superintendent may give a direction pursuant to this clause at any time before the expiry of the last defects liability period.

29.6. Sales Contracts

In addition to any other rights of the Principal or the Superintendent under sub clause, 29.3, the Contractor acknowledges that the Principal has or may have sales contracts for the dwellings, and that the interior finish of the dwellings must be completed to the standard, stated in or reasonably ascertainable from the contract documents.

30 Examination and testing

30.1 Tests

At any time before the expiry of the last defects liability period, the Superintendent may direct that any WUC be tested. The Contractor shall give such assistance and

samples and make accessible such parts of WUC as may be directed by the Superintendent.

30.2 Covering up

The Superintendent may direct that any part of WUC shall not be covered up or made inaccessible without the Superintendent's prior written direction.

30.3 Who conducts

Tests shall be conducted as provided elsewhere in the Contract or by the Superintendent or a person (which may include the Contractor) nominated by the Superintendent.

618. Clauses 29 and 30 have no relevance to this claim.

619. I have also read the Scott Schedules provided by the Respondent to the Claimant on 15 April 2024. There is no mention of slab deflections or of concrete slabs not being built in accordance with the Contract.

620. There is no nexus between the carrying out of a survey report measuring as-built slab deflections and the Scott Schedules.

621. I am persuaded the Respondent instructed the Claimant to engage a surveyor to carry out measurements of slab deflections and that Contractor was not required to carry out any such survey under the Contract.

622. I am also persuaded that the Respondent assumed design responsibility for checking shop drawings as set out in Part H of the Annexure, which states;

> *"Reviewing & approving shop drawings submitted by the Contractor & its subcontractors for dimensional correctness and conformity to the Contract documents;"*

623. That clause was unequivocal.

624. The Respondent assumed responsibility for ensuring the shop drawings were coordinated with all other design documents, which included the Respondent's deflection assessment report it issued on 27 April 2022 from which it was able to ascertain surface floor level to underside of slab levels and confirm the dimensional correctness of the Claimant's shop drawings.

625. Accordingly, the Respondent's assertion that the Claimant should have carried out its own site measurements at its costs has no contractual support.

626. The Respondent made no submissions in relation to the quantum claimed by the Claimed.

627. I, therefore, do not accept either of the Respondent's reasons for withholding payment as valid reasons.

628. Accordingly, for the reasons set out above at paragraphs 350) to 355), I have decided the Claimant is entitled to payment of the claimed amount of $34,261.92 for its variation claim referenced; HCV179.

CLAIM ITEM HCV 197 HYDRAULIC DESIGN CHANGES

Payment Claim

629. The Claimant claims $37,849.34 for a variation to installing additional cast-in services, balcony hose taps and hot water systems across levels 5 – 17.

630. In the Adjudication Application the Claimant, has considered the Glover Report and has changed its position and now claims; $28,533.97.

Payment Schedule

631. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) *"…As the installed Fastflow pipework installed by the contractor was a defective, and or not in accordance with the Contract, drawings were issued to rectify the Contractor's works and do not constitute a variation under clause 36.1 of the Contract where the Principal was required to rectify the Contractor's existing works."*

(b) *"… the Contractor is not entitled to a double payment for overheads and margin, where a variation will include a reasonable rate for overheads and profit. 10% is a reasonable rate for overheads and profit only."*

(c) *"The Contractor's variation submission references SI No 7 only which does not reflect the true nature of the Fastflow pipework matter.*

The Hydraulic Engineer assessed that the installed Fastflow pipes were defective. Any subsequent revision of the hydraulic drawings was undertaken to work around these defective works.

We note the following (non exhaustive) instructions issued in connection with the defective fastflow works.

SI No 69 issued on 15 Dec 2023 (referencing Clause 29.3)

SI No 103 issued on 24 Jan 2024 (referencing Clause 29.3)

SI No 115 issued on 14 Feb 2024 (referencing Clause 29.3)

SI No 176 issued on 18 April 2024 (referencing Clause 29.3)

The fact that the Contractor's submission is completely silent on the above in our view highlights the spurious nature of this claim.

*We also note that **multiple instructions had to be issued in connection with the Fastflow works** as the Contractor repeatedly failed to proceed with these rectification works.*

At this stage nobody has certified that compliant rectification works have been completed to close out this matter."

Decision

632. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the

Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

633. The Claimant asserts it is entitled to payment for installing additional cast-in services, balcony hose taps and hot water systems across levels 5 – 17 because the Respondent changed its design.

634. On 19 May 2023, the Respondent instructed (by way of its SI 7) to Claimant to perform a changed hydraulic design that included additional cast-in services, balcony hose taps and hot water systems across levels 5 – 17.

635. The Respondent asserts the Claimant has no entitlement to payment because the Fastflow pipework was defective as was made clear to the Claimant by way of SI 69, 103, 115 and 176 that were issued from 15 December 2023 to 18 April 2024.

636. On 16 October 2024, the Claimant submitted its notice of intention to claim for the additional cast-in services, balcony hose taps and hot water systems across levels 5 – 17 in the amount of $37,849.34.

637. Marcus Sebastian of the Claimant has explained that this claim for additional cast-in services, balcony hose taps and hot water systems across levels 5 – 17 is unrelated to defects in the Fastflow, which is a system of drainage pipework.

638. Given there is no Nexus between the provision of additional cast-in services, balcony hose taps and hot water systems across levels 5 – 17 and the Fastflow drainage system, the Respondent has failed to provide any valid reason for withholding payment.

639. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $17,943.00, for additional cast-in services, balcony hose taps and hot water systems across levels 5 – 17 for the reasons set out above at paragraphs 350) to 355);

640. I do accept, however that the Claimant is not entitled to claim for additional allowance for Contractor to manage procurement, administration of subcontract variations, EDMS, payments and the like (**Allowance**) and BWIC and Office Overheads.

641. The amount that I have decided the Claimant is entitled to receive is; Claimant claimed $28,533.97, less $960.00 for the Allowance and less $3,652.00

642. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $23,921.91 for its variation claim referenced; HCV197.

CLAIM ITEM HCV 207 ADDITIONAL TUNDISHES AND FLOOR WASTES – LEVELS 18 TO 22

Payment Claim

643. The Claimant claims $10,294.77 for a variation to install additional tundishes and floor wastes to the steam showers in Type M units across levels 18-22.

644. In the Adjudication Application the Claimant, has considered the Glover Report and has changed its position and now claims; $8,606.88.

Payment Schedule

645. The Respondent has scheduled $924.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) *"…The Contractor's claims for additional floor wastes were valued by the Superintendent as part of HCV 104 and the Contractor's claim for these items is a double payment being claimed which it is not entitled to."*

(b) *"… The Contractor also claims office overheads, BWIC and "Allowance for the Contractor to manage procurement, administration of subcontract variations, EDMS, payments and the like" in addition to margin in respect of this claim, effectively claiming 19.5% margin plus extra overhead related costs; per clause 36.4 the Contractor is not entitled to a double payment for overheads and margin, where a variation will include a reasonable rate for overheads and profit. 10% is a reasonable rate for overheads and profit only."*

(c) *"We also note that the Contractor has submitted a series of further new variations, which do have some breakdown, but no substantiation or supporting documentation,*

-HCV 207

…

These new variations claims are not valid as they: -

1. Have been received for the first time with Progress Claim 36 on 16 October 2024 over a month after the Contractor has departed site, and have not been notified as per Clause 36.1 and are therefore time barred;

2. Do not provide any supporting evidence for these claims at all, as per Clause 36.5;

3. Notwithstanding this, as breakdowns have been provided we have assessed each of these variations and refer to the appended Variations_Claim 36_ September 2024."

Decision

646. I have decided above at paragraphs 88) to 218) that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

647. The Claimant asserts it is entitled to payment for installing additional cast-in services, balcony hose taps and hot water systems across levels 5 – 17 because the Respondent changed its design and instructed it to perform the work set out in the changed design.

648. On 26 June 2024, the Respondent instructed (by way of its SI 269) the Claimant to construct hydraulic design that included additional tundishes and floor wastes across levels 5 – 17 and was different to the design provided at the time of Contract. The Respondent instructed as follows;

> *"Pursuant to Contract clause 36.1, the Contractor is to proceed with the updated documentation for construction as follows:*
>
> *Hydraulic 18600 – Hydraulic_Transmittal_New – 25.06.2024.*
>
> ***We note that the assessment of any additional/negative/neutral costs in association with this direction will be assessed by the Superintendent in accordance with clause 36.4, and with regard to the contract documents**."*

649. On 16 October 2024, the Claimant submitted its notice of intention to claim for the additional cast-in services, balcony hose taps and hot water systems across levels 5 – 17 in the amount of $10,294.77.

650. The Claimant asserts that it was accepted practice between the parties that the Respondent would issue new designs under clause 36.1 of the Contract, which would be considered by the Claimant in sufficient time for the construction to proceed as scheduled and further the Respondent would value its variation in due course. In other words, the parties agreed it was not necessary to strictly comply with the notice period requirement set out in clause 36.1.

651. The last paragraph of the Respondent's SI 269 confirms the Claimant's above assertion. The Superintendent indicated it would value the variation it had instructed under clause 36.4 and implicitly agreed that there was no need to make a submission as to whether it was the direction was a direction to vary WUC because it satisfied the form requirements of the second paragraph of clause 36.1.

652. Accordingly, I am not persuaded that the time bar on clause 36.1 can operate when the parties have evidently agreed something different. The parties appear to have which was confirmed by the Respondent.

653. The Respondent asserts the Claimant has no entitlement to payment because the additional floor wastes formed a part of the Claimant's claim referenced HCV 104. The Respondent asserts the Claimant has claimed twice for the same work under HCV 104 and HCV 207.

654. Notwithstanding that the Respondent indicated on 26 June 2024, that it would value the variation shown on the changed design it

had issued, I have also reviewed the Claimant's notice of intention to claim dated 16 October 2024. I am persuaded that there was ample description and pricing provided and together with the Respondent's drawings of 26 June 2024, the Respondent understood or ought to have understood the variation being claimed and how it had been valued.

655. I am satisfied with the Claimant's explanation that HCV 104 only included 4 floor wastes which are not measured in HCV 207.

656. I do, however, accept the Respondent's reason for withholding payment on the basis that the Claimant is not entitled to claim for additional allowance for Contractor to manage procurement, administration of subcontract variations, EDMS, payments and the like (**Allowance**) nor for the BWIC and Office Overheads.

657. For the reasons set out above, the amount the Claimant is entitled to receive is; $8,606.88 claimed by the Claimant, less $240.00 for the Allowance and less $336.94 for Office Overheads.

658. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $8,029.94 for its variation claim referenced; HCV 207.

CLAIM ITEM HCV 208 SOU PARTITIONS BETWEEN TYPE E & E1 APRARTMENTS – PW03 WALLS

Payment Claim

659. The Claimant claims $137,141.01 for a variation to adjust constructed framing and supply and install boxed studs and supply and install "niches" in the PW03 walls between Type E & Type E1 units.

660. In the Adjudication Application the Claimant, has considered the Glover Report and has changed its position and now claims; $36,269.16.

Payment Schedule

661. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) *"…The Contractor relies on site instructions 138 and 231 as the basis of this variation claim alleged to contain additional work, however there are no changes or additional works in those instructions where:*

** The information provided in Site Instructions 138 and 231 are instructions by the Superintendent to follow the architectural specifications for the partitions and is information which the Contractor could have obtained itself or sent to CSR/Rondo for confirmation.*

Niches have always been required by the Contract for fire rated walls however the Contractor refused to get recommendations from suppliers including CSR/Rondo for this niche detail, hence it being issued. Refer to section 1.4 of the 0522 partitions specification requiring the Contractor to submit evidence of conformance to products in respect of fire performance including fire hazard properties and fire-resistance levels and recommendations of manufacturers.

The Silencer F detail is a well-known CSR product (niche) out of the Red Book; the Silencer F is a custom supplied product by CSR. The Principal's design showed PW03 is a 92mm silent stud wall for all services penetrating through it and PW03 is a fire rated wall.

The Contractor did not comply with its contractual requirement to go through a submittal process whereby

CSR would advise on the Silencer F product as its custom system, with additional box studs to support the niches.

** There is no additional work in circumstances where a niche was required as part of the Principal's design for PW03 being a fire rated wall type, and the construction of niches forms part of the Contractor's works under the Contract.*

** In respect of Site Instruction 231, the instruction regarding the BMT is noted within the Architectural Specification 0522 in section 3.3 whereby the stud framing system expressly notes 0.75 BMT bottom tracks, rebate top tracks and steel wall studs, therefore this is not a change to the works pursuant to clause 36.1 of the Contract.*

** See also SI 165 were information was issued in good faith only because of the Contractor's failure to comply with its obligations under the Contract.*

Notwithstanding the Principal does not agree HCV 208 is a valid variation, the Contractor also claims other allowances, including items 1.3.1 to 1.3.4 being allowance for co-ordination with its subcontractor and administration of payments and variations, BWIC at 5% and office overheads at 4.5%. Separately, the Contractor also claims margin at 10% of the total variation costs. Items 1.3.1 to 1.3.2 concern works already allowed for in overheads and profit for variation claims and the Contractor is not entitled to additional payment for such work. As to items 1.3.3 to 1.3.4, BWIC and office overheads are not claimable where clause 36.4 notes the pricing of variations will include a reasonable amount for profit and overheads, therefore the Contractor is not entitled to additional payment for overhead related items via items 1.3.3 and 1.3.4 in addition to

10% margin. 10% is a reasonable rate for overheads and profit only."

(b) *The Contractor has completely* ***failed to meet their obligations of Specifications 0522 and 0531****, including: -*

Submissions

Certification

Manufacturers Recommendations

Section 3.3 Light steel frames, including stud framing, quiet stud framing, and alternative to quiet stud framing.

We do not assess that there is any variation cost. We further note that this argument was also set out in the Partitions Delay EOT 52 which was rejected by the Superintendent and further rejected in Adjudication.

The Contractor throughout has failed to comply with the requirements of the partitions specification, as set out in multiple variation and delay assessments.

Any update to partition types has been in response to the Contractor's complete failure to provide submissions as required under the Specification.

The Contractor refers to SI 138 and 231, but remains completely silent on the long body of correspondence which has been issued in connection with the Contractor's failures to comply with the Architectural specification and provide the information required, including but not limited to: -

SI75

SI80

SI104

SI109

SI119

SI155

SI165

SI185

SI275

Any information issued in connection with the partitions (ie stud sizes, BMT gauges, niches) has generally been in response to the Contractors failures to comply with the specification with regards submissions and manufacturers recommendations.

We further note that SI275 issued a defect notice in connection with the PW03 wall which the Contractor is attempting to claim a variation for in V208.

No substantiation and we reasonably assess this is include [sic] in the builders margin percentage of 10% for overheads and profit applied to variation costs below.

Included in margin percentage as per Clause 36.4 below. This is essentially a double claim for margin from the Contractor and not acceptable.

(c) *"We also note that the Contractor has submitted a series of further new variations, which do have some breakdown, but no substantiation or supporting documentation,*

…

-HCV 208

…

These new variations claims are not valid as they: -

> *1. Have been received for the first time with Progress Claim 36 on 16 October 2024 over a month after the Contractor has departed site, and have not been notified as per Clause 36.1 and are therefore time barred;*
>
> *2. Do not provide any supporting evidence for these claims at all, as per Clause 36.5;*
>
> *3. Notwithstanding this, as breakdowns have been provided we have assessed each of these variations and refer to the appended Variations_Claim 36_ September 2024."*

Decision

662. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

663. The Claimant asserts it is entitled to payment for a variation to adjust constructed framing and supply and install boxed studs and supply and install "custom niches" (5 per floor) in the PW03 walls between Type E & Type E1 units because the Respondent changed its design and instructed it to perform the work set out in the changed design.

664. Niches are pressed metal sections installed within walls and fire rated walls where hydraulic and electrical services are reticulated.

665. In the Respondent's SI 138, the Respondent directed the Claimant to rectify non-complying ceilings and walls. That part of the direction, however, has nothing to do with the changed design the Respondent instructed.

666. On 28 May 2024, the Respondent instructed (by way of its SI 231) the Claimant to construct the boxed studs whose wall thickness was increased from 0.7mm to 0.75mm and to supply and install Rondo 562 wall brackets. The Respondent instructed as follows;

> *"Pursuant to Contract clause 36.1, the Contractor is to proceed with the updated documentation for construction as follows:*
>
> *Structural GC180407 – External Stud design Rev 03 – 240527*
>
> ***We note that the assessment of any additional/negative/neutral costs in association with this direction will be assessed by the Superintendent in accordance with clause 36.4, and with regard to the contract documents**."*

667. On 10 October 2024, the Claimant submitted its notice of intention to claim for $137,141.01 for a variation to adjust constructed framing and supply and install boxed studs and

supply and install "custom niches" (5 per floor) in the PW03 walls between Type E & Type E1 units.

668. The Respondent asserts;

> *"…Niches have always been required by the Contract for fire rated walls however the Contractor refused to get recommendations from suppliers including CSR/Rondo for this niche detail, hence it being issued. Refer to section 1.4 of the 0522 partitions specification requiring the Contractor to submit evidence of conformance to products in respect of fire performance including fire hazard properties and fire-resistance levels and recommendations of manufacturers."*

669. In relation to the claim for a variation, the Claimant bears the burden of proof to explain why it was not liable for the change of design necessitating the custom niches instructed by the Respondent. Simply asserting there was a change of design, which is a variation, is not sufficient as it could have been that its detailed design was deficient.

670. The Claimant, however, failed to explain with supporting evidence that the Contract drawings and specifications did not require niches in the PW03 walls. Specifically, prior to the changed design, for the PW03 walls that contained electrical and hydraulic services, what did the Contract require to satisfy the fire rating and acoustic requirements or otherwise inform me as to why the Respondent's reasons for withholding payment in relation to the niches was incorrect.

671. The Claimant has similarly claimed the Rondo 562 wall brackets and the thicker boxed studs were changes to the design provided in Part G of the Annexure to the Contract.

672. The Claimant, however, failed to explain with supporting evidence that the Contract drawings and specifications did not require the Rondo 562 wall brackets and the thicker boxed studs.

673. The Claimant asserts that it was accepted practice between the parties that the Respondent would issue new designs under clause 36.1 of the Contract, which would be considered by the Claimant in sufficient time for the construction to proceed as scheduled and further the Respondent would value its variation in due course. In other words, the parties agreed it was not necessary to strictly comply with the notice period requirement set out in clause 36.1.

674. The last paragraph of the Respondent's SI 231 confirms the Claimant's above assertion. The Superintendent indicated it would value the variation it had instructed under clause 36.4 and implicitly agreed that there was no need to make a submission as to whether it was the direction was a direction to vary WUC because it satisfied the form requirements of the second paragraph of clause 36.1.

675. Accordingly, I am not persuaded that the time bar on clause 36.1 can operate when the parties have evidently agreed something different. The parties appear to have which was confirmed by the Respondent.

676. The Respondent asserts the Claimant has no entitlement to payment because the additional floor wastes formed a part of the Claimant's claim referenced HCV 104. The Respondent asserts the Claimant has claimed twice for the same work under HCV 104 and HCV 207.

677. Notwithstanding that the Respondent indicated on 26 June 2024, that it would value the variation shown on the changed design it had issued, I have also reviewed the Claimant's notice of

intention to claim dated 16 October 2024. I am persuaded that there was ample description and pricing provided and together with the Respondent's drawings of 26 June 2024, the Respondent understood or ought have understood the variation being claimed and how it had been valued.

678. Given there is no Nexus between the provision of additional cast-in services, balcony hose taps and hot water systems across levels 5 – 17 and the Fastflow drainage system, the Respondent has failed to provide any valid reason for withholding payment.

679. Accordingly, I have decided the Claimant is not entitled to payment of the claimed amount for its variation claim referenced; HCV 208.

CLAIM ITEM HCV 209 150 MM TESTABLE BACKFLOW PREVENTION DEVICE

Payment Claim

680. The Claimant claims $13,604.11 for a variation to install a 150 mm testable backflow prevention device.

681. In the Adjudication Application the Claimant, has considered the Glover Report and has changed its position and now claims; $13,233.47.

Payment Schedule

682. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) *"…The Principal disagrees with the Superintendent's assessment of this item. The works claimed by the Contractor are not a variation per clause 36.1 as the hydraulics/fire sprinkler specification forming part of the Contract at section 0823, subsection 3.2 states that backflow prevention is within the Contractor's scope of works therefore the change claimed by the Contractor is not a change to the Contract. In any event, backflow is required under Australian Standards and is a compliance requirement for Form 15s pursuant to clause 9.6 of the Contract and is therefore within scope and not payable."*

(b) *"We also note that the Contractor has submitted a series of further new variations, which do have some breakdown, but no substantiation or supporting documentation,*

…

-HCV 209

…

These new variations claims are not valid as they: -

> *1. Have been received for the first time with Progress Claim 36 on 16 October 2024 over a month after the Contractor has departed site, and have not been notified as per Clause 36.1 and are therefore time barred;*
>
> *2. Do not provide any supporting evidence for these claims at all, as per Clause 36.5;*
>
> *3. Notwithstanding this, as breakdowns have been provided we have assessed each of these variations and refer to the appended Variations_Claim 36_ September 2024."*

Decision

683. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

684. The Claimant asserts it is entitled to payment for installing a 150 mm testable backflow prevention device because the Respondent changed its design and instructed it to perform the work set out in the changed design.

685. On 19 May 2023, the Respondent instructed (by way of its SI 7) the Claimant to supply and install a 150 mm testable backflow prevention device, which was different to the design provided at the time of Contract. The Respondent instructed as follows;

> *"Pursuant to Contract clause 36.1, the Contractor is to proceed with the updated hydraulic documentation for construction as per the appended Drawings Transmittal:*

686. On 10 October 2024, the Claimant submitted its notice of intention to claim for a 150 mm testable backflow prevention device in the amount of $13,604.11.

687. The Respondent relies of the time bar of clause 36.1.

688. The Claimant has not explained why the Respondent should be estopped from insisting on strict simply compliance with the time requirement of clause 36.1 such as evidence indicating the Superintendent would assess the claim and the Claimant should proceed with the works the subject of the instruction that gave rise to the claim.

689. Accordingly, I accept that the Claimant has waived its right to claim payment for this item because it failed to explain why it was entitled to payment for this change of design and the Respondent's assertion was incorrect and it failed to submit its claim within the requisite period required under clause 36.1.

690. Accordingly, I have decided the Claimant is not entitled to payment of the claimed amount for its variation claim referenced; HCV 209.

CLAIM ITEM HCV 210 HYDRAULIC DESIGN CHANGES – LEVELS 18 TO 35

Payment Claim

691. The Claimant claims $72,830.54 for a variation to supply & install a hose tap on each of 4 balconies, change the location of the ensuite for Type E & Type E1 units, change the location of the balcony drainage in Type M units, supply & install 3 additional bathrooms an2 additional laundries on level 19, amend drainage and relocate certain bathrooms and supply and install a hose tap on each of 4 balconies across levels 20 to 35.

692. In the Adjudication Application the Claimant, has considered the Glover Report and has changed its position and now claims; $62,862.51.

Payment Schedule

693. The Respondent has scheduled $30,220.68.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) *"…The Contractor claims 'additional works' in addition to margin at 10%. Pursuant to clause 36.4 of the Contract, the Contractor is only entitled to a reasonable amount for profit and overheads, therefore the Contractor is not entitled to claim the 'additional works' in addition to margin, where the additional works are works which are compensated by margin, such as administration of subcontracts, BWIC and office overheads and the Contractor cannot claim a double payment for such costs. 10% is a reasonable rate for overheads and profit only."*

(b) *We acknowledge that hose taps are not shown on Contract drawings. Reasonable amount included for labour (2 hours per tap) at market rate. No substantiation from subcontractor provided.*

Changes to sanitary fixtures covered in our separate assessment of HCV 112.

No substantiation of additional costs provided, such as quantities, subcontractors quotations etc.

We further note that the revised drawing was issued on 19 April 2023, well in advance of plumbing works in this area (tower was up to level We further note that the revised drawing was issued on 19 April 2023, well in advance of plumbing works in this area (tower was up to level three in April 2023, so there are no aborted plumbing works.3 in April 2023, so there are no aborted plumbing works.

The highlighted drawings provided show in our view incidental changes to the plumbing layout only. The Contractor has not provided quantities or reasonably demonstrated any additional cost incurred to them.

Regarding the claim for Additional Works: No substantiation and we reasonably assess this is include [sic] in the builders margin percentage of 10% for overheads and profit applied to variation costs below.

Included in margin percentage of 10% as per Clause 36.4 below. This is essentially a double claim for margin from the Contractor and not acceptable

(c) *"We also note that the Contractor has submitted a series of further new variations, which do have some breakdown, but no substantiation or supporting documentation,*

…

-HCV 210

…

These new variations claims are not valid as they: -

1. Have been received for the first time with Progress Claim 36 on 16 October 2024 over a month after the Contractor has departed site, and have not been notified as per Clause 36.1 and are therefore time barred;

2. Do not provide any supporting evidence for these claims at all, as per Clause 36.5;

3. Notwithstanding this, as breakdowns have been provided we have assessed each of these variations and refer to the appended Variations_Claim 36_ September 2024."

Decision

694. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

695. The Claimant asserts it is entitled to payment to supply & install a hose tap on each of 4 balconies, change the location of the ensuite for Type E & Type E1 units, change the location of the balcony drainage in Type M units, supply & install 3 additional bathrooms and 2 additional laundries on level 19, amend drainage and relocate certain bathrooms and supply and install a hose tap on each of 4 balconies across levels 20 to 35, because the

Respondent changed its design and instructed it to perform the work set out in the changed design.

696. On 19 May 2023, the Respondent instructed (by way of its SI 7) to Claimant to execute a variation under clause 36.1, being for hydraulic services relating to changed hydraulic designs as described above.

697. On 16 October 2024, the Claimant submitted its notice of intention to claim for supply & install a hose tap on each of 4 balconies, change the location of the ensuite for Type E & Type E1 units, change the location of the balcony drainage in Type M units, supply & install 3 additional bathrooms and 2 additional laundries on level 19, amend drainage and relocate certain bathrooms and supply and install a hose tap on each of 4 balconies across levels 20 to 35.

698. The Respondent asserts the Claimant is not entitled to make this claim as it failed to notify the Respondent within the period prescribed under clause 36.1.

699. I find that assertion without merit because the Respondent has already made a determination of this claim in the amount of $30,220.68.00. Accordingly, if the Respondent was entitled to rely on the time bar, it waived its right to do so at the time it provided the payment schedule.

700. Accordingly, I accept the Claimant's submission on this point that the Respondent is estopped from now relying on strict compliance with clause 36.1 in relation to this claim because by its conduct, it accepted the claim and scheduled an amount for payment accordingly.

701. I have reviewed the particulars of the notice of intention to claim the Claimant submitted on 16 October 2024 and the Glover

Report, I am satisfied the Claimant provided sufficient explanation for the Respondent to assess the Claim. This objection also has no merit as it is self evident from the Payment Schedule that the Respondent understood what was being claimed, it advised the scheduled amount for payment and provided its technical reasons for withholding payment.

702. I accept the Claimant's explanation that it carried out no abortive work. Furthermore, I do not see in the notice of intention to claim submitted by the Claimant any claim for "abortive work".

703. I also do not accept the unsupported assertion of the Respondent's estimate of what is a "reasonable time" to install hose taps. It was up to the Respondent to provide a supported reason for withholding payment including an expert opinion, or a quotation or an extract from one of the many industry pricing guides.

704. I do, however, accept the Respondent's reason for withholding payment on the basis that the Claimant is not entitled to claim for additional allowance for Contractor to manage procurement, administration of subcontract variations, EDMS, payments and the like (**Allowance**) nor for the BWIC and Office Overheads.

705. For the reasons set out above, the amount the Claimant is entitled to receive is; $62,862.51 claimed by the Claimant, less $960.00 for the Allowance and less $1,636.54 for Office Overheads.

706. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $60,085.97 for its variation claim referenced; HCV 210.

CLAIM ITEM HCV 211 FRIDGE TAPS

Payment Claim

707. The Claimant claims $11,519.66 for a variation to install an additional fridge tap to each of 119 units.

Payment Schedule

708. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) *"…The Payment Claim does not attach a claim for a variation associated with HCV 211.*

Per clause 36.1, the Contractor failed to give the Superintendent notice of a variation within 10 business days of the instruction/direction, therefore HCV 211 is time barred and the Contractor has no entitlement to a variation on this basis.

The Contractor has also failed to identify a change in scope or otherwise pursuant to clause 36.1 to support this variation claim, meaning the Contractor has not substantiated this claim.

Notwithstanding the Principal does not agree HCV 211 is a valid variation, the Contractor claims 'additional works' at items 1.5 to 1.7 in addition to margin at 10% (see item 1.8) in its Payment Claim variation breakdown. Pursuant to clause 36.4 of the Contract, the Contractor is only entitled to a reasonable amount for profit and overheads, therefore the Contractor is not entitled to claim the 'additional works' in addition to margin, where the additional works are works which are already compensated by margin, such as administration of subcontracts, BWIC and office overheads and the Contractor

cannot claim a double payment for such costs. 10% is a reasonable rate for overheads and profit only."

(b) *"We also note that the Contractor has submitted a series of further new variations, which do have some breakdown, but no substantiation or supporting documentation,*

-HCV 211

…

These new variations claims are not valid as they: -

1. Have been received for the first time with Progress Claim 36 on 16 October 2024 over a month after the Contractor has departed site, and have not been notified as per Clause 36.1 and are therefore time barred;

2. Do not provide any supporting evidence for these claims at all, as per Clause 36.5;

3. Notwithstanding this, as breakdowns have been provided we have assessed each of these variations and refer to the appended Variations_Claim 36_ September 2024."

Decision

709. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September

2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

710. The Claimant asserts it is entitled to payment for installing install an additional fridge tap to each of 119 units because the Respondent changed its design and instructed it to perform the work set out in the changed design.

711. On 16 January 2024, the Respondent instructed (by way of its SI 81) the Claimant to construct hydraulic design that included additional tundishes and floor wastes across levels 5 – 17 and was different to the design provided at the time of Contract. The Respondent instructed as follows;

> *"Pursuant to Contract clause 36.1, the Contractor is to proceed with the updated documentation for construction as follows:*
>
> *Hydraulic PCS_2021_3139_Amended Stamped Approved Plans dated 10 May 2023*
>
> ….
>
> ***We note that the assessment of any additional/negative/neutral costs in association with this direction will be assessed by the Superintendent in accordance with clause 36.4, and with regard to the contract documents**."*

712. On 23 January 2024, the Claimant sent the Respondent a notice of variation concerning the Council Approved Hydraulic Plans and Permit 160124.

713. On 16 October 2024, the Claimant claimed payment for this variation in the amount of $11,519.16.

714. The Respondent asserts the Claimant is not entitled to make this claim and, accordingly is barred under clause 36.1 from doing so.

715. Pursuant to clause 36.1, the Claimant notified the Respondent on 23 January 2024 that it considered the work directed under the Respondent's instruction SI 81, was a variation.

716. Additionally, the Claimant asserts that it was accepted industry practice and accepted between the parties that the Respondent would issue new designs under clause 36.1 of the Contract, which would be considered by the Claimant in sufficient time for the construction to proceed as scheduled and further the Respondent would value its variation in due course. In other words, the parties agreed it was not necessary to strictly comply with the notice period requirement set out in clause 36.1.

717. The last paragraph of the Respondent's SI 81 confirms the Claimant's above assertion. The Superintendent indicated it would value the variation it had instructed under clause 36.4 and implicitly agreed that there was no need to make a submission as to whether it was the direction was a direction to vary WUC because it satisfied the form requirements of the second paragraph of clause 36.1.

718. Notwithstanding that the Claimant notified the variation within the time prescribed for giving notice of a variation under clause 36.1, the time bar in clause 36.1 does not operate when the parties agree something different. The Respondent's notice indicates the parties had agreed, expressly or implicitly, that the Respondent would value the variation and the Claimant would perform the work as instructed.

719. The Claimant was entitled to submit a claim for payment for HCV 211 with the Payment Claim because it had complied with the requirements of clause 36.1 by notice and by agreement.

720. I do, however, accept the Respondent's reason for withholding payment on the basis that the Claimant is not entitled to claim for additional allowance for Contractor to manage procurement, administration of subcontract variations, EDMS, payments and the like (**Allowance**) nor for the BWIC and Office Overheads.

721. For the reasons set out above, the amount the Claimant is entitled to receive is; $11,519.16 claimed by the Claimant, less $33.60 for the Allowance and less $300.89 for Office Overheads.

722. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $11,184.67 for its variation claim referenced; HCV 211.

CLAIM ITEM HCV 212 LEVEL 36 HYDRAULIC CHANGES

Payment Claim

723. The Claimant claims $6,145.50 for a variation to relocate the bathrooms and supply & install additional cast ins and hose taps to each balcony on level 36.

724. In the Adjudication Application the Claimant, has considered the Glover Report and has changed its position and now claims; $6,093.26.

Payment Schedule

725. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) *"…The Payment Claim does not attach a claim for a variation associated with HCV 212. Per clause 36.1, the Contractor failed to give the Superintendent notice of a variation within 10 business days of the instruction/direction, therefore HCV 212 is time barred and the Contractor has no entitlement to a variation on this basis.*

(b) *The Contractor has also failed to identify a change in scope or otherwise pursuant to clause 36.1 to support this variation claim, meaning the Contractor has not substantiated this claim.*

(c) *Notwithstanding the Principal does not agree HCV 212 is a valid variation, the Contractor claims 'additional works' at items 1.5 to 1.7 in addition to margin at 10% (see item 1.8) in its Payment Claim variation breakdown. Pursuant to clause 36.4 of the Contract, the Contractor is only entitled to a reasonable amount for profit and overheads, therefore the Contractor is not entitled to claim the 'additional works' in addition to margin, where the additional works are works which are already compensated by margin, such as administration of subcontracts, BWIC and office overheads and the Contractor cannot claim a double payment for such costs. 10% is a reasonable rate for overheads and profit only.."*

(d) *"We also note that the Contractor has submitted a series of further new variations, which do have some breakdown, but no substantiation or supporting documentation,*

-HCV 207

…

These new variations claims are not valid as they: -

1. Have been received for the first time with Progress Claim 36 on 16 October 2024 over a month after the Contractor has

departed site, and have not been notified as per Clause 36.1 and are therefore time barred;

2. Do not provide any supporting evidence for these claims at all, as per Clause 36.5;

3. Notwithstanding this, as breakdowns have been provided we have assessed each of these variations and refer to the appended Variations_Claim 36_ September 2024."

Decision

726. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

727. The Claimant asserts it is entitled to payment for to relocate the bathrooms and supply & install additional cast ins and hose taps to each balcony on level 36 because the Respondent changed its design and instructed it to perform the work set out in the changed design.

728. On 16 January 2024, the Respondent instructed (by way of its SI 81) the Claimant to construct hydraulic design that included additional tundishes and floor wastes across levels 5 – 17 and was different to the design provided at the time of Contract. The Respondent instructed as follows;

> *"Pursuant to Contract clause 36.1, the Contractor is to proceed with the updated documentation for construction as follows:*
>
> *Hydraulic PCS_2021_3139_Amended Stamped Approved Plans dated 10 May 2023*
>
> ….
>
> ***We note that the assessment of any additional/negative/neutral costs in association with this***

direction will be assessed by the Superintendent in accordance with clause 36.4, and with regard to the contract documents."

729. On 23 January 2024, the Claimant sent the Respondent a notice of variation concerning the Council Approved Hydraulic Plans and Permit 160124.

730. On 16 October 2024, the Claimant claimed payment for this variation in the amount of $6,145.50.

731. The Respondent asserts the Claimant is not entitled to make this claim and, accordingly is barred under clause 36.1 from doing so.

732. Pursuant to clause 36.1, the Claimant notified the Respondent on 23 January 2024 that it considered the work directed under the Respondent's instruction SI 81, was a variation.

733. Additionally, the Claimant asserts that it was accepted industry practice and accepted between the parties that the Respondent would issue new designs under clause 36.1 of the Contract, which would be considered by the Claimant in sufficient time for the construction to proceed as scheduled and further the Respondent would value its variation in due course. In other words, the parties agreed it was not necessary to strictly comply with the notice period requirement set out in clause 36.1.

734. The last paragraph of the Respondent's SI 81 confirms the Claimant's above assertion. The Superintendent indicated it would value the variation it had instructed under clause 36.4 and implicitly agreed that there was no need to make a submission as to whether it was the direction was a direction to vary WUC because it satisfied the form requirements of the second paragraph of clause 36.1.

735. Notwithstanding that the Claimant notified the variation within the time prescribed for giving notice of a variation under clause 36.1, the time bar in clause 36.1 does not operate when the parties agree something different. The Respondent's notice indicates the parties had agreed, expressly or implicitly, that the Respondent would value the variation and the Claimant would perform the work as instructed.

736. The Claimant was entitled to submit a claim for payment for HCV 212 with the Payment Claim because it had complied with the requirements of clause 36.1 by notice and by agreement.

737. I do, however, accept the Respondent's reason for withholding payment on the basis that the Claimant is not entitled to claim for additional allowance for Contractor to manage procurement, administration of subcontract variations, EDMS, payments and the like (**Allowance**) nor for the BWIC and Office Overheads.

738. For the reasons set out above, the amount the Claimant is entitled to receive is; $6,093.23 claimed by the Claimant, less $240.00 for the Allowance and less $245.34 for BWIC and less $147.20 for Office Overheads.

739. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $5,460.71 for its variation claim referenced; HCV 212.

CLAIM ITEM HCV 214 LEVEL 2 FAÇADE & LEVEL 5 SOFFIT

Payment Claim

740. The Claimant claims $19,445.63 for a variation to undertake waterproofing works to the ledges on level 2 and cur out the mechanical rebate from the soffit on level 5.

741. In the Adjudication Application the Claimant, has considered the Glover Report and has changed its position and now claims; $11,054.47.

Payment Schedule

742. The Respondent has scheduled $924.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) *"…These works form part of the Contractor's scope of works pursuant to section 0411 of the Architectural Specification and are therefore not a variation pursuant to clause 36.1."*

(b) *"… Notwithstanding the Principal does not agree HCV 214 is a valid variation, the Contractor claims 'additional works' at items 2.1 to 2.7 in addition to margin as part of HCV 214. Pursuant to clause 36.4 of the Contract, the Contractor is only entitled to a reasonable amount for profit and overheads, therefore the Contractor is not entitled to claim the 'other allowances' in addition to margin, where the additional works are works which are already compensated by margin, such as allowance for supervision, labourers for silica (which is not a variation or claim in which the Contractor is entitled to pursuant to the Superintendent's assessment), allowance for the 'Tomkins Commercial Team' to coordinate with subcontractors, BWIC at 5% and office overheads at 4.5%. The Contractor cannot claim a double*

payment for such costs, and is effectively claiming a 19.5% margin as well as the other allowances at items 2.1 to 2.5. 10% is a reasonable rate for overheads and profit only."

(c) *"We also note that the Contractor has submitted a series of further new variations, which do have some breakdown, but no substantiation or supporting documentation,*

-HCV 207

…

These new variations claims are not valid as they: -

1. Have been received for the first time with Progress Claim 36 on 16 October 2024 over a month after the Contractor has departed site, and have not been notified as per Clause 36.1 and are therefore time barred;

2. Do not provide any supporting evidence for these claims at all, as per Clause 36.5;

3. Notwithstanding this, as breakdowns have been provided we have assessed each of these variations and refer to the appended Variations_Claim 36_ September 2024."

Decision

743. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September

2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

744. The Claimant asserts it is entitled to payment to undertake application of Sikalastic works to the ledges on level 2 and cut out the mechanical rebate from the soffit on level 5 because the Respondent changed its design and instructed it to perform the work set out in the changed design.

745. The Claimant has not replied to the Respondent's assertion that the application of Sikalastic was part of the Claimant's scope of works pursuant to section 0411 of the Architectural Specification and, therefore, was not a variation.

746. In relation to the claim for a variation, the Claimant bears the burden of proof to explain why it was not liable for the alleged change of design necessitating the application of Sikalastic instructed by the Respondent. Simply asserting there was a change of design, without explanation as to what was included in the scope of works is not sufficient to displace the Respondent's reference to the architectural specification.

747. Accordingly, the Claimant is not entitled to payment for the application of Sikalastic to the level 2 façade.

748. On 24 October 2023, the Respondent instructed (by way of its SI 42) the Claimant to Sikalastic treatment of the southern façade on level 2 and to cut out a mechanical rebate on level 5 soffit and was different to the design provided at the time of Contract. The Respondent instructed as follows;

> *"Pursuant to Contract Clause 36.1 the Contractor is to proceed with the updated documentation for construction as follows: -*

Finish the southern façade on level 2 As per response to RFI 364 and confirmation by Cottee Parker dated 09 Oct 2023.

Setout of Balcony lighting for Unit Type C & C.2. As per response to RFI 352 and confirmation by Cottee Parker/MDA dated 25 Sep 2023.

Cut out of mechanical rebate on L5 Soffit as per response to RFI 349 and confirmation by Cottee Parker/OSKA dated 22 Sep 2023.

Infill of L3 redundant mechanical penetration as per response to RFI 343 and confirmation by OSKA dated 20 Sep 2023.

***We note that the assessment of any additional / negative / neutral costs in association with this direction will be assessed by the Superintendent in accordance with Clause 36.4, and with regard to the Contract documents**."*

749. On 10 October 2024, the Claimant submitted its notice of intention to claim for level 2 façade treatment & for the mechanical rebate.

750. However, the Claimant has not replied to the Respondent's assertion that the application of Sikalastic was part of the Claimant's scope of works pursuant to section 0411 of the Architectural Specification and, therefore, was not a variation. In the Adjudication Application, the Claimant acknowledges that;

> *"…Architectural specifications 0411 covers waterproofing and that section 4.1 schedules out all concrete areas…"*

751. The ledge referred to is made of concrete and presumably some surface treatment was specified. If the Claimant asserts that the

Superintendent directed a different finish, it should have made that clear, but it did not.

752. In relation to the claim for a variation, the Claimant bears the burden of proof to explain why it was not liable for the alleged change of design necessitating the application of Sikalastic instructed by the Respondent. Simply asserting there was a change of design, without explanation as to what was included in the scope of works is not sufficient to displace the Respondent's reference to the architectural specification.

753. Accordingly, the Claimant is not entitled to payment for the application of Sikalastic to the level 2 façade.

754. The claim for the cut out of a rebate arises from a mistake in the design, for which the Respondent is liable, for the reasons set out above. The defective design was explained in RFI 349 dated 20 September 2023 as follows:

> *"The window line of the balcony door in unit 403 is on a different alignment to the apartment on level five and above, however, this has not been shown on the concrete set out. The mechanical block out for level five, so if it has been cast as per the drawings but ends directly above the window line on level four. Any high-level rectification works need to be completed behind the safety of the screens. Please advise how this issue should be rectified.*

755. The Respondent provided a response on 21 September 2023 as follows;

> *"The mechanical rebate can be cut out of the soffit of level five slab. This should not interfere with any of the cast in PT tendons."*

756. Pursuant to Part H of the Annexure, the Respondent was responsible for the dimensional accuracy of all drawings etc…

Failing to indicate a rebate in the correct location is an error of design for which the Respondent is liable.

757. Accordingly, I am persuaded that the Respondent provided a direction to the Claimant to carry out rectification work arising from an error on its drawings, which was a variation for the purposes of clause 36.1 of the Contract.

758. The Claimant requested the Respondent provide a direction to carry out the cutting of the mechanical rebate on 22 September 2023 and 18 October 2023.

759. On 24 October 2023, the Respondent instructed (by way of its SI 42) the Claimant to cut out a mechanical rebate on level 5 soffit and was different to the design provided at the time of Contract. The Respondent instructed as follows;

> *"Pursuant to Contract Clause 36.1 the Contractor is to proceed with the updated documentation for construction as follows: -*
>
> > *Finish the southern façade on level 2 As per response to RFI 364 and confirmation by Cottee Parker dated 09 Oct 2023.*
> >
> > *Setout of Balcony lighting for Unit Type C & C.2. As per response to RFI 352 and confirmation by Cottee Parker/MDA dated 25 Sep 2023.*
> >
> > *Cut out of mechanical rebate on L5 Soffit as per response to RFI 349 and confirmation by Cottee Parker/OSKA dated 22 Sep 2023.*
> >
> > *Infill of L3 redundant mechanical penetration as per response to RFI 343 and confirmation by OSKA dated 20 Sep 2023.*
>
> ***We note that the assessment of any additional / negative / neutral costs in association with this direction will be assessed by the Superintendent in accordance with Clause 36.4, and with regard to the Contract documents**."*

760. The Respondent's direction made it clear that the Respondent must Cut out of mechanical rebate on L5 Soffit as per response to RFI 349 and confirmation by Cottee Parker/OSKA dated 22 Sep 2023 and that the Respondent would be assessed of any additional / negative / neutral costs in association with this direction will be assessed by the Superintendent in accordance with Clause 36.4, and with regard to the Contract documents.

761. The Claimant asserts that it was accepted practice between the parties that the Respondent would issue new designs under clause 36.1 of the Contract, which would be considered by the Claimant in sufficient time for the construction to proceed as scheduled and further the Respondent would value its variation in due course. In other words, the parties agreed it was not necessary to strictly comply with the notice period requirement set out in clause 36.1.

762. The last paragraph of the Respondent's SI 42 confirms the Claimant's above assertion. The Superintendent indicated it would value the variation it had instructed under clause 36.4 and implicitly agreed that there was no need to make a submission as to whether it was the direction was a direction to vary WUC because it satisfied the form requirements of the second paragraph of clause 36.1.

763. The time bar in clause 36.1 does not operate when the parties agree something different. The Respondent's notice indicates the parties had agreed, expressly or implicitly, that the Respondent would value the variation and the Claimant would perform the work as instructed.

764. The Claimant was entitled to submit a claim for payment for HCV 214 with the Payment Claim because it had complied with the requirements of clause 36.1 by agreement.

765. I therefore accept that the Claimant was instructed to rectify work constructed in accordance with the Respondent's drawings and that the Respondent is liable for the cost of that variation.

766. I do, however, accept the Respondent's reason for withholding payment on the basis that the Claimant is not entitled to claim for additional allowance for Contractor to manage procurement,

administration of subcontract variations, EDMS, payments and the like (**Allowance**) nor for the BWIC and Office Overheads.

767. For the reasons set out above, the amount the Claimant is entitled to receive is; $11,054.47 claimed by the Claimant, less $2,735.00 for the application of the Sikalastic, less $480.00 for the Allowance and less $292.70 for Office Overheads.

768. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $7,546.77 for its variation claim referenced; HCV 214.

CLAIM ITEM HCV 219 ENERGEX EARTHING PITS

Payment Claim

769. The Claimant claims $7,995.98 for a variation to supply and install Energex earthing pits.

770. In the Adjudication Application the Claimant, has considered the Glover Report and has changed its position and now claims; $6,699.11.

Payment Schedule

771. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) *"…As stated in the Superintendent's assessment of this variation claim, earthing to the building and associated works including waterproofing as per the MDA Specification and section 0411 of the Architectural Specification and the Contractor's existing scope for Energex works forms part of the Contractor's scope of works under the*

Contract and is not a variation pursuant to clause 36.1 of the Contract."

(b) *"…Notwithstanding the Principal does not agree HCV 217 is a valid variation, the Contractor claims 'additional works' at items 2.1 to 2.3 in addition to margin at 10% in its variation claim submitted with the Payment Claim. Pursuant to clause 36.4 of the Contract, the Contractor is only entitled to a reasonable amount for profit and overheads, therefore the Contractor is not entitled to claim the 'additional works' in addition to margin, where the additional works are works which are already compensated by margin, allowance for Tomkins supervision, Tomkins commercial team to coordinate with subcontractors, BWIC at 5% and office overheads at 4.5% and the Contractor cannot claim a double payment for such costs, effectively claiming 19.5% margin as well as its 'allowance' for the Tomkins commercial team and foreman to coordinate additional WUC. 10% is a reasonable rate for overheads and profit only."*

(c) *"We also note that the Contractor has submitted a series of further new variations, which do have some breakdown, but no substantiation or supporting documentation,*

-HCV 219

…

These new variations claims are not valid as they: -

1. Have been received for the first time with Progress Claim 36 on 16 October 2024 over a month after the Contractor has departed site, and have not been notified as per Clause 36.1 and are therefore time barred;

2. Do not provide any supporting evidence for these claims at all, as per Clause 36.5;

3. Notwithstanding this, as breakdowns have been provided we have assessed each of these variations and refer to the appended Variations_Claim 36_ September 2024."

Decision

772. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

773. The Claimant asserts it is entitled to payment to supply and install Energex earthing pits because the Respondent changed its design and instructed it to perform the work set out in the changed design.

774. On 27 October 2023, the Respondent instructed (by way of its SI 43) the Claimant to supply and install Energex earthing pits. The Respondent instructed as follows;

"Pursuant to Contract Clause 36.1 the Contractor is to proceed with the updated documentation for construction as follows: -

MDA Energex:

18600-ISS-E01[F] Indoor Substation Ground and Basement Layouts and Site Details Sheet 1 of 7.

As a general clarification in connection with the Energex works, the Principal is to complete all works outside the boundary of the site only.

MDA Hydraulic:

18600-H2013 [C5] Level 3 Drainage Layout.

We note that the assessment of any additional / negative / neutral costs in association with this direction will be assessed by the Superintendent in accordance with Clause 36.4, and with regard to the Contract documents."

775. On 1 March 2024, the Respondent issued further Energex pits related drawings under its instruction SI 133, which states;

"Pursuant to Contract Clause 36.1, and with reference to the obligations to sections 0411 of the Cottee Parker Specification, the Contractor is to proceed with the updated documentation for construction, which is reflective of the specification requirements, as follows:

Basement 7 Dewatering wells -Response to RFI 463

Sika - De-Watering Termination Detail -900 AU 020720 WC N 2308 MW 005

Oska Sketch SA-044 - Dewatering Well Plug Detail

Basement 7 Energex Earthing Waterproofing Detail - Response to RFI 464.

Sika - Energex Conduit Termination Detail - 900 AU 020720 WC N 2308 MW 006

Balcony Window Rebate Waterproofing Detail - Response to RFI 426

Sika - Detail 1 - Typical Door Threshold Detail - Alternative Option - 900 AUS 020910 RC 2309 MW BD02b

Balcony Hob Rebate Waterproofing Detail - Response to RFI 459

Sika - Detail 3 - Typical Parapet Detail (Option B) - 900 AUS 020910 RC 2309 MW BD04

We note that the assessment of any additional / negative / neutral costs in association with this direction will be assessed by the Superintendent in accordance with Clause 36.4, and with regard to the Contract documents.

776. On 7 March 2024, the Respondent superseded its previous Energex pits related drawings under its instruction SI 137, which states;

"Pursuant to Contract Clause 36.1, and with reference to the obligations to sections 0411 of the Cottee Parker Specification, the Contractor is to proceed with the updated documentation for construction, which is reflective of the specification requirements, as follows:

Basement 7 Dewatering wells

Sika - De-Watering Termination Detail -900 AU 020720 WC N 2308 MW 005 dated 02/24

Basement 7 Energex Earthing Waterproofing Detail

Sika - Energex Conduit Termination Detail - 900 AU 020720 WC N 2308 MW 006 dated 02/24

***Note these details supersede both Dewatering well and Earthing Waterproofing details provided within SI 133**.*

We note that the assessment of any additional / negative / neutral costs in association with this direction will be assessed by the Superintendent in accordance with Clause 36.4, and with regard to the Contract documents.

777. On 7 October 2024, the Claimant submitted its notice of intention (# HCV 219) to claim for variation to supply and install Energex earthing pits.

778. The Respondent claims the Claimant failed to notify that it intended to claim a variation within 10 business days of receiving the instruction to perform a variation pursuant to clause 36.1.

779. The Claimant asserts that it was accepted industry practice and between the parties that the Respondent would issue new designs under clause 36.1 of the Contract, which would be considered by the Claimant in sufficient time for the construction to proceed as scheduled and further the Respondent would value its variation in due course. In other words, the parties agreed, expressly or implicitly, it was not necessary for the Claimant to strictly comply with the notice period requirement set out in clause 36.1.

780. The last paragraph of the Respondent's SI 43, 133 & 147confirms the Claimant's above assertion. The Superintendent indicated it would value the variation it had instructed under clause 36.4 and implicitly agreed that there was no need to make a submission as to whether it was the direction was a direction to vary WUC because it satisfied the form requirements of the second paragraph of clause 36.1.

781. Accordingly, I the time bar in clause 36.1 does not operate when the parties agreed the Claimant would execute the variation and the Respondent would value the variation.

782. The Respondent asserts the Claimant has no entitlement to payment because the supply and installation of the Energex pits was included in the MDA Specification, which stated the Claimant; "*is responsible for Earthing to the building*". The Respondent also relies on the matrix of responsibilities for Utilities in section 3 of Part H to the Annexure.

783. I prefer the Claimant's explanation that works not sufficiently particularised by way of a drawing or by way of words in a specification were not included in the Claimant's scope of work.

784. The Respondent has not persuaded me that the Claimant was liable to supply and install the Energex pits simply by asserting;

> The Claimant "*is responsible for Earthing to the building*"
>
> or;
>
> "*Contractor + Energex*" are responsible for site works
>
> or;
>
> *"The scope of works comprises the supply, installation, testing and commissioning of the complete electrical services for the Midwater residential apartment tower, located at 3496 Main Beach Parade, Main Beach, as described in the specification and on the drawings.*
>
> > *The works shall include all necessary, minor and incidental work required to provide a complete and fully functional electrical services installation, which implements the intent and requirements of the specification and drawings.*

General; Provide electrical systems as documented. The extent of works for the electrical system is as follows, but not limited to the following major items.

Building Services

General: Provide the services as summarised as follows:

…

25. Earthing

…"

785. The Claimant's scope of works included all items shown on the drawings (unless expressly excluded) and or all items expressly specified in the specifications in Part G of the Annexure to the Contract.

786. None of the descriptions relied upon by the Respondent provide sufficient information for the Claimant to have been informed of the Energex waterproofed pits it was supposed to supply and install (nor the number of pits nor where they would be located) under the Contract.

787. In the context of the Respondent's design obligations particularised at Part H of the Annexure, the Respondent's reference to incomplete specifications merely should have indicated to the Claimant that some future work would be instructed as a variation upon the completion of the earthing design by the Respondent but there was not enough information for the Claimant to make a provision in its price.

788. Notwithstanding that the Respondent indicated on 26 June 2024, that it would value the variation shown on the changed design it

had issued, I have also reviewed the Claimant's notice of intention to claim dated 16 October 2024. I am persuaded that there was ample description and pricing provided and together with the Respondent's drawings of 26 June 2024, the Respondent understood or ought to have understood the variation being claimed and how it had been valued.

789. I do, however, accept the Respondent's reason for withholding payment on the basis that the Claimant is not entitled to claim for additional allowance for Contractor to manage procurement, administration of subcontract variations, EDMS, payments and the like (**Allowance**) nor for the BWIC and Office Overheads.

790. For the reasons set out above, the amount the Claimant is entitled to receive is; $8,606.88 claimed by the Claimant, less $480.00 for the Allowance and less $244.02 for Office Overheads.

791. Accordingly, I have decided the Claimant is entitled to payment of the $5,975.09 for its variation claim referenced; HCV 219.

CLAIM ITEM HCV 220 CONCRETE SCREED FOR THE BALCONIES

Payment Claim

792. The Claimant claims $195,923.07 for a variation to supply and install concrete screed to the balconies.

793. In the Adjudication Application the Claimant, has considered the Glover Report and has changed its position and now claims; $9,541.82.

Payment Schedule

794. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) *"…The Contractor relies on site instructions 35 and 71 as the basis of this variation claim alleged to contain additional work however there are no changes or additional works in those instructions where:*

Site Instruction 71 was issued via partition details provided by Cottee Parker on behalf of the Principal, who noted that in providing such details, there was no obligation for Cottee Parker and the Principal to supply partition details and the details subject of drawings in Site Instruction 71 are details readily available in technical information from the Redbook or via the submittal process with CSR/Rondo.

The purpose of drawing 5001 Revision B relied on by the Contractor is noted on the drawing "Façade updated to FER D" and the drawing shows detail around the façade and fire engineering report to assist the Contractor where the Contractor's façade subcontractor was unable to use the side rise system.

Drawings issued in Site Instruction 35 and 71 are drawings related to mandatory requirements (Australian Standards) to have falls on balcony to floor waste. ***The balconies as constructed by the Contractor pond water and therefore do not comply with these requirements****. As per section 0621 of the Architectural Specification, the Contractor is required to provide wet area waterproofing systems as documented which are graded to floor wastes, where installed, to dispose of water without ponding. The Principal has observed ponding in such wet areas. Per section 0411, the Contractor's scope includes screed to wet tiled areas including in the Sika specification attached.*

(b) *Notwithstanding the Principal does not agree HCV 220 is a valid variation, the Contractor claims 'additional works' in addition to margin at 10%. Pursuant to clause 36.4 of the Contract, the Contractor is only entitled to a reasonable amount for profit and overheads, therefore the Contractor is not entitled to claim the 'additional works' in addition to margin, where the additional works are works which are compensated by margin, such as administration of subcontracts, BWIC and office overheads and the Contractor cannot claim a double payment for such costs. 10% is a reasonable rate for overheads and profit only."*

(c) *"… Architectural Specification 0411 includes screed to falls to wet tiled areas in the Sika specification included. Section 1.7 of the specification required the Contractor to produce shop drawings for, which was not done. The drawings quoted by the Contractor were essentially the Principal, providing information which should have been covered.*

(d) *"We also note that the Contractor has submitted a series of further new variations, which do have some breakdown, but no substantiation or supporting documentation,*

…

-HCV 220

…

These new variations claims are not valid as they: -

1. Have been received for the first time with Progress Claim 36 on 16 October 2024 over a month after the Contractor has departed site, and have not been notified as per Clause 36.1 and are therefore time barred;

2. Do not provide any supporting evidence for these claims at all, as per Clause 36.5;

3. Notwithstanding this, as breakdowns have been provided we have assessed each of these variations and refer to the appended Variations_Claim 36_ September 2024."

Decision

795. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September

2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

796. The Claimant asserts it is entitled to payment for a variation to supply and install concrete screed to the balconies because the Respondent changed its design and instructed it to perform the work set out in the changed design.

797. On 12 October 2023, the Respondent instructed (by way of its SI 35) the apply waterproofing, which included the concrete screed, as follows;

> *"Pursuant to Contract Clause 36.1 the Contractor is to proceed with the waterproofing information in the appended SI No 35 folder.*
>
> *We note that the assessment of any additional / negative / neutral costs in association with this direction will be assessed by the Superintendent in accordance with Clause 36.4, and with regard to the Contract documents.*
>
> *This Instruction supersedes Instruction No 23."*

798. On 18 December 2023, the Respondent instructed (by way of its SI 71) further details relating to the concrete screed to be supplied and installed on the balconies as follows;

> *"Pursuant to Contract Clause 36.1 the Contractor is to proceed with the updated documentation for construction as follows: -*
>
> *Architectural*
>
> *5217 CD 5001_B_CONSTRUCTION DETAILS - updated to FER D*
>
> *5217 CD 5004_A_FIRE PARTITION DETAILS*
>
> *5217 CD 5005 _A_FIRE PARTITION DETAILS*

5217 CD 5006_A_FIRE PARTITION DETAILS

5217 CD 5007 _A_PARTITION DETAILS

*We note that the **assessment of** any additional / negative / neutral costs in association with **this direction** **will be assessed by the Superintendent in accordance with Clause 36.4**, and with regard to the Contract documents.*

799. On 10 October 2024, the Claimant submitted its notice of intention to claim (HCV # 220) for a variation to supply and install concrete screed to the balconies.

Estoppel

800. The Respondent now claims the Claimant failed to notify that it intended to claim a variation within 10 business days of receiving the instruction to perform a variation pursuant to clause 36.1. The Respondent further asserts the Claimant is now barred and is not entitled to claim this item.

801. The Claimant asserts that it was accepted industry practice and between the parties that the Respondent would issue new designs under clause 36.1 of the Contract, which would be considered by the Claimant in sufficient time for the construction to proceed as scheduled. Furthermore, the Respondent indicated to the Claimant in its written instruction that it would value the variation it had instructed. The Claimant proceeded as instructed.

802. The last paragraph of the Respondent's SI 43, 133 & 137, indicates, the parties agreed, expressly or implicitly, it was not necessary for the Claimant to strictly comply with the notice period requirement set out in clause 36.1 and notify the claimant of its intention to claim payment for the variation, because the

Respondent undertook to value that variation and adjust the contract sum accordingly.

803. In these circumstances, the time bar in clause 36.1 does not operate because the parties agreed a different process to value the variation and adjust the contract sum accordingly.

Requirements of Architectural Specification 0411

804. The Respondent asserts the Claimant has no entitlement to claim payment for the concrete screed to the balconies because the supply and installation of the concrete screed was included in the Architectural Specification #0411.

805. I have read Architectural Specification 0411 relied on by the Respondent as evidence of the Claimant's obligation to provide a concrete screed to the balconies. I can find nothing in that Architectural Specification #0411 that requires the use of a concrete screed. In fact, Architectural Specification #0411 indicates the membrane was to be applied to the as formed concrete surface constructed to 1:100 falls (or greater) as follows;

> *"1.1 Responsibilities*
>
> *…*
>
> *Requirement:* ***Provide waterproofing systems, and coatings to substrates****, as documented,…*
>
> *- Substrates graded to falls to dispose of stormwater without ponding.*
>
> *…*
>
> *3.1 Substrate Quality*
>
> *…*
>
> ***External slabs, internal plant room, slabs and similar shall be finished with falls to drainage of greater than 1:100*** *and shall be free of ponded areas, as per the requirements of AS4654.2.*

806. I am not persuaded the design included in the Contract for balconies required a concrete screed to be placed over the finished slabs.

807. It appears, the Respondent provided the design for the concrete screed for the first time on 12 October 2023 and then superseded that set of designs and provided a new design on 18 December 2023 which provided details of the concrete screed and the membrane to be applied over it once it had cured.

808. I prefer the Claimant's argument that works not sufficiently particularised by way of a drawing or by way of words in a specification were not included in the Claimant's scope of work.

809. The Claimant's scope of works included all items shown on the drawings (unless expressly excluded) and or all items expressly specified in the specifications in Part G of the Annexure to the Contract.

810. None of the descriptions relied upon by the Respondent provide sufficient information for the Claimant to have been informed that it had to supply and install concrete screed on balconies under the Contract.

811. I have also reviewed the Claimant's notice of intention to claim dated 16 October 2024. I am persuaded that there was ample description and pricing provided and together with the Respondent's specification and drawings of 18 December 2023, the Respondent understood or ought to have understood the variation being claimed and how it had been valued.

Allowance BWIC and Office overheads

812. I do, however, accept the Respondent's reason for withholding payment on the basis that the Claimant is not entitled to claim

for additional allowance for Contractor to manage procurement, administration of subcontract variations, EDMS, payments and the like (**Allowance**) nor for the BWIC and Office Overheads.

813. For the reasons set out above, the amount the Claimant is entitled to receive is; $113,622.19 claimed by the Claimant, less $0.00 for the Allowance and less $4,798.38 for BWIC and less $10,368.08 for Office Overheads.

814. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $98,455.73 for its variation claim referenced; HCV 220.

CLAIM ITEM HCV 222 LEVEL 2 INFILL SLAB

Payment Claim

815. The Claimant claims $12,095.60 for a variation to supply and install concrete infill slab above the garbage room on level 2.

816. In the Adjudication Application the Claimant, has considered the Glover Report and has changed its position and now claims; $9,541.82.

Payment Schedule

817. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) *"…For the reasons stated in the Superintendent's assessment of this variation claim, **these works form part of the Contractor's existing scope as per the sections of the Mechanical Specification** referred to by the Superintendent and is not a variation as per clause 36.1 of the Contract.*

(b) *Notwithstanding the Principal does not agree HCV 222 is a valid variation, the Contractor claims 'additional works' in addition to margin at 10%. Pursuant to clause 36.4 of the Contract, the Contractor is only entitled to a reasonable amount for profit and overheads, therefore the Contractor is not entitled to claim the 'additional works' in addition to margin, where the additional works are works which are compensated by margin, such as administration of subcontracts, BWIC and office overheads and the Contractor cannot claim a double payment for such costs. 10% is a reasonable rate for overheads and profit only.*

(c) *"We also note that the Contractor has submitted a series of further new variations, which do have some breakdown, but no substantiation or supporting documentation,*

…

-HCV 222

…

These new variations claims are not valid as they: -

1. Have been received for the first time with Progress Claim 36 on 16 October 2024 over a month after the Contractor has departed site, and have not been notified as per Clause 36.1 and are therefore time barred;

2. Do not provide any supporting evidence for these claims at all, as per Clause 36.5;

3. Notwithstanding this, as breakdowns have been provided we have assessed each of these variations and refer to the appended Variations_Claim 36_ September 2024."

Decision

818. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September

2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

819. The Claimant asserts it is entitled to payment for a variation to supply and install to supply and install concrete infill slab above the garbage room on level 2 because the Respondent changed its design and instructed it to perform the work set out in the changed design.

820. On 10 August 2023, the Respondent instructed (by way of its SI 17) the apply waterproofing, which included the concrete screed, as follows;

> *"Pursuant to Contract Clause 36.1 the Contractor is to proceed with the updated documentation for construction as follows: -*
>
> *Architectural Drawings*
>
> *5217_CD_DocTransmittal_230808*
>
> *5217 CD 6100 - Door Hardware Schedule_C*
>
> *5217 CD 6201_B_Door & Frame Schedules & Details*
>
> *Main Beach Pde DWG Model.dwg 10.08.2023 (For information)*
>
> *Structural Drawings*
>
> *S038 Rev F*
>
> *SO30 Rev G*
>
> *S030.1 Rev C*
>
> *SO320 Rev G*
>
> *S032.1 Rev C*

S038.1 Rev D"

821. On 10 October 2024, the Claimant submitted its notice of intention to claim (HCV # 220) for a variation to supply and install concrete screed to the balconies.

Estoppel

822. The Respondent now claims the Claimant failed to notify that it intended to claim a variation within 10 business days of receiving the instruction to perform a variation pursuant to clause 36.1. The Respondent further asserts the Claimant is now barred and is not entitled to claim this item.

823. The Claimant asserts that it was accepted industry practice and between the parties that the Respondent would issue new designs under clause 36.1 of the Contract, which would be considered by the Claimant in sufficient time for the construction to proceed as scheduled.

824. I am not persuaded there was any agreement between the Claimant and the Respondent that it would not follow the strict requirements to notify a variation under clause 36.1 in relation to the Respondent's instruction SI 17.

Time bar.

825. The Claimant failed to notify its intention to claim a variation within 10 business days of receipt of the Respondent's direction SI 17.

826. Accordingly, I have decided the Claimant is not entitled to payment of the claimed amount for its variation claim referenced; HCV 222.

CLAIM ITEM HCV 226 CHEMICAL FIXINGS TO BALCONY SLIDERS AND WINDOWS

Payment Claim

827. The Claimant claims $28,439.16 for a variation to supply and install chemical grout anchors to secure balcony sliding doors and windows.

828. In the Adjudication Application the Claimant, has considered the Glover Report, has changed its position and now claims; $9,086.62.

Payment Schedule

829. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

> *We assess that the Contractor should reasonably have allowed for works such as this in connection with the façade installation. We note that the Façade Specification states;*
>
> *101 Summary Item A*
>
> *The Sub-contractor (Façade Contractor) shall design, engineer, test, fabricate, supply and install the complete façade work*
>
> *101 Summary Item B.3*
>
> *Coordination of the façade work with the overall project requirements including all areas of interfaces with internal finishes and external finishes.*

101 Summary Item C.1

The Contract Documents show the general design intentions and requirements, project conditions, desired visual detail, profiles and character, but not necessarily the construction details. The Sub-contractor shall design, supply, fabricate, assemble and erect a complete system

101 Summary Item C.3

Coordination of the facade work with the overall project requirements including all areas of interfaces with internal finishes and external finishes

101 Item E

Methods of installation, including fixings, anchorage, caulking, flashings

102 ***Item F***

Anchorages, brackets and fixings to the base-structure.

101 Summary Item I: -

The Specification together with the Drawings defines the scope of works, mandatory geometry of visible facade surfaces, the performance parameters for the facade, provide minimum acceptable standards and establish a regime for verification of the design, fabrication and installation processes.

As scope and performance documents, the Drawings and Specifications do not necessarily indicate or describe in detail all work required for the full performance and completion of the Works provide all items required for proper completion of the Works without adjustment to the Contract Price.

209 Bolts Fixing Metalwork to Concrete

The above is a non-exhaustive list. The Contractor throughout has failed to comply with the requirements to provide a fully designed and constructed façade installation.

We note that the Contractor is basing this claim no SI 144. As covered in SI 144, Section 0411 of the Architectural specification has obligations for the Contractor, including provision of shop drawings which was not done.

The information issued in SI 144 was required due to the Contractors own failure to comply with the Waterproofing and Façade specifications. We reject the Contractor's attempt to claim variation costs for façade fixings.

Regarding the claim for Additional Works: No substantiation and we reasonably assess this is include [sic] in the builders margin percentage of 10% for overheads and profit applied to variation costs below.

Included in margin percentage of 10% as per Clause 36.4 below. This is essentially a double claim for margin from the Contractor and not acceptable.

(a) *"…As per the Superintendent's assessment of this variation claim, the works subject of this claim are not a change to the existing scope within the meaning of a variation pursuant to clause 36.1 of the Contract and is not payable; where the works form part of the façade works and Façade Specification.*

The cause of these works was also due to the Contractor's failure to provide shop drawings pursuant to section 0411 of the Architectural Specification.

Notwithstanding the Principal does not agree HCV 226 is a valid variation, the Contractor claims 'additional works' in addition to margin at 10%. Pursuant to clause 36.4 of the Contract, the Contractor is only entitled to a reasonable amount for profit and overheads, therefore the Contractor is not entitled to claim the 'additional works' in addition to margin, where the additional works are works which are compensated by margin, such as administration of subcontracts, BWIC

and office overheads and the Contractor cannot claim a double payment for such costs. 10% is a reasonable rate for overheads and profit only.

(b) *"We also note that the Contractor has submitted a series of further new variations, which do have some breakdown, but no substantiation or supporting documentation,*

…

-HCV 226

…

These new variations claims are not valid as they: -

1. Have been received for the first time with Progress Claim 36 on 16 October 2024 over a month after the Contractor has departed site, and have not been notified as per Clause 36.1 and are therefore time barred;

2. Do not provide any supporting evidence for these claims at all, as per Clause 36.5;

3. Notwithstanding this, as breakdowns have been provided we have assessed each of these variations and refer to the appended Variations_Claim 36_ September 2024."

Decision

830. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September

2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

831. The Claimant asserts it is entitled to payment for a variation to supply and install chemical grout anchors to secure balcony sliding doors and windows because the Respondent changed its design and instructed it to perform the work set out in the changed design.

832. On 15 March 2024, the Respondent instructed (by way of its SI 144) waterproofing details, as follows;

> *"Pursuant to Contract Clause 36.1, and with reference to the obligations of sections 0411 of the Cottee Parker Specification, and reference to RFI 459 the Contractor is to proceed with the updated documentation for construction, which is reflective of the specification requirements, as follows:*
>
> *Balcony Hob Waterproofing Detail*
>
> *Sika - Detail 3 - Typical Parapet Detail-900 AUS 020910 RC 2309 MW BDO4a dated 03/24*
>
> *Balcony Typical Door Threshold Detail*
>
> *Sika - Detail 1 - Typical Door Threshold Detail - 900 AUS 020910 RC 2309 MW BD02b dated 02/24*
>
> *Note these details supersede both Balcony hob and Typical Door Threshold details provided within SI 133.*
>
> *We note that the assessment of any additional / negative / neutral costs in association with this direction will be assessed by the Superintendent in accordance with Clause 36.4, and with regard to the Contract documents."*

833. On 18 December 2023, the Respondent instructed (by way of its SI 71) further details relating to the concrete screed to be supplied and installed on the balconies as follows;

> *"Pursuant to Contract Clause 36.1 the Contractor is to proceed with the updated documentation for construction as follows: -*
>
> *Architectural*
>
> *5217 CD 5001_B_CONSTRUCTION DETAILS - updated to FER D*
>
> *5217 CD 5004_A_FIRE PARTITION DETAILS*
>
> *5217 CD 5005 _A_FIRE PARTITION DETAILS*
>
> *5217 CD 5006_A_FIRE PARTITION DETAILS*
>
> *5217 CD 5007 _A_PARTITION DETAILS*
>
> *We note that the **assessment of** any additional / negative / neutral costs in association with **this direction** **will be assessed by the Superintendent in accordance with Clause 36.4**, and with regard to the Contract documents.*

834. On 10 October 2024, the Claimant submitted its notice of intention to claim (HCV # 226) for a variation to supply and install chemical grout anchors to secure balcony sliding doors and windows.

Requirements of Architectural Specification 0411

835. The Claimant has provided a drawing showing typical sill details and explains there was no mention of chemical grout anchors on that drawing referenced DD6352 Rev 04.

836. The Claimant has also provided typical details drawings produced by Sika and transmitted by the Superintendent that shows chemical grout anchors used to secure sliding doors and window sills etc…

837. The Respondent asserts the Claimant has no entitlement to claim payment for the supply and install chemical grout anchors to secure balcony sliding doors and windows because the supply and installation of all fixings was included in sections 101 and 209 of the Architectural Façade Specification.

838. I noted that drawing referenced DD6352 Rev 04 relied on by the Claimant as evidence that it was not required to supply and install chemical grout anchors to secure balcony sliding doors and windows shows a masonry anchor that the Claimant was required to supply and install. I acknowledge there is no specification for that masonry fixing / anchor.

839. It is normal practice for a builder to supply and install appropriate fixings and these are rarely specified by the architect unless those fixings have some special importance. I am no persuaded that M10 chemical grout anchors or any other M10 masonry anchor was something not included by the Façade Specification.

840. I am persuaded that the Claimant was required to provide all fixings pursuant to the drawings and the Contract even though each fixing was not specifically particularised.

841. If the Claimant considered its chemical grout anchors (advised by the Claimant to be $4.00 each) were significantly more expensive than M10 masonry anchors it was required to provide, it should have explained its claim in that way. The Claimant has imply claimed for all chemical grout anchors and ignored the fact that it had to supply equivalent masonry fixings.

842. Accordingly, I have decided the Claimant is not entitled to payment of the claimed amount for its variation claim referenced; HCV 226.

CLAIM ITEM HCV 227 LOBBY RELIEF SLAB EXTENSION

Payment Claim

843. The Claimant claims $30,144.53 for a variation to supply and install concrete screed to the balconies.

844. In the Adjudication Application the Claimant, has considered the Glover Report and has changed its position and now claims; $27,206.27.

Payment Schedule

845. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) *"…Notwithstanding the Principal does not agree HCV 227 is a valid variation, the Contractor claims 'additional works' in addition to margin at 10%. Pursuant to clause 36.4 of the Contract, the Contractor is only entitled to a reasonable amount for profit and overheads, therefore the Contractor is not entitled to claim the 'additional works' in addition to margin, where the additional works are works which are compensated by margin, such as administration of subcontracts, BWIC and office overheads and the Contractor cannot claim a double payment for such costs. 10% is a reasonable rate for overheads and profit only.*

(b) *The basis of this variation claim is RFI 229 which was a RFI raised by the Contractor's mechanical subcontractor over the sizing of the subducts without dampeners and requested to use formed subducts by way of a concrete slab extension and blockwork wall which the Principal's consultants advised would not fit and the Contractor did not provide evidence of why the Principal's design would fail.*

The Contractor then raised RFI 544 where it was noted by the Principal's consultant that the Contractor commenced subduct work without approved shop drawings, after which the Contractor informed the Principal that the arrangement would not work.

The Mechanical Specification requires the Contractor to submit shop drawings for approval prior to commencing works. The Contractor failed to do so (including under clause 36.1 not to proceed with a variation without approval). The Contractor's construction of an unapproved shop drawing is what caused the issue subject of this variation claim, and is therefore not a variation within the meaning of clause 36.1 of the Contract.

(c) *"We also note that the Contractor has submitted a series of further new variations, which do have some breakdown, but no substantiation or supporting documentation,*

…

-HCV 227

…

These new variations claims are not valid as they: -

1. Have been received for the first time with Progress Claim 36 on 16 October 2024 over a month after the Contractor has departed site, and have not been notified as per Clause 36.1 and are therefore time barred;

2. Do not provide any supporting evidence for these claims at all, as per Clause 36.5;

3. Notwithstanding this, as breakdowns have been provided we have assessed each of these variations and

refer to the appended Variations_Claim 36_ September 2024."

Decision

846. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

847. The Claimant asserts it is entitled to payment for a variation to construct an extension to an existing concrete slab to construct a formed concrete duct integrated into a sheet metal duct because the Respondent changed its design and instructed it to perform the work set out in the changed design.

848. On 16 March 2023, the Claimant raised doubts about the compliance of the Respondent's design of the mechanical system as follows;

> *"We have some concerns around the commissioning of the system to achieve compliance. …*
>
> *Current setup has subducts, and this design can be improved by changing these from subjects to formed subduct with concrete and sheet-metal plating."*

849. In the above correspondence, the Respondent had been advised by the Claimant's mechanical subcontractor advised as follows;

> *"I have done some calculations on the information provided. The lobby relief sub duct is grossly undersized and will prove to*

be impossible to achieve the minimum standard of 1.0 m/s down the building."

850. On 20 March 2023, the Respondent's mechanical consultant advised the Superintendent and the Claimant as follows;

"Having reviewed David's comments and spoken with him, it seems his only concern is the subduct sizing rather than the lack of motorised dampers.

His suggestion is providing 1 m2 min free area through the subducts, which can be achieved by increasing them to 700 x 1450 mm. I note the desire to use a formed subject which I typically do not have issues…

My recommendation would be increasing subducts to 700 x 1450 mm, including a chamfered base to provide min 1 m² cross-section as it transfers to the main riser."

851. On 22 March 2023, the Respondent's architect directed as follows;

"… We will have to get a chance at subduct system to work within the design constraints."

852. There was extensive correspondence about this design from 22 March 2023 to 4 April 2024 discussing the constructability of the larger subduct in a confined area.

853. On 4 April 2023, the Respondent's mechanical consultant advised its designed to satisfy solution as follows;

"… The arrangement would be a DTS solution using parts of the structure as a formed subject. The sides of the sheet metal

insert will need to be sealed to the walls with packing to the requirements of clause 3.6.2 of a S 1668.12015 as per below.."

854. On 23 August 2023, the Superintendent directed the Claimant to implement the changes to the concrete slab etc…under its instruction SI 20 issued under clause 36.1 of the Contract.

855. The Respondent asserts this all relates to a variation for the convenience of the Claimant.

856. I do not agree. The above evidence indicates the Respondent's design was undersized. The redesigned duct was much larger but due to the architecture of the building, there was not sufficient room to install a sheet metal duct. The Respondent's consultant and the Claimant's subcontractor discussed and agreed a hybrid solution that involved a slab extension to an existing slab that would form one of the walls of the duct and the remainder of the duct (in the confined area) would sheet metal. The concrete and sheet metal together would for a boxed section being the new duct.

857. In relation to shop drawings, the Respondent's asserts;

> *"The Contractor's construction of an unapproved shop drawing is what caused the issue subject of this variation claim…"*

The Respondent appears to have misunderstood its consultant's advice. The above evidence indicates there was a design defect (size of the duct) that meant the Respondent's design did not comply to the relevant standards and the solution was to increase the size of the duct was certified by the Respondent's mechanical consultant, being its DTS solution.

Estoppel

858. I am satisfied that there was sufficient contemporaneous discussion from 16 March 2023 to 23 August 2023 and the admission of the Respondent's consultant given on 4 April 2023 for the Respondent to understand that it had provided a defective mechanical design and that the solution certified by the Respondent's consultant included the slab extension to create the "hybrid" duct.

859. The Respondent now claims the Claimant failed to notify that it intended to claim a variation within 10 business days of

receiving the instruction to perform a variation pursuant to clause 36.1. The Respondent further asserts the Claimant is now barred and is not entitled to claim this item.

860. The Claimant asserts that this defective design and variation was extensively discussed between the parties and that the Respondent would issue a new design for the concrete extension to the completed slab under clause 36.1 of the Contract in due course. The evidence indicates that is precisely what happened.

861. In these circumstances, the Respondent knew that there was a mistake in the design that would cause the Claimant to incur more cost about 5 months before it instructed the amended designs.

862. I accept the Claimant's argument that the Respondent knew that the Claimant would claim payment for the additional work to construct the slab extension.

863. Accordingly, I am persuaded the Respondent is estopped from insisting on strict compliance with the notice provision of clause 36.1.

864. I have also reviewed the Claimant's notice of intention to claim dated 10 October 2024. I am persuaded that there was ample description and pricing provided and together with the Respondent's specification and drawings of 18 December 2023, the Respondent understood or ought to have understood the variation being claimed and how it had been valued.

Allowance BWIC and Office overheads

865. I do, however, accept the Respondent's reason for withholding payment on the basis that the Claimant is not entitled to claim for additional allowance for Contractor to manage procurement,

administration of subcontract variations, EDMS, payments and the like (**Allowance**) nor for the BWIC and Office Overheads.

866. For the reasons set out above, the amount the Claimant is entitled to receive is; $27,206.27 claimed by the Claimant, less $480.00 for the Allowance and less $0.00 for BWIC and less $720.38 for Office Overheads.

867. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $26,005.59 for its variation claim referenced; HCV 227.

CLAIM ITEM HCV 228 50 MPA CONCRETE

Payment Claim

868. The Claimant claims $10,479.50 for a variation to supply and install concrete screed to the balconies.

869. In the Adjudication Application the Claimant, has considered the Glover Report and has changed its position and now claims; $9,390.08.

Payment Schedule

870. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) *"…The Principal also relies on OSKA's response to RFI 466 noting that the concrete mix design requested by the Contractor is not required to be changed and is a change for convenience for the Contractor, noting the structural drawings show this detail on structural drawings 007 and 007.1. The Principal therefore does not consider this claim to be a variation within the*

meaning of clause 36.1 as this work forms part of the works under the Contract.

(b) *Notwithstanding the Principal does not agree HCV 221 is a valid variation, the Contractor claims 'additional works' in addition to margin at 10%. Pursuant to clause 36.4 of the Contract, the Contractor is only entitled to a reasonable amount for profit and overheads, therefore the Contractor is not entitled to claim the 'additional works' in addition to margin, where the additional works are works which are compensated by margin, such as administration of subcontracts, BWIC and office overheads and the Contractor cannot claim a double payment for such costs. 10% is a reasonable rate for overheads and profit only.*

(c) *"We also note that the Contractor has submitted a series of further new variations, which do have some breakdown, but no substantiation or supporting documentation,*

…

-HCV 228

…

These new variations claims are not valid as they: -

1. Have been received for the first time with Progress Claim 36 on 16 October 2024 over a month after the Contractor has departed site, and have not been notified as per Clause 36.1 and are therefore time barred;

2. Do not provide any supporting evidence for these claims at all, as per Clause 36.5;

3. Notwithstanding this, as breakdowns have been provided we have assessed each of these variations and

refer to the appended Variations_Claim 36_ September 2024."

Decision

871. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

872. The Claimant asserts it is entitled to payment for a variation to supply and install 50 MPa concrete over doorways and header beams because the Respondent changed its design and instructed it to perform the work set out in the changed design.

873. On 23 February 2024, the Claimant requested as follows;

> *"Refer attached for updated concrete mix designs for the project. As the building progresses to higher level pumping pressures are increasing requiring updated mix designs.*
>
> *Tomkins also understands you require 50 MPA concrete where slabs run through call doorways. Therefore the 50 MPA deck mix design is attached. Concrete where slabs run through call doorways. Therefore the 50 MPA deck mix design is attached."*

874. On 18 March 2024, the Respondent's consultant advised the Claimant as follows;

> *"I have confirm below that the concrete mix design provided is okay **but also is not required to be changed** and is a change for convenience to Tompkins. Structural drawing show this detailing, refer to drawing S007, S007.1.*

875. The Respondent asserts this all relates to a variation for the convenience of the Claimant.

876. As there is no evidence of any change of design directed by the Respondent, I do not accept the Claimant's assertion.

877. Accordingly, I have decided the Claimant is not entitled to payment of the claimed amount for its variation claim referenced; HCV 228.

CLAIM ITEM HCV 231 BASEMENT SPEED PANEL

Payment Claim

878. The Claimant claims $23,707.02 for a variation to supply and install and additional 78mm Speedpanel to the wall tagged "RW14".

879. In the Adjudication Application the Claimant, has considered the Glover Report and has changed its position and now claims; $17,969.57.

Payment Schedule

880. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) *"…The Contractor has not provided a variation claim as part of its Payment Claim for this HCV 231 and appears to rely on the variation breakdown only. Per clause 36.1, the Contractor failed to give the Superintendent notice of a variation within 10 business days of the instruction/direction, therefore HCV 231 is time barred and the Contractor has no entitlement to a variation on this basis.*

(b) *HCV 231 is also invalid where the Contractor has failed to identify a change in scope or otherwise pursuant to clause 36.1 to support this variation claim, meaning the Contractor has not established an entitlement to a variation under the Contract or substantiated this claim.* ***The Principal also notes that the drawings relied on by the Contractor were issued for clarification only, and do not contain additional scope subject of a variation****, where the same walls subject of this claim are contained in drawings forming part of the Contract (CD DD_2007 - 2010).*

(c) *Notwithstanding the Principal does not agree HCV 231 is a valid variation, the Contractor claims 'additional works' at items 2.6 to 2.9 in addition to margin at 10% (see item 3.0) in its Payment Claim variation breakdown. Pursuant to clause 36.4 of the Contract, the Contractor is only entitled to a reasonable amount for profit and overheads, therefore the Contractor is not entitled to claim the 'additional works' in addition to margin, where the additional works are works which are already compensated by margin, such as costs for co-ordinating and assisting subcontractors, BWIC and office overheads and the Contractor cannot claim a double payment for such costs, effectively claiming 19.5% margin and in addition to overhead related cost for 'allowance for Tomkins*

Commercial Team to assist, review and coordinate with the Subcontractors'. 10% is a reasonable rate for overheads and profit only."

(d) *"We also note that the Contractor has submitted a series of further new variations, which do have some breakdown, but no substantiation or supporting documentation,*

-HCV 231

…

These new variations claims are not valid as they: -

1. Have been received for the first time with Progress Claim 36 on 16 October 2024 over a month after the Contractor has departed site, and have not been notified as per Clause 36.1 and are therefore time barred;

2. Do not provide any supporting evidence for these claims at all, as per Clause 36.5;

3. Notwithstanding this, as breakdowns have been provided we have assessed each of these variations and refer to the appended Variations_Claim 36_ September 2024."

Decision

881. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

882. The Claimant asserts it is entitled to payment to supply and install an additional 78mm Speedpanel to the wall tagged "RW14" because the Respondent changed its design and instructed it to perform the work set out in the changed design.

883. On 20 May 2024, the Respondent instructed (by way of its SI 216A) the Claimant to construct a duct utilising RW14 type walls and was different to the design provided at the time of Contract. The Respondent instructed as follows;

> *"Pursuant to Contract Clause 36.1 the Contractor is to proceed with the updated documentation for construction as follows: -*
>
> *Architectural*
>
> *5217_CD_DocTransmittal_240517*
>
> *We note that the **assessment of any additional / negative / neutral costs in association with this direction will be assessed by the Superintendent** in accordance with Clause 36.4, and with regard to the Contract documents."*

884. On 21 May 2024, the Claimant sent the Respondent a notice of intention to claim a variation relating to instruction SI 216A in accordance with clause 36.1.

885. On 16 October 2024, the Claimant submitted its notice of intention to claim for to supply and install and additional 78mm Speedpanel to the wall tagged "RW14".

886. The Superintendent's instruction included drawings Floor Plan Basement 04, 05, 06 & 07. Those Floor Plans now identified the wall type to be constructed for the riser duct, which were not detailed on the preceding revisions in Part G of the Annexure.

887. The Claimant's scope of works included all items shown on the drawings (unless expressly excluded) and or all items expressly specified in the specifications in Part G of the Annexure to the Contract.

888. The Contract drawings mentioned above failed to provide sufficient information for the Claimant to have been informed about what type of wall it had to construct under the Contract.

889. The Respondent argues that the drawings relied on by the Claimant were issued for clarification only, and do not contain additional scope subject of a variation.

890. I do not accept the Respondent's understanding of what constitutes a change. In circumstances where a wall is shown but the particulars of the wall are unknown and later those particulars are provided ("clarified"), that is a change because in the first instance the wall could not be constructed but after the clarification, it could be constructed because additional information was provided.

891. I accept the Claimant's argument that it was liable for designs that could be constructed that were identified in Part G of the Annexure. The Contract drawings show a riser wall but those drawings did not identify the type of wall, so it could not be constructed.

892. In those circumstances, the Claimant should have been on notice that at some point during the course of the Contract, the Respondent would instruct a design that was capable of being constructed and at that would be a variation to the Contract.

893. The Claimant accrued an entitlement to claim a variation on 21 May 2024 when it send the Respondent in accordance with clause 36.1 of the Contract.

894. Additionally, the Claimant asserts that it was accepted practice between the parties that the Respondent would issue new designs under clause 36.1 of the Contract, which would be considered by the Claimant in sufficient time for the construction to proceed as scheduled and further the Respondent would value its variation in due course. In other words, the parties agreed it was not necessary to strictly comply with the notice period requirement set out in clause 36.1.

895. The last paragraph of the Respondent's SI 216A confirms the Claimant's above assertion. The Superintendent indicated it would value the variation it had instructed under clause 36.4 and implicitly agreed that there was no need to make a submission as to whether it was the direction was a direction to vary WUC because it satisfied the form requirements of the second paragraph of clause 36.1.

896. Accordingly, I the time bar on clause 36.1 does not operate when the Respondent instructed it would value the variation in accordance with clause 36.4.

897. Notwithstanding that the Respondent indicated on 20 May 2024, that it would value the variation shown on the changed design it had issued, I have also reviewed the Claimant's notice of intention to claim dated 16 October 2024. I am persuaded that there was ample description and pricing provided and together with the Respondent's drawings of 26 June 2024, the Respondent understood or ought have understood the variation being claimed and how it had been valued.

898. I am satisfied with the Claimant's explanation that HCV 231 that it was instructed to perform a variation on 20 May 2024 when it received the Respondent's instruction 216A.

899. I do, however, accept the Respondent's reason for withholding payment on the basis that the Claimant is not entitled to claim for additional allowance for Contractor to manage procurement, administration of subcontract variations, EDMS, payments and the like (**Allowance**) nor for the BWIC and Office Overheads.

900. For the reasons set out above, the amount the Claimant is entitled to receive is; $17,969.57 claimed by the Claimant, less $480.00 for the Allowance and less $249.15 for Office Overheads.

901. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $17,240.42 for its variation claim referenced; HCV 231.

CLAIM ITEM HCV 234 ADDITIONAL WATERPROOFING TO LIGHTWEIGHT BALCONY WALLS

Payment Claim

902. The Claimant claims $73,135.36 for a variation to supply and install additional waterproofing to the headers above the external light weight walls on the balconies of the units.

903. In the Adjudication Application the Claimant, has considered the Glover Report and has changed its position and now claims; $55,990.54.

Payment Schedule

904. The Respondent has scheduled 0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) *"…In addition to the Superintendent's assessment, the Principal relies on the following reasons for withholding payment of this claim:*

The Principal's consultant addressed this issue via RFI 546 in June 2024.

The Contractor did not comply with its contractual obligations to issue a shop drawing *in respect of waterproofing to window openings above the walls before proceeding with waterproofing works, consistent with the Contractor's project manager Bernard Blom stating during PCG meetings that the Contractor will not be issuing shop drawings for the project.*

> ***The Principal relies on it and its consultants responses to RFI 546 in respect of this claim, noting drawing 6351 at detail 10 shows waterproofing extending across the balcony soffit in front of the door*** *meaning the Contractor is obliged the construct the product on the soffit for the external walls. As* ***detail 1 also on 6351 drawing also indicates the entire soffit is waterproofed****, the* ***works subject of this claim are works within the scope of the existing works under the Contract and not a variation as per clause 36.1****.*
>
> *The Principal also relies on the Superintendent's assessment of this variation as reasons for withholding payment, noting the works subject of this claim are waterproofing works the Contractor is required to carry out pursuant to section 0411 of the Architectural Specification including the Sika schedule.*

Notwithstanding the Principal does not agree HCV 234 is a valid variation, the Contractor claims 'additional builder's works' at items 1.41-1.4.3 in addition to margin at 10% in HCV 234. Pursuant to clause 36.4 of the Contract, the Contractor is only entitled to a reasonable amount for profit and overheads, therefore the Contractor is not entitled to claim 'additional builder works' which are compensated by the 10% margin inclusive of profit and overheads and the Contractor cannot claim a double payment for overhead costs, effectively claiming 18% margin and in addition to overhead related cost for"

(b) *"We also note that the Contractor has submitted a series of further new variations, which do have some breakdown, but no substantiation or supporting documentation,*

…

-HCV 234

…

These new variations claims are not valid as they: -

1. Have been received for the first time with Progress Claim 36 on 16 October 2024 over a month after the Contractor has departed site, and have not been notified as per Clause 36.1 and are therefore time barred;

2. Do not provide any supporting evidence for these claims at all, as per Clause 36.5;

3. Notwithstanding this, as breakdowns have been provided we have assessed each of these variations and refer to the appended Variations_Claim 36_ September 2024."

Decision

905. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

906. The Claimant asserts it is entitled to payment to supply and install additional waterproofing to the headers above the external light weight walls on the balconies of the units because the Respondent changed its design and instructed it to perform the work set out in the changed design.

907. On 28 June 2024, the Respondent instructed (by way of its SI 274) the Claimant to construct an architectural design that included additional to supply and install additional waterproofing to the

headers above the external light weight walls on the balconies of the units and that the Claimant asserts was different to the design provided at the time of Contract. The Respondent instructed as follows;

> *"Pursuant to Contract Clause 36.1 the Contractor is to proceed with the updated documentation for construction as follows: -*
>
> *Architectural*
>
> *5217_CD_DocTransmittal_240627*
>
> *We note that the assessment of any additional / negative / neutral costs in association with this direction will be assessed by the Superintendent in accordance with Clause 36.4, and with regard to the Contract documents."*

908. The Claimant has provided a copy of the Contract drawing referenced CD5016 Rev A and a copy of the changed design referenced CD5016 Revision B. It is clear that the later revision B shows a waterproof membrane on the soffit and up to the lightweight wall.

909. The Claimant also advises that in order to apply the membrane directed by the Superintendent under instruction SI 274, it was required to remove the sheeted and completed framing, which had been painted and apply the membrane and then reconstruct the framing.

910. On 16 October 2024, the Claimant submitted its notice of intention to claim to supply and install additional waterproofing to the headers above the external light weight walls on the balconies of the units.

911. The Claimant asserts that it was accepted practice between the parties that the Respondent would issue new designs under clause 36.1 of the Contract, which would be considered by the Claimant in sufficient time for the construction to proceed as scheduled and further the Respondent would value its variation in due course. In other words, the parties agreed it was not necessary to strictly comply with the notice period requirement set out in clause 36.1.

912. The last paragraph of the Respondent's SI 274 confirms the Claimant's above assertion. The Superintendent indicated it would value the variation it had instructed under clause 36.4 and implicitly agreed that there was no need to make a submission as to whether it was the direction was a direction to vary WUC because it satisfied the form requirements of the second paragraph of clause 36.1.

913. Accordingly, I the time bar on clause 36.1 does not operate when the Respondent instructed it would value the variation in accordance with clause 36.4.

914. Notwithstanding that the Respondent indicated on 26 June 2024, that it would value the variation shown on the changed design it had issued, I have also reviewed the Claimant's notice of intention to claim dated 16 October 2024. I am persuaded that there was ample description and pricing provided and together with the Respondent's drawings of 26 June 2024, the Respondent understood or ought to have understood the variation being claimed and how it had been valued.

915. I do, however, accept the Respondent's reason for withholding payment on the basis that the Claimant is not entitled to claim for additional allowance for Contractor to manage procurement, administration of subcontract variations, EDMS, payments and the like (**Allowance**) nor for the BWIC and Office Overheads.

916. For the reasons set out above, the amount the Claimant is entitled to receive is; $55,990.54 claimed by the Claimant, less $528.00 for the Allowance and less $983.04 for BWIC and less $884.73 for Office Overheads.

917. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $53,594.77 for its variation claim referenced; HCV 231.

CLAIM ITEM HCV 243 CHANGE OF STUD

Payment Claim

918. The Claimant claims $10,699.59 for a variation to change the PW03 wall type to include a 92 mm Rondo "quiet stud" instead of the originally designed PW03 wall type containing a standard 92 mm Rondo stud.

919. In the Adjudication Application the Claimant, has considered the Glover Report and has changed its position and now claims; $9,799.51.

Payment Schedule

920. The Respondent has scheduled 0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) *"…In addition to the Superintendent's assessment of this variation claim, the Principal's reasons for withholding payment are that PW03 is a CSR 1130(c) wall which is a steel framed wall with a Rondo Quiet Stud 92mm steel stud which is exclusively manufactured by CSR and Rondo;*

the Contractor did not carry out its contractual obligations under the Architectural Specification (section 0522 and 0531) to consult with CSR/Rondo regarding the wall design which would have confirmed this was a Rondo Quiet Stud*, therefore this is not additional or change in work pursuant to clause 36.1 and forms part of the Contractor's scope of works under the Contract. This was also provided for under section 3.3 of section 0522 of the Architectural Specification.*

(b) *The Contractor claims it can procure and install the Principal's PW03 wall design as a variation despite under HCV 171 stating that the Principal's wall design is not constructable.*

(c) *Notwithstanding the Principal does not agree HCV 243 is a valid variation, it notes that the Contractor claims 'other allowances' at items 2.1 to 2.3 of HCV 243 in addition to margin at 10%. Pursuant to clause 36.4 of the Contract, the Contractor is only entitled to a reasonable amount for profit and overheads, therefore the Contractor is not entitled to claim 'other allowances' which are compensated by the 10% margin inclusive of profit and overheads and the Contractor cannot claim a double payment for overhead costs, effectively claiming 19.5% margin and in addition to other overhead related costs being the claim for "allowance for Tomkins commercial team to assist, review and coordinate with the subcontractors". 10% is a reasonable rate for overheads and profit only*"

(d) *"We also note that the Contractor has submitted a series of further new variations, which do have some breakdown, but no substantiation or supporting documentation,*

…

-HCV 234

…

These new variations claims are not valid as they: -

> *1. Have been received for the first time with Progress Claim 36 on 16 October 2024 over a month after the Contractor has departed site, and have not been notified as per Clause 36.1 and are therefore time barred;*
>
> *2. Do not provide any supporting evidence for these claims at all, as per Clause 36.5;*

3. Notwithstanding this, as breakdowns have been provided we have assessed each of these variations and refer to the appended Variations_Claim 36_ September 2024."

Decision

921. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

922. The Claimant asserts it is entitled to payment for the Respondent's design change the PW03 wall type to include a 92 mm Rondo "quiet stud" instead of the originally designed PW03 wall type containing a standard 92 mm Rondo stud.

923. On 20 March 2024, the Respondent instructed (by way of its SI 151) the Claimant to construct an architectural design that included the 92 mm Rondo "quiet studs" that the Claimant asserts was different to the design provided at the time of Contract. The Respondent instructed as follows;

> *"Pursuant to Contract Clause 36.1 the Contractor is to proceed with the updated documentation for construction as follows: -*
>
> *Architectural*
>
> *5217_CD_DocTransmittal_240320*
>
> *We note that the assessment of any additional / negative / neutral costs in association with this direction will be assessed by the Superintendent in accordance with Clause 36.4, and with regard to the Contract documents."*

924. On 25 March 2024, the Respondent instructed (by way of its SI 157) the Claimant to construct an updated structural design related to the SI 151 that the Claimant asserts was different to the design provided at the time of Contract. The Respondent instructed as follows;

> *"Pursuant to Contract Clause 36.1 the Contractor is to proceed with the updated documentation for construction as follows: -*
>
> *Structural*
>
> *5217 CD 0901_E_LEGEND*
>
> *5217 CD 2028_F_FLOOR PLAN - LEVEL 18*
>
> *5217 CD 2048_E_FLOOR PLAN - LEVEL 38*
>
> *5217 CD 2328_G_PARTITION PLAN - LEVEL 18 (MID TOWER PENTHOUSE)*
>
> *5217 CD 2348_F_PARTITION PLAN - LEVEL 38 (PENTHOUSE)*
>
> *5217 CD 4701_F_UNIT TYPE A DETAIL PLAN THROUGH TO 5217 CD 4726_D_UNIT TYPE PENTHOUSE 38 DETAIL RCP 2_2*
>
> *5217 CD 5004_E_FIRE PARTITION DETAILS*
>
> *5217 CD 5008_C_PARTITION DETAILS*
>
> *5217 CD 5009_C_PARTITION DETAILS*
>
> *5217 CD 5010_C_PARTITION DETAILS*
>
> *5217 CD 5011_B_PARTITION DETAILS*

5217 CD 5013_B_PARTITION DETAILS

5217 CD 5015_PARTITION DETAILS

5217 CD 5016_A_PARTITION DETAILS

We note that the assessment of any additional / negative / neutral costs in association with this direction will be assessed by the Superintendent in accordance with Clause 36.4, and with regard to the Contract documents.

The Principal further reserves their right to recover costs where design works have been completed by the Principal in lieu of the Contractor fulfilling their obligations in the Contract specifications, including but not limited to: -

Submissions;

Certifications;

Manufacturers recommendations;

Shop Drawings

925. On 9 May 2024, the Respondent instructed (by way of its SI 208) the Claimant to construct an updated architectural design related to the SI 151 that the Claimant asserts was different to the design provided at the time of Contract. The Respondent instructed as follows;

"Pursuant to Contract Clause 36.1 the Contractor is to proceed with the updated documentation for construction as follows: -

Architectural

5217_CD_DocTransmittal_240508

5217_CD_DocTransmittal_240422

We note that the assessment of any additional / negative / neutral costs in association with this direction will be assessed by the Superintendent in accordance with Clause 36.4, and with regard to the Contract documents.

926. On 30 May 2024, the Respondent instructed (by way of its SI 234) the Claimant to construct an updated architectural design related to the SI 151 that the Claimant asserts was different to the design provided at the time of Contract. The Respondent instructed as follows;

"Pursuant to Contract Clause 36.1 the Contractor is to proceed with the updated documentation for construction as follows: -

Architectural

5217_CD_DocTransmittal_240529

We note that the assessment of any additional / negative / neutral costs in association with this direction will be assessed by the Superintendent in accordance with Clause 36.4, and with regard to the Contract documents.

The Principal further reserves their right to recover costs where design works have been completed by the Principal in lieu of the Contractor fulfilling their obligations in the Contract specifications, including but not limited to: -

Submissions;

Certifications;

Manufacturers recommendations;

Shop Drawings

927. On 9 September 2024, the Respondent instructed (by way of its SI 365) the Claimant to construct an updated architectural design related to the SI 151 that the Claimant asserts was different to the design provided at the time of Contract. The Respondent instructed as follows;

> *"Subject to the current Suspension directed under SI 360 being first removed, pursuant to Contract Clause 36.1 the Contractor is to proceed with the updated documentation for construction as follows: -*
>
> *Architectural*
>
> *5217_CD_DocTransmittal_240906;*
>
> *We note that the assessment of any additional / negative / neutral costs in association with this direction will be assessed by the Superintendent in accordance with Clause 36.4, and with regard to the Contract*

928. The Respondent argues that the Claimant did not carry out its contractual obligations under the Architectural Specification (section 0522 and 0531) to consult with CSR/Rondo regarding the wall design to ascertain that the Respondent's design included a Rondo Quiet Stud.

929. The Claimant has provided a copy of the Contract drawing referenced

930. The Claimant has provided an extract from the Contract drawings including CD901 that indicated the PW03 wall type included "92 Steel Stud" and has also provided an extract from the updated drawings that indicated the PW03 wall type included "92 Rondo Quiet Stud".

931. The Contract was based on completed construction documentation set out in Part G of the Annexure. It was up to the Respondent to notify the Claimant of its design changes. The Respondent did that by way of its instructions SI 151, 157, 208, 234 and 365. There was no need for the Respondent to check the Respondent's design. It was entitled to assume that what weas specified on the Contract drawings is what it had to construct. To the extent the Contract Drawings and the standard CSR designs were inconsistent, that was a risk taken by the Respondent pursuant to clause 14.3(e) of the Contract.

932. I am therefore satisfied that the Respondent changed the Contract design and the Respondent is liable for the additional costs relating to the 92 Quiet Stud.

933. On 16 October 2024, the Claimant submitted its notice of intention to claim to supply and install additional waterproofing to the headers above the external light weight walls on the balconies of the units.

934. The Claimant asserts that it was accepted practice between the parties that the Respondent would issue new designs under clause 36.1 of the Contract, which would be considered by the Claimant in sufficient time for the construction to proceed as scheduled and further the Respondent would value its variation in due course. In other words, the parties agreed it was not necessary to strictly comply with the notice period requirement set out in clause 36.1.

935. The last paragraph or the 2nd last paragraph of the Respondent's SI 151, 157, 208, 234 and 365 confirms the Claimant's above assertion because the Superintendent indicated it would value the variation it had instructed under clause 36.4 and implicitly agreed that there was no need to make a submission as to whether it was the direction was a direction to vary WUC

because it satisfied the form requirements of the second paragraph of clause 36.1.

936. Accordingly, I the time bar on clause 36.1 does not operate when the Respondent instructed it would value the variation in accordance with clause 36.4 because the parties agreed that term would not operate.

937. Notwithstanding that the Respondent indicated on all of its instructions that it would value the variation shown on the changed design it had issued, I have also reviewed the Claimant's notice of intention to claim dated 16 October 2024. I am persuaded that there was ample description and pricing provided and together with the Respondent's drawings of 26 June 2024, the Respondent understood or ought to have understood the variation being claimed and how it had been valued.

938. I do, however, accept the Respondent's reason for withholding payment on the basis that the Claimant is not entitled to claim for additional allowance for Contractor to manage procurement, administration of subcontract variations, EDMS, payments and the like (**Allowance**) nor for the BWIC and Office Overheads.

939. For the reasons set out above, the amount the Claimant is entitled to receive is; $9,799.51 claimed by the Claimant, less $230.40 for the Allowance and less $0.00 for BWIC and less $261.22 for Office Overheads.

940. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $9,307.89 for its variation claim referenced; HCV 243.

CLAIM ITEM HCV 251 COMPENSABLE DELAY COST – APPROVED EOT 21

Payment Claim

941. The Claimant claims $47,259.30 for delay costs claimed in relation to its claim for an extension of time EOT21 for 3 days.

942. In the Adjudication Application the Claimant, has considered the Glover Report and has changed its position and now claims; $42,963.00.

Payment Schedule

943. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) *"…The Principal does not agree with the Superintendent's assessment on the basis that no delay costs are payable to the Contractor where the EOT awarded is not within the meaning of a compensable cause which the Contractor is entitled to delay costs under clause 34.9 of the Contract.*

The former Superintendent (Troy White Jennings) issued a instruction that the Contractor can proceed with Broad as its façade subcontractor to issue Form 15 and FP1.4 report, but ***when Broad's system was designed by the Contractor to change to a soffit detail, the Principal was required to issue the instructed drawings to accommodate this design change, which was therefore caused by the Contractor.*** *Claims are approved on account under the Contract only, which includes extension of time claims as per clause 37.2 of the Contract.*

(b) *The Contractor is claiming 10% margin in costs for $4,296.30. The Principal does not agree the Contractor is entitled to a payment for margin in addition to a fixed delay cost rate where:*

> *Pursuant to clause 34.9, the Contractor's sole remedy for delay due to a compensable cause is the delay costs rate under the Contract, therefore the Contractor has no entitlement to claim additional payment for margin; and*
>
> *A claim for delay costs is not a variation claim; rather it is a claim pursuant to subclause 41.1 of the Contract. Clause 41.1 does not entitle the Contractor to claim margin."*

(c) *"We also note that the Contractor has submitted a series of further new variations, which do have some breakdown, but no substantiation or supporting documentation,*

…

-HCV 251

…

These new variations claims are not valid as they: -

> *1. Have been received for the first time with Progress Claim 36 on 16 October 2024 over a month after the Contractor has departed site, and have not been notified as per Clause 36.1 and are therefore time barred;*
>
> *2. Do not provide any supporting evidence for these claims at all, as per Clause 36.5;*
>
> *3. Notwithstanding this, as breakdowns have been provided we have assessed each of these variations and refer to the appended Variations_Claim 36_ September 2024."*

Decision

944. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on 10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

945. The Claimant asserts it is entitled to payment delay costs claimed in relation to its claim for an extension of time EOT21 for 3 days because the Superintendent previously granted the extension of time.

946. On 10 May 2023, the Claimant submitted its claim for an extension of time referenced EOT21. The Claimant asserted the delay was due to changes associated with level 4, P – C 10 column on grid 2 in circumstances where the documentation was missing a drop panel in the area below the P – the 10 column on grid 2. The period of delay was the period for the Claimant to change the formwork deck, install additional reinforcement and re-schedule the concrete supply, pump and place.

947. On 7 June 2023, the Superintendent granted an extension of time of 3 days. It admitted the cause was due to an act or omission of the Respondent and described the reason for the grant as;

> *"Documentation error – L4 panels"*

948. The dispute, among other issues, is about;

(a) whether the Respondent is entitled to change the decision of the Superintendent;

(b) whether the delay for which the EOT was granted was a compensable cause; and

(c) whether the Claimant is barred from claiming the Delay Costs because it failed to submit the claim within the period prescribed by clause 36.1 of the Contract.

949. The Respondent asserts the grant of additional time is "on account only" up until the final reconciliation at the time of the final claim in the same way as all payments made are on account only up to the final payment" as stated in clause 37.2 of the Contract..

950. I prefer the Claimant's argument that that the Respondent is entitled to reverse the decision of the Superintendent because there is nothing in the Contract that permits the Respondent to do so.

951. Under the Act, the Respondent is entitled to nominate itself as the person who will respond to the Payment Claim. The Act, however, does not entitle the Respondent from reversing the decision to grant 3 days EOT of the former superintendent.

952. The Respondent must provide reasons for withholding payment in relation to the claim for Delay Costs following the grant of the EOT. The Respondent has failed to provide any valid reason for withholding payment because it only provided an unsupported assertion that the former Superintendent got it decision wrong because he did not consider all the facts and, therefore, the Claimant never accrued any right to claim EOT21.

953. I am not persuaded by the Respondent's unsupported argument that the former Superintendent got it wrong because the Respondent has not provided any evidence that would displace the claim for the EOT, the Superintendent's grant of EOT, the explanation of the change that was required due to the error in the level 4 design and the time taken to rectify the work that was underway.

954. I am also not persuaded that the Respondent's design error, which was admitted by the Superintendent, is not a compensable cause because clause 1 of the Contract defines "*compensable cause*" as;

> *"a) any act, default, or omission of the Superintendent, the Principal, its consultants, agents, other contractors (not being employed by the Contractor), or separate contractors;"*

955. Further, clause 14.3(e) of the Contract makes it clear that the Respondent is liable for damage or loss suffered by the Claimant due to defects in the design of the WUC. Similarly, clause 32 of the Contract provides that;

> *"…*
>
> *b) any act, direction or omission of the Principal or Superintendent, causes, the Contractor to incur more or less cost than otherwise would have been incurred, the difference will be assessed by the Superintendent in accordance with clause 36.4 and added or deducted from the contract sum.*

956. The Claimant was required to construct in accordance with the Respondent's design contained in Part G of the Annexure. The design should have been provided the Claimant to the standard set out in Part H of the Annexure to the Contract. Based on the

Superintendent's reason for the grant, the L4 design was defective.

957. Pursuant to clause 1, I do not accept that the Respondent's failure to provide defect free design that cause the Claimant to suffer loss or damage is not a compensable cause.

958. The Respondent asserts the Claimant failed to follow the process set out in clause 36.1 for variations. The Claimant asserts this was not a claim for a variation it was a claim for repayment of Delay Costs incurred due to an act or omission of the Respondent. I accept the Claimant's reason based on the definition of Delay Costs provided in clause 34.9, which states;

> *"For every day the subject of an EOT for a compensable cause and for which the Contractor gives the Superintendent a claim for delay costs pursuant to subclause 41.1, costs certified by the Superintendent as reasonably and necessarily incurred due to the delay (subject to the daily cap stated in Item 26A) will be due and payable to the Contractor. The Contractor has no claim of any kind whatsoever for delay or disruption costs as a result of the Superintendent exercising the discretion under subclause 34.5 to direct an EOT and, except as stated in this clause 34.9, the Contractor has no claim of any kind whatsoever for delay or disruption costs arising out of WUC.*

959. Further, there is nothing in the Contract that specifies a maximum time within which the Claimant may make a claim for Delay Costs following the grant of an extension of time.

960. In relation to the Respondent's reason for withholding payment on the basis this "variation" was received for the first time on 16 October 2024. I can see that the Delay Costs pursuant to clause 34.9 were claimed for the first time on 16 October 2024. The Respondent has not explained where the Contract says that the Claimant will lose its right to claim payment for Delay Costs for an EOT granted by the Superintendent.

961. The Claimant was entitled to claim the costs prescribed in Item 26A of Part A of the Annexure. There is no dispute that the crane and the man/material hoist are erected and in place.

962. Accordingly, the Claimant was entitled to claim $14,321.00 per day.

963. For the reasons set out above, the amount the Claimant is entitled to payment of; $42,963.00.

964. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount of $42,963.00 for its Delay Costs claim referenced; HCV 251.

CLAIM ITEM HCV 252 TERMINATION COSTS

Payment Claim

965. The Claimant claims $11,462,264.72 for "termination costs".

Payment Schedule

966. The Respondent has scheduled $0.00 in the Payment Schedule for payment of this Item and provides the following reasons for withholding payment;

(a) *"…The basis of HCV 252 (Revision A) is stated by the Contractor as costs incurred following the Principal's substantial breaches and subsequent termination by the Contractor" and makes claims for:*

loss of profit on contract and variation works;

costs of demobilisation;

costs of items remaining on site;

additional hire of equipment for demobilisation (assuming demobilisation date of 31 October 2024);

the Contractor's team costs at varying weekly durations from director and CFO to labourer;

legal costs associated with termination and breaches, including cost to date and forecast cost;

office overheads at 4.5%; and

margin at 10%.

The Principal's primary position is that the amounts claimed in CV 252 are not payable to the Contractor where: for the reasons stated in its notice dated 11 September 2024,

the Contractor purported to exercise a right to terminate the Contract where it had no entitlement to do so and was unlawful, amounting to repudiation of the Contract, and the Principal elected to affirm the Contract. In those circumstances, the Contract is still on foot and ***the Contractor has no lawful right to a claim for damages associated with unlawful termination of the Contract****;*

on 12 September 2024, the Principal issued a take out notice pursuant to the Contract, which included the exercise of clause 39.4 to take the whole of the remaining works out of the Contractor's hands and suspend payment until it becomes due and payable pursuant to clause 39.6 of the Contract. As the Contractor has no right to payment until it becomes due and payable pursuant to subclause 39.6, the amounts claimed in CV 252 are not payable; and

Clause 39.10 of the Contract provides that if the Contractor terminates the Contract pursuant to clause 39.9 (which is denied), the parties remedies, rights and liabilities will be the same as they would have been under the law governing the Contract had the defaulting party repudiated the Contract and the other party elected to treat the Contract as at an end and recover damages. ***As the Contractor is claiming costs due to its unlawful termination, clause 39.9 confirms under the Contract this is a claim for damages for repudiation and therefore not claimable under the Act.***

(b) *Notwithstanding the above primary position that the Contract is on foot and the Contractor has no entitlement to claim damages for breach of Contract, the Principal also considers there to be no amount payable where HCV 252 is a claim for damages for repudiation and/or breach and/or termination of the Contract and is not a claim for a progress payment for construction work and is not claimable under the Act. The Contractor attempts to claim as a variation amounts which are associated with its unlawful termination of the contract, which is not a claim within the meaning of clause 36.1 of the Contract and therefore the Contractor has no entitlement to claim the amounts under this clause or otherwise under the Contract.*

In addition to the above primary position, the Principal also relies on the following reasons:

Loss of Profit

The Contractor has no entitlement to claim for loss of profit on contract works and variation works also because:

a claim for loss of profit is a claim for damages for repudiation and is not a claim for a progress payment for construction work and therefore not recoverable under the Act;

pursuant to clause 45 of the Contract, each party's liability to the other does not include liability for consequential loss, which is defined in clause 1 to include "loss of profit or anticipated profit" and "loss of opportunities" therefore the Contractor has no basis under the Contract or otherwise to claim loss of profit or anticipated profit from the Principal; and

the Contractor also has no entitlement to claim loss of profit on variations which are unapproved or rejected by

the Superintendent and/or Principal, nor entitlement to claim loss of profit generally for contract works and variations under the Contractor's termination rights (termination of which was unlawful) or anywhere else in the Contract.

Demobilisation from the site costs

In respect claims for demobilisation of the site:

Items 1.2.1 to 1.2.6 refer to tax invoices from Equipment & Lifting Solution which have not been provided with the Payment Claim but presumably were issued to the Contractor for unlawful removal of plant, equipment and materials from the site from 29 August 2024. The Contractor has no entitlement to such claims where the Contractor unlawfully suspended works, and unlawfully refused to comply with correspondence issued by the Principal on 30 August 2024 and directions issued by the Superintendent to cease unlawful removal of materials without the Superintendent's approval including SI 357 and 360.

Any invoices for costs incurred following the order of the Court dated 4 September 2024 in proceeding BS11674/24 are in contravention of that court order and not payable to the Contractor, subject to the terms of that order.

The crane remains on site therefore the Contractor has not incurred these demobilisation costs, including the hoist and loading bays which also remain on site. Pursuant to clause 39.5, the Principal retains the right to use such plant and equipment to complete the works without further payment to the Contractor until such time as certification is provided under clause 39.6 of the Contract.

Items remain on site for York

The Contractor has provided no evidence of the items remaining on site for the Principal to verify these amounts, noting that in any event the Contractor has

no right to payment of these items where pursuant to clause 39.5, the Principal is entitled to use such items for completion of WUC until certification pursuant to clause 39.6.

Additional hire of equipment for demobilisation (assuming demobilisation date of 31 October 2024)

In the ordinary course of demobilisation, the Contractor has no entitlement to claim storage fees for Schindler lifts and façade form. Further, per clause 37.3, the Contractor has no right to payment associated with unfixed plant and materials which includes the façade and lift where the Contractor claims storage fees.

Tomkins team

The Contractor's breakdown provides no explanation for why there are varying durations for Tomkins team from director down to labourers. The costs claimed for senior management personnel such as Director, CDO, operations manager and commercial manager are unreasonable where such personnel are not resources directly involved or responsible for the works under the Contract.

Costs claimed for management personnel in excess of 14-17 weeks is unreasonable and not reflective of a period of time for demobilisation for such personnel to be involved in the project. The Contractor has not substantiated these costs will be incurred, and are reasonable and reflective of termination/demobilisation costs (which the Principal denies the Contractor is entitled to).

Legal costs for Termination and Client Breaches

> *The Contractor has no right to claim legal costs including forecasted legal costs under the Act; this is not a claim for construction work related to a progress payment and is a claim for damages associated with repudiation.*
>
> *The costs to date and forecast are unreasonable and do not provide any breakdowns associated to substantiate this component of this claim.*

Other allowances

> *The Contractor has also attempted to claim office overheads at 4.5% in addition to the 10% allowance for profit and overheads, which we do not view as reasonable. Even if this was a valid variation (which is denied) per clause 36.4, the Contractor is not entitled to double payment for OH&P where the Contractor already claims margin of 10% and is attempting to claim here 14.5% profit.*
>
> *The Contractor also has no entitlement whatsoever to any form of OH&P where the Contractor is already claiming loss of profit, meaning this is a double claim for payment which the Contractor has no entitlement to."*

Decision

967. I have decided above at paragraphs 88) to 218)that the Claimant lawfully terminated the Contract on 10 September 2024. Accordingly, there is no need to consider again the Respondent's assertion that it took the work out of the hands of the Claimant on 12 September 2024 because, the Contract was terminated on

10 September 2024 and save for the clauses of the Contract that survive termination, all rights and obligations under the Contract between the parties were extinguished on 10 September 2024. Accordingly, in reliance on the rights under clause 39.5 by the Respondent are of no consequence and are nugatory.

968. The Claimant asserts it is entitled to claim $11,462264.72 for "termination costs" comprised of the following;

(a) Loss of profit on Contract works;

(b) Loss of profit on Variation works;

(c) The costs of demobilisation;

(d) The value of items left on site;

(e) Additional hire of equipment not including demobilisation;

(f) The cost of the Tomkins project team;

(g) Legal costs (which are not pressed in this Adjudication Application);

(h) Contractor overheads; and Margin.

Termination of the Contract

969. The Respondent asserts the Claimant is not entitled to make this termination claim because it has no lawful right to claim for damages arising from an unlawful termination of the Contract.

970. For the reasons set out above at paragraphs; 87) to 217), I found the Claimant lawfully terminated the Contract on 10 September 2024.

Respondent asserts it took the work out of the hands of the Claimant on 12 September 2024

971. The Respondent asserts it took the work out of the hands of the Claimant on 12 September 2024 and, therefore, the Claimant has no right to make this claim.

972. The Claimant asserts it lawfully terminated the Contract on 10 September 2024.

973. For the reasons set out above at paragraphs; 87) to 217), I have decided the Claimant lawfully terminated the Contract on 10 September 2024.

974. From the date of termination, the parties' future rights and obligations under the Contract were extinguished save for those terms that the Contract indicates would survive termination.

975. Clause 39.4 of the Contract sets out a process whereby the Respondent can take the work out of the hands of the Claimant and perform that work itself while the Contract remains on-foot.

976. There is nothing in the Contract that indicates that clause 39.4 survives termination and, therefore, the Respondent's notice of 12 September 2024 is void as the Contract was terminated on 10 September 2024 by the Claimant.

977. Accordingly, the Respondent's notice under clause 39.4 was void.

Respondent asserts Claimant has no right to make Payment Claim after date of termination

978. I decided above at paragraphs 23) to 26)that the work being performed under the Contract is construction work as defined in

section 65 of the Act. I also decided that the Contract is a construction contract as defined in section 64 of the Act and the Claimant's Payment Claim was valid payment claim pursuant to sections 68 and 76 of the Act.

979. The Respondent asserts that paragraph 39.10 makes it clear that all claims following termination are claims for damages, which are not permitted under the Act.

980. Clause 39.10 provides;

> *39.10 Termination*
>
> *If the Contract is terminated pursuant to subclause 39.4(b) or 39.9. the parties' remedies, rights and liabilities will be the same as they would have been under the law governing the Contract had the defaulting party repudiated the Contract and the other party elected to treat the Contract as at an end and recover damages.*
>
> *If the Principal has terminated the Contract, the Principal may also without payment or compensation, take possession of the design documents.*

981. The Respondent further asserts that damages for breach of contract are not construction work that can be claimed under the Act.

982. The Claimant asserts the Act provides a statutory right to make a final payment claim in circumstances where the Claimant terminated the Contract. The Claimant refers to section 70 of the Act, which provides;

> *"70. Right to progress payments*

> *From each reference date under a construction contract,* ***a person is entitled to a progress payment if the person has carried out construction work, or supplied related goods and services, under the contract****.*

983. Section 67 of the Act provides;

> *"67Meaning of reference date*
>
> *(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****.*

984. The Contract does not provide the Claimant a right to make a progress claim following termination.

985. There is no doubt, however, that the Claimant accrued a right to make a payment claim from the date of termination because that right is provided by section 67 of the Act.

986. I am, therefore, persuaded the Claimant accrued a right to make a payment claim from the date of termination by the operation of section 67 of the Act.

Respondent argues all claims after termination are claims for damages under clause 39.10

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987. The Respondent argues that Clause 39.10 makes it clear that all claims made after the date of termination are claims for damages and, since damages are not considered construction work for the purposes of the Act, the Claimant is not entitled to claim any further amounts following termination. Clause 39.10 provides;

> *39.10 Termination*
>
> *If the Contract is terminated pursuant to subclause 39.4(b) or 39.9. the parties' remedies, rights and liabilities will be the same as they would have been under the law governing the Contract had the defaulting party repudiated the Contract and the other party elected to treat the Contract as at an end and recover damages.*
>
> *If the Principal has terminated the Contract, the Principal may also without payment or compensation, take possession of the design documents.*

988. The Claimant argues that clause 39.10 creates an express contractual, right for the claimant to recover all damages, which would otherwise have been available in circumstances where a common-law claim for repudiation existed.

989. I accept the Respondent's argument that where the Contract has been terminated, all subsequent claims are claims for damages for the purposes of contract law.

990. However, it does not follow that all claims for damages cannot be claimed under the Contract or in a final payment claim made under the Act because the Contract expressly provides otherwise as does the Act.

991. Ordinarily, a Claimant cannot claim for damages arising from breach of contract unless the Contract expressly provides for claiming for the types of damages[10]. Clauses 14, 32, 34.9 and 39.9 are examples of such clauses.

992. Furthermore, some claims for damages may be made pursuant to the provisions of the Contract that survive termination. For example; clause 39.9 requires the Superintendent and or the Respondent to assess certain damages after termination. Clearly, that is assessment and liability of the Respondent is an amount for which the Claimant can claim payment.

993. The operation of the Act permits claims for damages to be made in a final payment claim under the Act if those claims for damages are referable to the construction work. In other words, anything that was claimable under the Contract during the course of the Contract may be claimed in the final payment claim under the Act after termination of the Contract.

994. The permitted contents of a final payment claim following termination was explained in *S.H.A. Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd* [2020] QSC 307 as follows;

> *"…*
>
> *75. A similar proposition applies in relation to the final payment claim, which the Act authorises to be made when a contract has*

[10] *Coordinated Construction Co. Pty. Ltd. v. J.M. Hargreaves (NSW) Pty. Ltd. & Ors. [2005] NSWCA 228 (**Hargreaves**)*

been terminated, and even though the fact of the ***termination means that there can never be a final payment claim advanced pursuant to the contract****.*

In the present case, it does not matter that the amount which represents the retentions withheld under the contract cannot be said to be an amount which has yet accrued due and payable under the contract*.*

The contractor has a statutory entitlement to a final payment claim, calculated under s 71(b) and valued under s 72(1)(b)*.*

If the adjudicator values that claim in accordance with the provisions of the Act, the effect of that valuation may well be to enable the claimant to be paid an amount of money which includes the value of cash retentions withheld from work already done (and even though under the contract there was no accrued right to the return of cash retentions), but that seems to me to be made permissible by the terms of the Act.

…"

995. In the event of termination under the clause 39.9, common law rights are expressly preserved by subclause 39.1, which states;

"39.1 Preservation of other rights

If a party breaches (including repudiates), the Contract, nothing in this clause will prejudice the right of the other party to recover damages or exercise any other right or remedy."

996. Clause 39.10 preserves each party's common law rights in respect to damages for breach of the Contract. It provides that if the Contract is terminated, each party's rights, remedies and

liabilities are the same as they would have been under the law governing the Contract had the defaulting party repudiated the Contract and the other party had elected to treat the Contract as at an end and to recover damages.

997. Clause 39.10 is necessary otherwise a party terminating the Contract pursuant to clause 39 may not be able to recover damages because of such breach. Clause 39.1 makes it clear that a party terminating the Contract under subclause 39.4(b) or 39.9, as the case may be, may also at the same time exercise its common law rights to recover damages or exercise any other legal right or remedy.

998. Clause 39.10 ensures the preservation of the terminating party's rights to payment for work completed and the Contract and for damages referable to the Contract including for damages arising from the suspension.

999. I do not, however, accept the Claimant's assertion that all common law rights the Claimant may have in relation to the Contract can be applied in determining the Claimant's final entitlements under the Adjudication Application. The express words of clause 39.10 of the Contract only indicates that the parties' common law rights are not displaced by the Contract in the event of termination of the Contract.

1000. To the extent any provision of the Contract conflicts with any section of the Act, section 200 of the Act provides that contractual provision will be void and have no effect in the determination of the parties' rights and liabilities. The provisions of the Act will prevail.

1001. The Contract provides for the assessment of certain types of damages by the Superintendent and payment of those assessed damages by the Respondent. For example, clauses 14, 32, 34.9

and 39.9 identify certain types of damages, which form part of the construction work in certain cases and may be the subject of a payment claim. This conclusion was confirmed in *Coordinated Construction Co. Pty. Ltd. v. J.M. Hargreaves (NSW) Pty. Ltd. & Ors. [2005] NSWCA 228.* The relevant extract from that case appears at paragraph 1010) below.

1002. The Claimant may similarly claim payment for damages under clauses 14, 32, 34.9 and 39.9 incurred during the course of the Contract after termination.

1003. I decided above at paragraphs 978) to 987), that the Act provides that upon termination of the Contract, the Claimant accrues a reference date being the date of termination and the Claimant is entitled to make a final payment claim under the Act.

1004. In other words, the Claimant was entitled to make the Payment Claim for completed work which includes damages incurred that were referred to in the Contract.

1005. The Claimant was entitled to claim for the damages suffered that were envisaged by the Contract, which were described in *Hargreaves* as forming a part of the construction work. The Claimant is not, however, entitled to claim for the types of damages that are not expressly permitted to be claimed by the Contract.

1006. Accordingly, I do not accept the Respondent's argument that the Payment Claim is invalid because it is a claim for damages.

1007. I also do not accept the Claimant's argument about the operation of clause 39.10.

Damages envisaged by the Contract - Clauses 14, 15.1, 26.3, 32, 34.9 and 39.9

1008. The term; "*damages*" ordinarily refers to the monetary compensation awarded to a party who suffers a loss or injury due to a breach of contract, aiming to restore them to the position they would have been in had the contract been fulfilled.

1009. Under the Contract, the term "*damages*" is not defined.

1010. In *Coordinated Construction Co. Pty. Ltd. v. J.M. Hargreaves (NSW) Pty. Ltd. & Ors. [2005] NSWCA 228*, the Court provided some guidance about the meaning of the term "*damages*" under an AS 4903-2000 form of contract as follows;

> *"38 The object of the Act is stated in s.3(1) as being "to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services". **The definition of "progress payment" refers to s.8, which does not limit the payment to payment for construction work and/or related goods and services; and the amount of the progress payment is dealt with in s.9, which also does not impose such a limit.***

39 It is true that s.13 requires a payment claim to indicate the claimed amount, and that this expression is defined to be an amount claimed to be due for construction work carried out or for related goods and services supplied; and, pursuant to s.17, what is adjudicated is the payment claim. That gives some support to the argument that the adjudicator can only include in progress payments amounts claimed to be due for construction work carried out and/or for related goods and services supplied; but the terms of s.13 itself, in particular s.13(3), tell against it. Further, as submitted by Mr. Feller SC for Hargreaves, it is by no means clear that the words "carried out" and "supplied" should be given a strict temporal connotation.

40 Further, in the case of a construction contract that provides that progress payments include certain amounts, s.9(a) strongly suggests that such amounts are to be included in progress payments required by the Act, whether or not they are for construction work or related goods and services; and in my opinion, to put it at its lowest, that in turn suggests that any requirement from s.13 and the definition of ***"claimed amount" that the progress payment must be for construction work carried out or for related goods and services supplied should not be given a narrow construction or effect****. I do not say that it would be sufficient that an amount be "in respect of" or "in relation to" construction work carried out or related goods and services applied; but I do say that "for" should not be construed narrowly.*

41 ***In my opinion, the circumstance that a particular amount may be characterised by a contract as "damages" or "interest" cannot be conclusive as to whether or not such an amount is for construction work carried out or for related goods and 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" or "interest"; 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.

42 Under the contract in this case, delay damages are payable only if an EOT is for a compensable cause, that is, in general some act or omission of the head contractor or the superintendent or the sub-contract superintendent; but nevertheless, they are not of their nature damages for breach but rather are additional amounts which may become due and payable under the contract (cl.34.9) and which are then to be included in progress payments (cl.37.1). They are therefore prima facie within s.9(a) of the Act.

43 If in substance they represent the increased cost or price of construction work actually carried out, in my opinion they are clearly for construction work carried out. If they represent the cost or price of goods or services actually supplied in connection with the construction work under the contract, they are for related goods or services supplied, even if not for construction work carried out.

44 If they represent off-site costs (such as office overheads) or other on-site costs, it may be a question of fact and degree whether they are for construction work carried out or for related goods and services supplied. They would in my opinion properly be regarded at least as part of the price for the totality of the construction work when completed. And it would seem artificial to say that they are excluded from the Act if they are not referable to work that has already been carried out,

particularly when s.9(b) refers to the value of construction work undertaken to be carried out and related goods and services undertaken to be supplied. However, it is not necessary in this case altogether to exclude the possibility that some delay damages claimed under this contract might possibly not be for construction work carried out or related goods and services supplied within the definition of "claimed amount" in s.4; but it is certainly not obvious that this is so in relation to any of the claims in this case.

> *45 It follows from this discussion that delay damages and interest under this contract could be claimed to be due for construction work carried out or for related goods and services supplied; and in my opinion, even if s.13 is construed as limiting claims to claims for payment for construction work carried out or for related goods and services supplied, it would be for the adjudicator to determine whether or not such amounts should be included in the amount determined, having regard particularly to s.9(a) and other provisions of the Act and the contract. This appears to be what each adjudicator did; and I am not satisfied even that any error of law on the face of the record has been established, much less an error of the kind that could invalidate a decision.*

1011. Under the Contract there are several references to "*damages*" for which the Respondent may be liable.

1012. For example, "*delay damages*" are payable only if an EOT is for a compensable cause, but nevertheless, they are not of their nature damages for breach but rather are additional amounts which may become due and payable under clause 34.9 of the Contract and which are then to be included in progress payments pursuant to clause 37.1 of the Contract. Prima facie they are contemplated by within section 71 of the Act.

1013. Similarly, under clause 14.3(a) of the Contract the Respondent is liable for loss or damage due to the acts or omissions of the Superintendent, the Respondent and its other contractors and agents.

1014. Furthermore, under clause 14.3(e) of the Contract the Respondent is liable for loss or damage due to defects in the design of WUC.

1015. Under clause 32 of the Contract, the Respondent is liable for any act, direction or omission of the Respondent or the Superintendent that causes the Claimant to suffer more or less cost than otherwise would have been incurred.

1016. If damages referred to in the Contract form a part of the increased cost or price of construction work actually carried out, those damages are clearly for construction work carried out.

1017. Finally, the damages must have been suffered or costs for which the Respondent is liable, incurred by the Claimant. There is no provision for future losses.

1018. The Claimant refers me to section 68(2) of the Act and section 37.4 of the Contract, which it argues confirms that the Claimant is entitled to claim payment for any claim in connection with the Contract. That section also refers to section98(3) of the Act.

1019. Sections 68 and 93 of the Act provide;

> "68 *Meaning of payment claim*
>
> *(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*
>
> *(b) states the amount (the claimed amount) of the progress payment that the claimant claims is payable by the respondent; and*
>
> *(c) requests payment of the claimed amount; and*
>
> *(d) includes the other information prescribed by regulation.*

(2) ***The amount claimed in the payment claim may include an amount that—***

(a) the respondent is liable to pay the claimant under section 98(3)*; or*

(b) is held under the construction contract by the respondent and that the claimant claims is due for release.

(3) A written document bearing the word 'invoice' is taken to satisfy subsection (1)(c).

98 Claimant's right to suspend work

(1) A claimant may suspend carrying out construction work, or supplying related goods and services, under a construction contract if at least 2 business days have passed since the claimant gave notice of intention to do so to the respondent under section 78 or 92.

(2) The right conferred under subsection (1) exists until the day on which the claimant receives payment from the respondent of the amount mentioned in section 78(1) or 92(1), and continues for another 3 business days immediately following that day.

(3) ***If, in exercising the right to suspend carrying out construction work or supplying related goods and services under a construction contract, the claimant incurs a loss or expense because the respondent removes any part of the work or supply from the contract, the respondent is liable to pay the claimant the amount of the loss or expense.***

> *(4) A claimant who suspends carrying out construction work, or supplying related goods and services under a construction contract under subsection (1) is not liable for any loss or damage suffered by the respondent, or by any person claiming through the respondent, because of the claimant not carrying out that work or not supplying those goods and services, during the suspension.*

1020. The Act and the Contract both entitle the Claimant to claim damages incurred under the Contract, which are referred to in the Contract. I do not accept that either the Act of the Contract entitle the Claimant to claim a loss that has not been incurred as of the date of the termination.

1021. I do not consider the loss of profit on unexecuted work is a damage that forms a part of any executed work.

1022. I am not persuaded that section 98(3) is relevant because the Respondent did not take any of the work out of the hands of the Claimant because the Claimant terminated the Contract before the Respondent was able to do so.

1023. In order for damages to be claimable, they must be referable to the work that has been carried out and those damages must have been incurred.

1024. The Claimant referred me to *S.H.A. Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd* [2020] QSC 307, which sets out what a Claimant may claim upon accruing a right to make a payment claim upon termination of the Contract. That case involved an AS4902 contract, which is similar to the Contract. In that case, Bond J held;

> …
>
> *56. Clause 37 provided for progress claims by Niclin in respect of work it had done under the contract. That clause provided for successive progress claims to be made, and for a Superintendent to issue in response to each claim a progress certificate certifying the amount due pursuant to the claim and also a certificate evidencing the Superintendent's assessment of "retention moneys". SHA was entitled to deduct the amount certified for retention moneys from the amount otherwise certified to be due for work which had been performed.*
>
> *57. The contractual contemplation was that any retention moneys so deducted from amounts which would otherwise have been payable for work done would be held as security pursuant to cl 5.[11] Clauses 5.2 and 5.4 dealt with the circumstances in which SHA (as Principal) was entitled to have recourse to security and the circumstances in which SHA was obliged to reduce or release security in these terms:*
>
> *5.2 Recourse*
>
> *Security shall be subject to recourse by the Principal when:*
>
> *[11] There was an incongruity between the language of the contract (which in Annexure Part A identified that Niclin would provide insurance bonds as security, rather than cash retention) and what actually happened (namely, that security was actually provided in the form of cash retentions, and not by way of insurance bonds). But it was common ground that*

this had happened and that cash retentions were accepted as security for the purposes of cl 5.

(a) the Principal remains unpaid after the time for payment of a claim for moneys;

(b) the Superintendent has certified that monies are due and payable to the Principal;

(c) the Principal has or asserts an entitlement to payment of money (including by way of set off) by the Contractor in connection with this Contract or otherwise at law;

(d) the Principal asserts that the Contractor is in breach of any of its obligations in connection with this Contract (whether or not the financial consequences to the Principal of any such breach have been ascertained) in all such cases as if the security were a sum of money due or to become due to the Principal by the Contractor; or

(e) the Contractor is insolvent within the meaning subclause 39.11.

...

5.4 Reduction and release

Upon the issue of the certificate of practical completion the Principal's entitlement to security … shall be reduced by the percentage or amount in Item 14(f) as applicable, and the reduction shall be released and returned within 14 days to the Contractor.

…

The Principal's entitlement otherwise to security shall cease 14 days after final certificate.

Upon the Principal's entitlement to security ceasing, the Principal shall release and return forthwith the security to the Contractor.

58. If recourse was not had to the cash retentions pursuant to cl 5.3, then SHA would be obliged to return 50% of the retentions once practical completion was achieved and could hold the balance until 14 days after the final certificate. The process of claiming for and obtaining a final certificate was set out in cl 37.4. The effect of that clause was that Niclin could lodge a final payment claim within 28 days after the expiry of the last defects liability period, and the Superintendent was obliged to issue a final certificate within 42 days after the expiry of the last defects liability period.

59. However, the contract did provide for what would happen to contractual rights if the contract was terminated in the way in which SHA had purported to terminate it. Clause 39.10 of the contract provided:

> *If the Contract is terminated pursuant to subclause 39.4(b) or 39.9, the parties' remedies, rights and liabilities shall be the same as they would have been under the law governing the Contract had the defaulting party repudiated the Contract and the other party elected to treat the Contract as at an end and recover damages.*

60. Unless an entitlement to be paid the amount of the retention moneys which had been withheld from previous progress payments had already accrued under the contract prior to its termination, then, as a matter of orthodox contract law, Niclin could not advance a claim that those moneys were contractually due and owing under the contract: McDonald v Dennys Lascelles Ltd *(1933) 48 CLR 457 at 476–7. Niclin would have to express its claim by reference to some other cause of action.*

61. The adjudicator acted on these propositions:

(a) Moneys had been retained by SHA by operation of cl 37.[12]

(b) Practical completion was achieved on 2 August 2018, and a 12-month defects liability period commenced on that date.[13]

(c) However, the defects liability period was extended by a defects notice dated 25 July 2019, with the result that the defects liability period was to expire on 2 August 2020.[14]

(d) Pursuant to cl 39.4 of the contract, SHA terminated the contract on 12 December 2019.[15]

(e) Pursuant to s 67(2) of the Act, a reference date arose on 12 December 2019 when the contract was terminated.[16]

[12] *Charleville adjudication decision at [133]–[134]; [152]; [457]–[466]; [625].*

[13] *Charleville adjudication decision at* [14].

[14] *Charleville adjudication decision at* [17].

[15] *Charleville adjudication decision at [21];* [128].

[16] *Charleville adjudication decision at [136];* [195].

62. The adjudicator noted the terms of cl 37.10 and concluded that the progress payment provisions of the contract did not "survive termination",[17] with the result that Niclin could not submit a claim for payment under the contract and could not advance a claim for the release of retentions under cl 37.4 of the contract.[18] He then observed:[19]

> *Therefore, in order to claim any money which [Niclin] claims is due under the contract from [SHA], including retention money, [Niclin] must submit its payment claim, for all amounts it claims is due, following termination.*

[17] Charleville adjudication decision at [131]; [140].

[18] Charleville adjudication decision at [133].

[19] Charleville adjudication decision at [134].

63. He reasoned that, pursuant to s 67(2), Niclin had a right to advance a final payment claim under the Act.[20] He reasoned that Niclin was authorised by the Act to include in that final payment claim all moneys it said were due and payable under the contract.[21] He then concluded that the existence of a right to a final payment claim was a sufficient basis to warrant the conclusion that Niclin had the right to include the amount of the cash retentions in the amount that it claimed was payable by SHA.[22] Two aspects of his reasoning should be quoted.

[20] Charleville adjudication decision at [135]–[137].

[21] Charleville adjudication decision at [148].

[22] Charleville adjudication decision at [148]–[152]; [461]–[462].

64. First, from the "Jurisdiction" section of his reasoning:

> *152. I am satisfied from the information before me as follows:*
>
> *• That the payment claim does not include for any costs incurred in rectifying defects;*
>
> *• That the payment claim includes for the completion of contract works;*

> • *That the payment claim includes for the release of cash retention;*
>
> • *That [Niclin] has carried out the rectification of the defects set out in [SHA's] defects notice dated 25 July 2019;*
>
> • *That [SHA] was aware that the rectification work had been carried out; and*
>
> • *That having completed the defects included in the defects notice and pursuant to section 68(1)(b) of the Act, [Niclin] is entitled to include the release of the cash retention in the amount [Niclin] says is payable by [SHA].*

65. Finally, his reasoning was ultimately expressed in these terms:

> *461. As noted in the 'Jurisdiction' section of this adjudication decision, the parties agree that the contract has been terminated and I am satisfied that the contract has been terminated. In addition, I am satisfied that the defects liability period is no longer on foot. I am also satisfied that pursuant to section 75(6) of the Act, the payment claim is a progress claim for the final payment for the construction work carried under the contract.*
>
> *462. I am therefore satisfied that [Niclin] is entitled to the release of the final security held by [SHA].*

66. In my view, the criticisms which SHA made of the adjudicator cannot be accepted. It was evident from his reasoning that he had performed his task in the manner contemplated by the Act. He appreciated that the contract did not give a right to recover the value of the retention sums. He reasoned that once Niclin had established a right to make a final

payment claim, the provisions of the Act were such that the final payment claim could be calculated in such a way that permitted an effective recovery of retentions (or, using his words, having completed the works and defects, Niclin was "entitled to include the release of the cash retention in the amount [Niclin] says is payable"). That was so because of the nature of a final payment claim, and of cash retentions (which represent a withholding of payment from the value of work which has already been completed).

67. For the reasons which follow, the proper construction of the Act permitted of that approach.

68. The final reference date for this contract was the date the contract was terminated: s 67(2).
The Act contemplates a final payment claim under its terms, even if no final payment claim is authorised by the contractual provisions.

69. From that final reference date, Niclin was entitled to a progress payment: s 70. "Progress payment" is relevantly defined in s 64 as "the final payment for construction work carried out, or for related goods and services supplied, under a construction contract". That means that, from the date the contract was terminated, the Act gave Niclin the entitlement to advance a payment claim for the final payment for construction work carried out under the contract.

70. Pursuant to s 71:

> *The amount of a progress payment to which a person is entitled under a construction contract is—*
>
> *(a)* ***if the contract provides for the matter—the amount calculated in accordance with the contract****; or*
>
> *(b) if the contract does not provide for the matter—the amount calculated on the basis of the value of construction work carried out, or related goods and services supplied, by the person in accordance with the contract.*

71. Pursuant to s 72:

> *(1) Construction work carried out under a construction contract is to be valued—*
>
> *(a) if the contract provides for the matter—in accordance with the contract; or*
>
> *(b) if the contract does not provide for the matter—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.***
>
> …
>
> (4) In this section—
>
> ***contract price, for a construction contract, means the amount the contracted party is entitled to be paid under the contract or, if the amount can not be accurately calculated, the reasonable estimate of the amount the contracted party is entitled to be paid under the contract.***

72. In this case, the contract did not provide for the calculation of a final payment claim calculated from the date of termination of the contract or for the valuation of such a claim. Accordingly, the amount of this particular progress payment (which, in the circumstances, was the final payment claim) was to be calculated under s 71(b) and valued under s 72(1)(b).

73. In the present case, Niclin presented its payment claim in a way which demonstrated that, insofar as its claim sought return of retentions, that was because its payment claim was based on the value of all work done including variations less previous

payments, and that value necessitated payment of retentions which had previously been withheld from the valuation of work done. That is apparent by reference to this table expressed in Niclin's payment claim:

74. SHA's first argument before me wrongly seeks to advance the proposition that a payment claim under the Act cannot advance a money claim unless it can demonstrate that the entirety of the amount claimed has actually accrued due under the contract. But that proposition cannot be made good. Most sophisticated construction contracts are structured such that progress payments do not accrue due unless and until a certifier has certified an amount for payment. The existence of such a certificate is a condition precedent to the amount becoming due and payable under the contract. Absent that certificate, the claimant is not entitled to be paid under the contract. But the Act creates an entitlement to a progress payment valued in a particular way, and regardless of whether the contractual certificate has been obtained. The fact that progress payments are to be valued "having regard to … contract price", and that the definition of that term refers to the amount the party is "entitled to be paid under the contract", is not to be construed as a mechanism by which contractual conditions precedent to entitlement stymie the right to a progress payment which the Act provides.

75. A similar proposition applies in relation to the final payment claim, which the Act authorises to be made when a contract has been terminated, and even though the fact of the termination means that there can never be a final payment claim advanced pursuant to the contract. In the present case, it does not matter that the amount which represents the retentions withheld under the contract cannot be said to be an amount which has yet accrued due and payable under the contract. The

contractor has a statutory entitlement to a final payment claim, calculated under s 71(b) and valued under s 72(1)(b). If the adjudicator values that claim in accordance with the provisions of the Act, the effect of that valuation may well be to enable the claimant to be paid an amount of money which includes the value of cash retentions withheld from work already done (and even though under the contract there was no accrued right to the return of cash retentions), but that seems to me to be made permissible by the terms of the Act.

76. A variant of the first argument was that conducting the valuation of a final payment claim in a way which permits of the effective recovery of cash retentions would be contrary to the contractual contemplation that security in the form of cash retentions would continue to be available to SHA post-termination. There are two answers to this. First, the answer given in the previous two paragraphs applies. But second, and even if the first answer is wrong, an adjudicator's erroneous failure to appreciate the correctness of the contended-for construction of the contract would be an error within jurisdiction. I observe, for completeness, that it is not at all clear[23] (and it seems to me to be unnecessary to decide) that, in this contract, SHA's right to have recourse to security would survive termination by it pursuant to cl 39.4. Clause 39.10 was very explicit as to what would happen to contractual rights in the event of such a termination by SHA. It might be thought that that clause is inimical to the conclusion that contractual rights to access or to retain security should continue post-termination.

> *[23] Notwithstanding observations by judges in relation to other contracts in cases like Pearson Bridge (NSW) Pty Ltd v State Rail Authority of NSW [1982] 1 Aust Const LR 81 at 87; Kennedy Taylor (Vic) Pty Ltd v Baulderstone Hornibrook Pty Ltd [2000] VSC 43 at [25]; Southern Cross Constructions*

(NSW) Pty Limited (administrators appointed) v Bucasia Pty Limited [2012] NSWSC 1419 at [28]–[32].

Claim for loss of profit on Contract works

1025. The Claimant claims $4,454,044.13 as loss of profit on work that remains to be executed under the Contract.

1026. The Act entitles the Claimant to claim for construction work carried out or goods and services supplied valued in accordance with sections 71 and 72 of the Act, which includes the provisions of the Contract.

1027. There is nothing in the Contract that provides the Claimant the right to claim for profit before the work to which it relates has been carried out.

1028. There is, similarly, nothing in the Act that entitles the Claimant to claim for profit on future work that it will never execute because it terminated the Contract.

1029. Accordingly, I am not persuaded the Claimant is entitled to payment for loss of profit on unexecuted work under the Contract.

Claim for loss of profit on Variation works

1030. For the reasons set out above, I am not persuaded the Claimant is entitled to payment for loss of profit on unexecuted variations under the Contract.

Claim for costs of demobilisation

Claim

1031. The Claimant claims $313,609.89 as costs of demobilisation, which are comprised of the following;

(a) $118,924.89 being the direct costs of demobilising from the site; and

(b) $194,685.00 being the costs of equipment hired to demobilise the Claimant's equipment from the site.

1032. The Claimant provided a detailed break-down of the demobilisation costs in the Payment Claim.

Scheduled

1033. The Respondent has scheduled $0.00 payment for this part of the claim for termination costs # HCV252. The Respondent provided the following reason for withholding payment;

> *"In respect claims for demobilisation of the site:*
>
> *Items 1.2.1 to 1.2.6 refer to tax invoices from Equipment & Lifting Solution which have not been provided with the Payment Claim but presumably were issued to the Contractor for unlawful removal of plant, equipment and materials from the site from 29 August 2024.*

*The **Contractor has no entitlement to such claims where the Contractor unlawfully suspended works and unlawfully refused to comply with correspondence issued by the Principal on 30 August 2024** and directions issued by the Superintendent to cease unlawful removal of materials without the Superintendent's approval including SI 357 and 360.*

*Any **invoices for costs incurred following the order of the Court dated 4 September 2024 in proceeding BS11674/24 are in contravention of that court order** and not payable to the Contractor, subject to the terms of that order.*

The crane remains on site therefore the Contractor has not incurred these demobilisation costs, including the hoist and loading bays which also remain on site. Pursuant to clause 39.5, the Principal retains the right to use such plant and equipment to complete the works without further payment to the Contractor until such time as certification is provided under clause 39.6 of the Contract.

1034. The Respondent argues it was not provided invoices for equipment hired to demobilise the Claimant's equipment from the site.

1035. The Respondent argues the Claimant has no entitlement to claim the costs of demobilisation because it unlawfully terminated the Contract.

Decision

1036. I do not accept the Respondent's argument for the reasons set out above at paragraphs; 87) to 217), where I found the Claimant lawfully terminated the Contract on 10 September 2024.

1037. The Respondent asserts it instructed the Claimant to leave materials and equipment on site on 30 August 2024. The Respondent instructed the Claimant as follows;

"…1. We refer to the Contractor's notice of full suspension dated 29 August 2024.

…

5. ***The Principal notes that the Superintendent has directed the Contractor to cease removing materials from the site****. We trust that the Contractor will comply with this direction.*, however, the Respondent

1038. I do not accept that the Respondent instructed the Claimant not to remove its equipment from site because its instruction did not say so. The instruction related to material that were on site to be used for the construction of the works.

1039. The Claimant complied with that instruction and left the unfixed materials on site, for which it has claimed payment in the Payment Claim. The claims for unfixed materials have been decided above.

1040. The Respondent asserts its right under clause 39.5 to use the materials and equipment and other things intended for WUC without payment to the Claimant.

1041. That right, however, could not be asserted, at the earliest, until it issued the notice to take the work out of the Claimant's hands under clause 39.4(a) of the Contract. The Respondent issued that notice on 12 September 2024.

1042. However, that notice was void and of no effect because the Claimant lawfully terminated the Contract on 10 September 2024.

1043. In *Niclin*, Bond J explained what may be included in a final payment claim in the event the contract that has been terminated made no provision for a final claim as follows;

> "…
>
> ***72. In this case, the contract did not provide for the calculation of a final payment claim calculated from the date of termination of the contract or for the valuation of such a claim. Accordingly,*** *the amount of this particular progress payment (which, in the circumstances, was* ***the final payment claim) was to be calculated under s 71(b) and valued under s 72(1)(b)****.*
>
> …
>
> *74. SHA's first argument before me wrongly seeks to advance the proposition that a payment claim under the Act cannot advance a money claim unless it can demonstrate that the entirety of the amount claimed has actually accrued due under the contract. But that proposition cannot be made good. Most sophisticated construction contracts are structured such that progress payments do not accrue due unless and until a certifier has certified an amount for payment. The existence of such a certificate is a condition precedent to the amount becoming due and payable under the contract. Absent that certificate, the claimant is not entitled to be paid under the contract. But the Act creates an entitlement to a progress payment valued in a particular way, and regardless of whether the contractual certificate has been obtained.* ***The fact that progress payments are to be valued "having regard to … contract price", and that the definition of that term refers to the amount the party is "entitled to be paid under the contract", is not to be construed as a mechanism by which contractual conditions precedent to entitlement***

stymie the right to a progress payment which the Act provides.

75. A similar proposition applies in relation to the final payment claim, which the Act authorises to be made when a contract has been terminated, and even though the fact of the termination means that there can never be a final payment claim advanced pursuant to the contract. *In the present case, it does not matter that the amount which represents the retentions withheld under the contract cannot be said to be an amount which has yet accrued due and payable under the contract.* ***The contractor has a statutory entitlement to a final payment claim, calculated under s 71(b) and valued under s 72(1)(b). If the adjudicator values that claim in accordance with the provisions of the Act, the effect of that valuation may well be to enable the claimant to be paid an amount of money which includes the value of cash retentions withheld from work already done (and even though under the contract there was no accrued right to the return of cash retentions), but that seems to me to be made permissible by the terms of the Act***.

1044. The Contract requires the Claimant to perform the WUC. The performance of the WUC includes the supply of materials, supervision, labour, equipment and the like and the performance of all things required that are expressly stated or reasonably inferred from the Contract. Clause 1 of the Contract defines WUC as follows:

> *"means the work, which the Contractor is, or maybe required to carry out and complete under the Contract and includes variations, remedial, work, construction, plant, retention, works, and temporary works."*

1045. I am persuaded that the costs of demobilisation were costs that formed a part of the total costs of the construction work under the Contract, that the Claimant is entitled to claim in the Payment Claim pursuant to section 71(b) of the Act.

1046. The Respondent claims no breakdown of the claimed costs were provided.

1047. I have reviewed the Payment Claim and the claim for demobilisation was broken down by;

(a) Crane hire to load Claimant's equipment (each hire was particularised);

(b) Tower crane hire – left in-situ;

(c) Hoist - left in-situ;

(d) Concrete pump left in-situ;

(e) Loading bays - left in-situ;

(f) Storage of Schindler lift equipment (for which invoices were provided);

(g) Storage of façade elements (for which invoices were provided);

1048. Considering the breakdown (including costs) that were provided in the Payment Claim, I do not accept the Respondent's assertion that there was insufficient specification of the equipment hire included in this claim for costs of demobilisation for it to assess this claim.

1049. The Claimant has claimed for the hire of Crane, Hoist, Loading Platforms and Storage to an assumed demobilisation date of 30 October 2024.

1050. The Claimant asserts this equipment was left on site in accordance with the with the Respondent's instruction dated 30 August 2024. The Respondent does not take issue with that assertion.

1051. None of the invoices relating to the removal of equipment were raised after the date of the Court Order referred to by the parties.

1052. Save for the reasons for withholding payment that are set out above, the Respondent has provided no submissions about the quantum claimed.

1053. Accordingly, for the reasons set out above at paragraphs 379) to **Error! Reference source not found.**), I have the decided the Claimant is entitled to payment for costs of demobilisation in the amount of $313,609.89.00.

Claim for items left on site

Claimed

1054. The Claimant claimed $174,799.00 for the property left on site by the Claimant. Those items included, desks, chairs, tables, fridge, TV support brackets, white boards, book shelves, lunch tables, lunch chairs, fire extinguishers, radio repeaters, temporary handrail and gantry crane for moving materials to the basement.

Scheduled

1055. The Respondent has scheduled $0.00 payment for this part of the claim, being items left on site, for the claim for termination costs

HCV252. The Respondent provided the following reason for withholding payment;

> "…
>
> *The Contractor has provided no evidence of the items remaining on site for the Principal to verify these amounts, noting that in any event the Contractor has no right to payment of these items where pursuant to clause 39.5, the Principal is entitled to use such items for completion of WUC until certification pursuant to clause 39.6….."*

1056. The Claimant has particularised each and every claimed item left behind in its Payment Claim.

1057. Save for the reasons for withholding payment that are set out above, the Respondent has provided no submissions about the quantum claimed nor does it reject the claim in principle.

Decision

1058. Accordingly, for the reasons set out above at paragraphs 350) to 355), I will follow the decisions of *Ceerose* and *Insite* as authority permitting me to accept the Claimant's stated valuation.

1059. I have the decided the Claimant is entitled to payment in the amount of $174,799.16 for items left on site under its claim HCV 252.

Claim for staff costs

Claimed

1060. The Claimant claimed $867,317.00 for staff costs from the date of suspension up to the date the Claimant completed all work associated with the demobilisation.

1061. The suspension of all work under the Contract commenced on 29 August 2024 and the date of termination was 10 September 2024, which was a period of 11 days.

1062. The Claimant claimed varying periods for each member of staff from 3 weeks to 17 weeks. The Claimant explained the work performed in this period was required to finalise the project, including, but not limited to the cost of contract administration, closing out, final accounts, and closing out, sub contracts and subcontractor claims.

1063. The Claimant relies on *S.H.A. Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd* [2020] QSC 307 (***Niclin***) as authority that supports the Claimant's entitlement to make this claim for staff costs.

Scheduled

1064. The Respondent has scheduled $0.00 payment for this part of the claim for termination costs # HCV252. The Respondent provided the following reason for withholding payment;

> "
>
> …*The Contractor's breakdown* ***provides no explanation for why there are varying durations for Tomkins team from director down to labourers***.
>
> *The costs claimed for senior management personnel such as Director, CFO, operations manager and commercial manager are unreasonable where such personnel are not resources*

directly involved or responsible for the works under the Contract.

Costs claimed for management personnel in excess of 14-17 weeks is unreasonable and not reflective of a period of time for demobilisation for such personnel to be involved in the project.

The Contractor has not substantiated these costs will be incurred, and are reasonable and reflective of termination/demobilisation costs (which the Principal denies the Contractor is entitled to)…."

Decision

1065. In *Niclin*, Bond J explained what may be included in a final payment claim in the event the contract that has been terminated made no provision for a final claim as follows;

> *"…*
>
> ***72. In this case, the contract did not provide for the calculation of a final payment claim calculated from the date of termination of the contract or for the valuation of such a claim. Accordingly,*** *the amount of this particular progress payment (which, in the circumstances, was* ***the final payment claim) was to be calculated under s 71(b) and valued under s 72(1)(b)****.*
>
> *…*
>
> *74. SHA's first argument before me wrongly seeks to advance the proposition that a payment claim under the Act cannot advance a money claim unless it can demonstrate that the entirety of the amount claimed has actually accrued due under the contract. But that proposition cannot be made good. Most sophisticated construction contracts are structured such that progress payments do not accrue due unless and until a certifier has certified an amount for payment. The existence of such a certificate is a condition precedent to the amount becoming due and payable under the contract. Absent that certificate, the claimant is not entitled to be paid under the contract. But the Act creates an entitlement to a progress payment valued in a particular way, and regardless of whether the contractual certificate has been obtained.* ***The fact that progress payments are to be valued "having regard to … contract price", and that the definition of that term refers to the amount the party is "entitled to be paid under the***

> ***contract", is not to be construed as a mechanism by which contractual conditions precedent to entitlement stymie the right to a progress payment which the Act provides.***
>
> ***75. A similar proposition applies in relation to the final payment claim, which the Act authorises to be made when a contract has been terminated, and even though the fact of the termination means that there can never be a final payment claim advanced pursuant to the contract****. In the present case, it does not matter that the amount which represents the retentions withheld under the contract cannot be said to be an amount which has yet accrued due and payable under the contract.* ***The contractor has a statutory entitlement to a final payment claim, calculated under s 71(b) and valued under s 72(1)(b). If the adjudicator values that claim in accordance with the provisions of the Act, the effect of that valuation may well be to enable the claimant to be paid an amount of money which includes the value of cash retentions withheld from work already done (and even though under the contract there was no accrued right to the return of cash retentions), but that seems to me to be made permissible by the terms of the Act****.*

1066. The Contract requires the Claimant to perform the WUC. The performance of the WUC includes the supply of materials, supervision, labour, equipment and the like and the performance of all things required that are expressly stated or reasonably inferred from the Contract. Clause 1 of the Contract defines WUC as follows:

> *"means the work, which the Contractor is, or maybe required to carry out and complete under the Contract and includes*

variations, remedial, work, construction, plant, retention, works, and temporary works."

1067. I am persuaded that the costs of mobilisation and demobilisation were costs that formed a part of the total costs of the construction work under the Contract, that the Claimant is entitled to claim in the Payment Claim pursuant to section 71(b) of the Act.

1068. The Respondent asserts that it is unreasonable to claim payment of 4 weeks for the Director, CFO, operations manager and commercial manager as they were not directly involved in the project.

1069. I accept the Respondent's reason in relation to the Director, CFO, operations manager and commercial manager and have decided the Claimant is not entitled to payment of those staff's costs.

1070. The Respondent argues that *Costs claimed for management personnel in excess of 14-17 weeks is unreasonable and not reflective of a period of time for demobilisation for such personnel to be involved in the project.*

1071. I have reviewed the claim and there are no claims for any staff in excess of 17 weeks. Accordingly, I take that to mean the Respondent considers the other periods claimed reasonable.

1072. The Respondent makes a comment about costs "*that will be incurred*". The Respondent's meaning is not clear, and I will assume that it considers a period of 14 – 17 weeks to be reasonable, which is what has been claimed.

1073. The Respondent has provided no submissions about the quantum claimed.

1074. Accordingly, for the reasons set out above at paragraphs 350) to 355), I will follow the decisions of *Ceerose* and *Insite* as authority permitting me to accept the Claimant's stated valuation less the following adjustments.

1075. I have the decided the Claimant is entitled to payment for staff costs in the amount of $867,317.00 less $100,892.86 (for the Director) less $69,535.71 (for the CFO) less $50,446.43 (for the Operations Manager) less $40,357.14 (for the Commercial Manager).

1076. The Claimant is entitled to payment of $615,084.86 for the claim for staff costs under HCV 252.

Claim for legal costs

Claimed

1077. The Claimant claimed $1,650,000 for legal costs relating to the suspension and the termination.

1078. The Claimant has elected not to pursue this part of the claim referenced HCV 252 in this Adjudication Application.

Claim for overheads and margin

Claimed

1079. The Claimant claimed $448,718.50 for overheads at the rate of 4.5%) from the date of termination.

1080. The Claimant has also claimed $1,042,024.07 for margin (at the rate of 10%)

Scheduled

1081. The Respondent does not accept those amounts claimed and provided the following reasons for withholding payment;

> "
>
> *…The Contractor has also attempted to claim office overheads at 4.5% in addition to the 10% allowance for profit and overheads, which we do not view as reasonable. Even if this was a valid variation (which is denied) per clause 36.4, the Contractor is not entitled to double payment for OH&P where the Contractor already claims margin of 10% and is attempting to claim here 14.5% profit.*
>
> …"

Decision

1082. The Claimant accepts the Respondent's reason for withholding payment and has applied the position acceptable to the Respondent and reduced its claim accordingly.

1083. The reduced claim and as decided by me above, is as follows;

(a) Claim for costs of demobilisation; $313,609.89

(b)	Claim for items left on site;	$174,799.16
(c)	Claim for costs of staff;	$615,084.86
(d)	SUBTOTAL	$1,103,493.91
(e)	10% Margin	$110,349.39

1084. The Respondent has provided no submissions about the quantum claimed.

1085. Accordingly, for the reasons set out above at paragraphs 350) to 355), I will follow the decisions of *Ceerose* and *Insite* as authority permitting me to accept the Claimant's stated valuation).

1086. I have decided the Claimant is entitled to payment of $110,349.39 as the cost of overheads on the costs of demobilisation, for items left on site and for staff costs.

1087. In total, I have decided the Claimant is entitled to payment of the of $1,213,843.30 for its termination claim referenced; HCV 252.

SUPERINTENDENT'S DEDUCTIONS

Scheduled

1088. The Respondent has deducted $6,149,925.85 against the certified amount.

1089. The following applies to each of the Respondent's 7 deductions that are relevant to this Adjudication Application. I have further set out the Respondent's detailed reasons for each deduction against each decision of that deduction considered below.

1090. The Respondent has explained its reasons for all deductions as follows;

> "…
>
> ***We have included deductions as per the appended schedule for completed works which are not in accordance with the Contract.*** *Full details and particulars have been previously provided in the Scott Schedule / John Groom reports issued to the Contractor by way of SI170, 170A, SI209, SI223 and SI283 to date of works which are currently not in accordance with the Contract, the contents of each of these documents is expressly incorporated into this Payment Schedule.*
>
> *The* ***value of the deduction noted in the appended schedule is the value of the works undertaken to date which have not been completed in accordance with the Contract.*** *The total value of works completed as assessed in this schedule are hereby reduced by this sum.*
>
> ***In the alternative, the deduction is made pursuant to clause 29.3 and/or 37.7 of the Contract, and/or Section***

72(1)(b)(iv) of the BIFA. *The reasons stated therein form part of this payment schedule.*

We note that the appended Scott Schedule dated 27.6.24 covers defective works and works not in accordance with the Contract. We further note that this schedule is not a final position, or limitation to works which may reasonably considered as defective or not in accordance with the Contract.

We note that the Scott Schedules have been instructed through Defective Works instructions SI170, S1170A, SI209, SI223, SI283, SI283A, S/291, SI313, SI334, SI342, SI359.

Each of the items referred to in the Scott Schedules attached with and forming part of the payment schedule are WUC for which the Contractor has been overpaid for the value of work actually completed to date in accordance with the terms of the Contract. The Principal is therefore entitled to deduct these amounts from the assessments of WUC above to ensure the assessments accurately reflect the value of the work completed by the Contractor in accordance with the Contract.

Mechanical plant rooms have not been constructed as directed. Refer SI85, SI96, Sl101 Subducts have also been installed without shop drawings being prepared and/or approved. [This is relevant to and was considered in adjudication application #2671069]

The Principal also considers the works to be defective and not in accordance with the Contract as per its notifications to the Contractor including on 9 May 2024, 17 May 2024 (among others).

The Principal has incurred direct costs in the form of Architectural fees in connection with the Contractor's

failure to comply with the requirements of the Architectural Specification. These reasonable costs have been deducted in this assessment.

Temporary services costs have also been deducted as per the Notice issued in SI 126. [This is relevant to and was considered in adjudication application #2671069]

We note that the schedule of items included is not an exhaustive or final list. The Principal in completing the works taken out of the Contractor's hands may uncover more defective works / works not in accordance with Contract. We will assess any such further items and associated costs when they are raised.

We have included deductions as per the appended schedule for completed works which are not in accordance with the Contract. Full details and particulars have been previously provided in the Scott Schedule / John Groom reports issued to the Contractor by way of SI170, 170A, SI209, SI223 and SI283 to date of works which are currently not in accordance with the Contract, the contents of each of these documents is expressly incorporated into this Payment Schedule.

We also refer to the Principal's Show Cause Notice dated 17 May 2024 and Principal's Show Cause Notice dated 2 September 2024 and our further instructions SI236, SI237, SI238, SI242, SI247, SI254, SI255, SI279, SI303, SI350, SI359 in connection with Defective Works, the contents of each of these documents and correspondences are also expressly incorporated into this Payment Schedule.

Reference is also made to the Superintendent's certification of progress claim 32 which certified payment in the amount of -$1,209,103.68 and progress claim 34 which certified payment in the amount of -$652,079.45 (excluding GST) as owing by the Contractor to the Principal, being amounts which was not paid by the Contractor pursuant to clause 37.2.

If any amount is deemed to be payable to the Contractor, then those amounts certified as an amount payable by the Contractor is required to be paid or offset pursuant to clauses 37.2 and 37.7 of the Contract.

In addition to the deductions noted above and in the appended schedule, on account of the Principal having taken the whole of the remaining works out of the Contractor's hands in exercise of its rights under clause 39.4(a) on 12 September 2024, the Principal has a bona fide claim for the difference between the

amount the Principal would have had to pay the Contractor to complete the whole of the works had it not exercised its rights under clause 39.4(a), and the total cost to the Principal for the works, pursuant to clause 39.6.

Claimant's reply

1091. The Claimant advises that $3,142,548.20 of the total amount deducted is subject of the 3rd adjudication application referenced; #2671069.

1092. The Claimant has advised that it disputes the Respondent's entitlement to deduct amounts totalling; $3,007,377.65. The deductions that are the subject of this Adjudication Application #2760615 are as follows;

(a)	Consultants	$47,957.50;
(b)	Diaphragm wall	$205,000.00;
(c)	Fastflow pipework	$588,420.15;
(d)	Swiss Park rectification	$300,000.00;
(e)	Topping & Grinding;	$1,436,000.00;
(f)	Ceilings	$280,000.00;
(g)	Partitions	$150,000.00;
(h)	Sub-total	$3,007,377.65.

1093. The Claimant asserts;

(a) There are no defects and the works identified by the Respondent as defective have been constructed in accordance with the Contract;

(b) The Respondent has failed to particularise each defect in the Payment Schedule and the Claimant is unable to meaningfully respond;

(c) The Respondent has not followed the process set out in the Contract relating to the rectification of defective work and the Respondent has not accrued any right to set off its claimed amounts under the Contract. The requirement to follow the Contract is confirmed by sections 71(a) and 72(1)(a) and 72(2)(a) of the Act; and

(d) The Respondent has failed to value each defect in accordance with sections 71(a) and 72(1)(a) and 72(2)(a) of the Act and, is not entitled to withhold payment for any alleged defective work.

Consultant – Architect – Invoices in connection with C&P – [$47,957.50 relate to this Adjudication Application]

Scheduled

1094. The Respondent has provided the following reason for deduction the costs of the architect from money otherwise payable to the Claimant. $47,957.50 relates to the deduction the subject of this Adjudication Application;

> *Consultant – Architect – Invoices in connection with C&P*
>
> ***Full details and particulars have been previously provided in the Scott Schedule/ John Groom reports issued to the Contractor by way of SI170, SI170A, SI209 and SI223*** *to date of works which are currently not in accordance with the Contract.*
>
> *The* ***value of the deduction noted herein is the value of the works undertaken to date which have not been completed in accordance with the Contract.*** *The total value of the C&P works completed as assessed earlier in this schedule are hereby reduced by this sum.*

In the alternative, the deduction is made pursuant to clause 29.3 and/or 37.7 of the Contract or section 72(1)(b)(iv) of the BIFA. The Contractor has not provided any shop drawings, submittals or recommendations as set out in Architectural specification 0522

1095. The Respondent asserts that a number of the claims in the Payment Claim were determined in previous adjudications, which I am bound to follow. The adjudication applications are referenced; # 2573124, # 2602454 and # 2671069 and the Respondent relies on *Dualcorp Pty Ltd v Remo Constructions Pty Ltd [2009] NSWCA 69, John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd [2010] QSC 159 and Karam Group Pty Ltd ATF The Karam (No. 1) Family Trust v HCA Queensland & Ors [2023] QSC 245 (**Karam**)* as authority for that assertion.

Issue Estoppel

1096. Before considering this deduction further, I will consider the jurisdictional issue raised by the Respondent, being that the Claimant is precluded from re-agitating a claim that has been previously decided in the previous adjudication applications; # 2573124, # 2602454 and # 2671069.

1097. Karam provides a summary of the state of the law concerning the applicability of these principles to the Act, which I will follow. In Karam, Martin SJA considered the principles of issue estoppel. I have relied upon that judgment for guidance about the extent of the estoppel as it applies to the Payment Claim under the Act. I have underlined the sections that are particularly relevant to this decision. Martin SJA held as follows;

"*Estoppel and the Act…*

18.The consideration of this question commences with the decision of the New South Wales Court of Appeal in Dualcorp Pty Ltd v Remo Construction Pty Ltd[2] which examined issue estoppel in the context of the Building and Construction Industry Security of Payment Act 1999 (NSW) (NSW SoP Act). Macfarlan JA (with whom Handley AJA agreed):

> *"[60] … When a claim is made, a dispute arises and an adjudication determination resolves that dispute.* ***I consider that determination to be final and binding between the parties as to the issues determined, except to the extent that the Act allows the determination to be revisited.*** *It would in my view be* ***quite contrary to the scheme of the Act to permit claimants simply to resubmit the already adjudicated claims*** *if they were dissatisfied with the adjudication." (emphasis added)*
>
> *[2] (2009) NSWLR 190.*

19. *Macfarlan JA then considered s 22(4), the New South Wales equivalent of s 87(2) of the BIF Act, and said:*

> *"[67]I do not consider however that s 22(4) should be regarded as an exhaustive statement of the matters determined by an earlier adjudication which are binding on a subsequent adjudicator. For reasons I have given, I consider that the Act when read as a whole manifests an intention to preclude reagitation of the same issues.* ***Thus, if questions of entitlement have been resolved by an adjudication determination, those findings may not in my view be reopened upon a subsequent adjudication****. …" (emphasis added)*

20. *Finally, Macfarlan JA concluded:*

> *"[70] … The view that the claimant once disappointed by an adjudicator can seek a different determination from another, or indeed from a succession of others, until a favourable decision is reached would in my view conflict with the policy of the Act to render adjudicators' determinations final on issues which they resolved, subject only to provisions of the Act conferring limited rights of correction of determinations."*

21. Allsop P agreed with Macfarlan JA's orders but for different reasons. His Honour held that the NSW SoP Act generally manifests an intention to prevent repetitious re-agitation of the same issues which is covered by ss 13(5) and 22(4) of the NSW SoP Act. Allsop P left the question of estoppel for another occasion.

22. I observe that, as a judge sitting at first instance, I should follow persuasive authority of an intermediate appellate court on a similar question, unless persuaded that it was wrongly decided or that the reasoning in substance is distinguishable from the present case.

23.Further consideration was given to this question in Urban Traders v Michael.[3] *The issue in that case was whether the defendant's engagement of the NSW SoP Act was an abuse of process or otherwise liable to be restrained. After an analysis of Dualcorp and the cases that had since come after it, McDougall J said:*

> *[3] [2009] NSWSC 1072.*
>
> *"[41] **It does not follow from the decisions to which I have referred that every repetition, in a subsequent payment claim, of a claim made in an earlier payment must amount to an abuse of process**. **That is so even if that earlier payment claim has been the subject of an adjudicator's determination**. The relevant concept is not abuse of process at large. It is abuse of the processes of the Act: specifically, the processes of the Act designed to ensure that builders and subcontractors (and of course others) received prompt and progressive payment for construction work performed or related goods and services provided. The question of whether there has been an abuse the processes [sic] of the Act must take into account relevant provisions of the Act. Specifically:*

*(1) **s 13(6) of the Act recognises that a claimant may include in a payment claim an amount that has been the subject of a previous payment claim**; and*

*(2) s 22(4) of the Act deals, to an extent, with a repeated claim by providing that if particular construction work or related goods and services have been valued by an adjudicator, **an adjudicator in a subsequent adjudication application is to give them the same value unless satisfied that the value has changed since that previous determination.***

[42] Further, whether or not the repetition of a claim amounts to an abuse of process requires consideration of all relevant contextual facts. In addition, it requires consideration of the reasons why the courts intervene to prevent abuse of process. Those reasons include intervention to prevent a person from being vexed by having to reargue an issue already authoritatively decided. Thus, in deciding whether a repetition of a claim amounts to abuse of process, it may be relevant to take into consideration whether, because of fresh claims that are advanced, the respondent will be required to defend itself in any event.

*[43] I do not think that it is possible to state in some exhaustive fashion what combination of factors, including repetition, will lead to the conclusion that there is an abuse of process. (See, as to this, French CJ, Gummow, Hayne and Crennan JJ in Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd [2009] HCA 43 at [27].) **My concern is simply to make it clear that, in my opinion, it would be inconsistent with the provisions of the Act to which I have referred above to hold that repetition, by itself and without more, always amounts to abuse of process**." (emphasis added)*

24. His Honour then found that the claim by the builder was "foredoomed to fail" due to issue estoppel.[4]

[4] At [59].

25. McDougall J gave a more detailed analysis of the concern he had expressed (in Urban Traders) in Watpac Construction (NSW) Pty Ltd v Austin Corp Pty Ltd[5] where he said that he had some difficulty with part of the reasoning of McFarlan JA in Dualcorp. But that related to the repetition of a claim which had been made earlier and not about the determination of a broad contractual right.

[5] [2010] NSWSC 168.

26. Nevertheless, in that case, his Honour proceeded to find the builder's payment claim was barred by the principle of issue estoppel and that it was an abuse of the NSW SoP Act's processes.[6]

[6] At [176].

27. A detailed analysis of Dualcorp and other New South Wales cases which were decided after it was undertaken by Applegarth J in AE & E Australia Pty Ltd v Stowe Australia Pty Ltd[7] and I gratefully adopt it without setting it all out.

[7] [2010] QSC 135

28. Applegarth J revisited Dualcorp and the question of issue estoppel in John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd.[8] His Honour said:

> "[48] I adopt, with respect, the conclusions reached by the Court in Dualcorp that the NSW Act as a whole generally manifests an intention to prevent repetitious re-agitation of the same issues. The same construction should be applied to the Queensland Act. The conclusion that, subject to certain exceptions, the Act precludes the re-agitation of the same issues that have been earlier determined does not mean that the same issue may not arise in a

later adjudication. The issue that is later sought to be re-agitated must have been earlier determined for the principle of issue estoppel to apply. As Macfarlan JA observed by way of illustration in Dualcorp, if a progress claim were rejected by an adjudicator because it was premature by reason of the date stipulated for payment by the contract, a later claim made on a timely basis would not be precluded. A further illustration arises in the facts of O'Brien in which the first adjudicator did not determine the date for practical completion and therefore the entitlement of the applicant to liquidated damages. It was therefore open to seek a determination from a later adjudicator about the date of practical completion and a claimed entitlement to deduct any liquidated damages on the hearing of a later, different claim, and on the basis of additional material and submissions.

[49] The reservation expressed by McDougall J in Urban Traders and in Watpac about certain statements in the majority judgment in Dualcorp, being a reservation that I respectfully adopted in AE & E, does not detract from the point of substance determined in Dualcorp. I should follow Dualcorp in respect of the parallel provision of the Queensland Act. ***The Queensland Act as a whole manifests an intention to preclude the re-agitation of the same issues and, subject to s 27, does not permit the re-agitation of the same issues that have been determined by an earlier adjudicator****."*

[8] [2010] QSC 159

29. In Spankie v James Trowse Construction Pty Ltd,[9] Fraser JA (with whom Holmes JA as her Honour then was and Chesterman JA agreed) cited Dualcorp for the following proposition:

"[25] Of course the re-agitation of a payment claim may be impermissible for other reasons. In particular, it may be

impermissible in particular cases where a previous payment claim has been the subject of a valid adjudication determination. … "

[9] [2010] QCA 355.

30. Dualcorp was distinguished in Spankie as the facts in that case lacked the critical feature of a preceding valid adjudication determination.

*31. In Caltex Refineries (Qld) Pty Ltd v Allstate Access (Australia) Pty Ltd,[10] **McMurdo J expressed the view that Dualcorp was not authority for issue estoppel applying in all respects. His Honour held**:*

[10] [2014] QSC 223.

*"[51] … Recognising this effect of s 32, Macfarlan JA confined the inability of a claimant to reagitate issues determined **by a previous adjudication to a context of a further claim for a progress payment.***

[54] Although Macfarlan JA described the outcome as a result of an issue estoppel, it is clear that his Honour had in mind something less than the operation of the common law doctrine of issue estoppel as it is usually understood. The doctrine of issue estoppel has been said to reflect 'a central and pervading tenet of the judicial system [which] is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances'. Where the doctrine does apply, then subject to any qualification by legislation or agreement, it precludes the reagitation in any forum of the same issue. Yet, the estoppel for which Allstate contends, in attempted reliance upon Dualcorp, at its highest is one in which the issue could be reagitated in some forums but not others. It is a remarkable species of issue estoppel

where, having regard to s 32 of the New South Wales Act, the 'entitlements inter se under the contract' are unaffected by it. The source of this more limited estoppel must be found, if at all, within the legislation. In my view, the legislation does not provide it. A contrary indication is that such an estoppel would be problematic in many ways. ***Take, for example, a case where a court declares the effect of the parties' contract, inconsistent with an adjudicator's decision. Is a future adjudicator, dealing with another claim under that contract, bound by the decision of the earlier adjudication (if not set aside) or that of the court?***

[55] The limited finality described by Macfarlan JA was founded, as his Honour explained, upon the combined effect of several provisions within this statute. Contrary to the submission for Allstate, the judgment of Macfarlan JA did not hold that the doctrine of issue estoppel applies in this context in all respects. ***The judgment identifies a finality of an adjudicator's decision in the sense of precluding a claimant from pursuing a progress payment inconsistently with determination of an issue by an adjudicator which was fundamental to that decision****." (emphasis added)*

32. In Sunshine Coast Regional Council v Earthpro Pty Ltd,[11] *Byrne SJA considered whether the re-agitation of claims could result in jurisdictional error in construction adjudications. His Honour held that the BIF Act inferentially precludes re-agitation of the same issue where that issue was essential to a determination in an earlier adjudication.*[12]

[11] [2015] QSC 168.

[12] At [42]

33. There was no discussion of issue estoppel directly. Instead, it was determined on a jurisdictional basis.

34. Jackson J considered whether there is a form of estoppel in construction adjudication in Wiggins Island Coal Export Terminal Pty Ltd v Monadelphous Engineering Pty Ltd.[13] *After an analysis of Dualcorp, Caltex, and Sunshine Coast Regional Council, his Honour stated that: "any issue estoppel that arises under the [Act] is a unique species of estoppel. For brevity, I will call it 'Dualcorp issue estoppel"'.*

[13] [2016] QSC 96.

35. His Honour then proceeded to determine whether Dualcorp issue estoppel applied to the facts of each variation and claim. His Honour declined to determine whether an abuse of process applied as:

> *"[175]* ***The questions raised were all about re-agitation of earlier claims****. In my view, such questions are properly analysed in the frameworks of the Dualcorp issue estoppel or extended or Anshun estoppel, to the extent that they operate in this field of discourse."*

36. The cases show the accepted position in Queensland is that Dualcorp issue estoppel applies in construction adjudication. I do not accept HCA's submission that the Queensland authorities show considerable caution in the operation and application of Dualcorp issue estoppel.

37. There have been two developments since Wiggins which HCA submitted changes the established position.

38. First, HCA referred me to Civil & Allied Technical Construction Pty Ltd v Resolution Institute[14] *where Kourakis CJ said:*

> *"[63] The problem of multiple determinations of the same issue by an administrative tribunal is usually addressed by a provision allowing the tribunal to dismiss frivolous or vexatious*

> *applications. That power is absent in the Security of Payment Act."*
>
> *[14] [2019] SASC 193.*

39. According to HCA, this power is expressly addressed in s 84(2)(a)(ii) which states:

> *"(2) For a proceeding conducted to decide an adjudication application, an adjudicator—*
>
> *(a) must decide—*
>
> *…*
>
> *(ii) whether the application is frivolous or vexatious."*

40. This section was not in the legislation in place at the time of Wiggins. It also is not present in the New South Wales, South Australia and Australian Capital Territory equivalents.

41. It was argued that this task corresponds to the task that a court would have otherwise undertaken with respect to the re-agitation of claims, as discussed in Urban Traders, AE & E and Wiggins. Any task of determining whether something is vexatious, in the sense that it is a re-agitation of claims which would have otherwise been addressed by Dualcorp issue estoppel, is statutorily required to be addressed by the adjudicator.

42. I do not agree.

43. I can discern no express intention either in the BIF Act or in the explanatory memorandum that this section is to act instead of

the Dualcorp issue estoppel which was accepted at the time the BIF Act came into force.

44. Section 84(2)(a)(ii) was considered by Bond J where his Honour said:

> *"[29] … The Act does not provide for what an adjudicator must do if the adjudicator determines that the application is frivolous or vexatious. However, I think it is obvious enough from the association of ss 84(2)(a)(i) and (ii) that the legislature must be taken to have contemplated that the adjudicator should only proceed further to determine the adjudication application within those tight time limits if the adjudicator has (1) decided that he or she has jurisdiction and (2) decided that the adjudication application is not frivolous or vexatious.*
>
> *[30] Section 85(3) seems to contemplate that course because it prohibits the adjudicator from deciding an adjudication application before receiving the adjudication response, but provides an exception where the adjudicator has decided that he or she has no jurisdiction or that the application is frivolous or vexatious. …"*[15]
>
> [15] S.H.A. Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd [2020] QSC 307.

45. Bond J concluded that the intention behind s 84(2)(a)(ii) is that an adjudicator's jurisdiction is conditional on the adjudicator determining, as a threshold issue, whether the application is frivolous or vexatious. The 'subjective jurisdictional fact' is the adjudicator having a particular state of mind, namely, the state of mind of having decided that the application is not frivolous or vexatious.

46. The BIF Act requires an assessment of whether 'the application' is frivolous or vexatious. If it is, the adjudicator ought not proceed. But, this is a test to be applied early in the life of the adjudication and before

all arguments have been heard. Section 84 is a blunt weapon. It does not easily accommodate the case where, as here, there was an adjudication application which, on its face, was neither frivolous nor vexatious but one part of which was based upon an argument which had already been rejected in two earlier adjudications. If the argument that a particular contention may not be pursued – whether because it is subject to some form of estoppel or because it is an abuse of process – is successful, that does not mandate a finding that the entire application is frivolous or vexatious.

47. The Third Adjudication Decision demonstrates this point. The Third Adjudicator determined that the Third Adjudication Application was not frivolous or vexatious for the purpose of s 84(2)(a)(ii), but still found that estoppel applied to parts of HCA's arguments.

48. Secondly, HCA referred me to Harlech Enterprises Pty Ltd v Beno Excavations Pty Ltd.[16]

> [16] (2022) 18 ACTLR 245.

49. In Harlech, Lee J held that the Building and Construction Industry (Security of Payment) Act 2009 (ACT) "manifests an intention to preclude abuse of the statutory scheme by repetitive claims for the same work or related goods or services including an abuse of the process of obtaining a judgment".[17]

> [17] Ibid at [89].

50. His Honour held, citing Urban Traders, that a re-agitation of claims previously decided would be an abuse of the Act, even before a judgment on a second or subsequent adjudication is obtained. However, his Honour was critical of the "Dualcorp issue estoppel", saying:

> *"[88] A considered survey of the Dualcorp line of authorities reveals that 'issue estoppel' in the context of security of payment*

> *legislation deviates from the principles of issue estoppel as commonly understood. Even where the doctrine has been found to operate, it is characterised as inchoate, narrow in scope, and based upon broader principles of preclusion."*

51. Lee J was of the view "Dualcorp issue estoppel" is not actually issue estoppel, but a species of preclusion best described as an abuse of process. He said:

> *"[96] Finally, eschewing the use of the term issue estoppel is also consistent with recognising that the starting point is the Act itself: Dualcorp (at [42] per Macfarlan JA, Handley JA agreeing at [76]); Kuligowski (at [9] per Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ). In a statutory context, common law principles operate so as to complement acts of Parliament, not to overwhelm them. The present source of any form of preclusion must be the SOP Act itself: Caltex Refineries (at [54] per Philip McMurdo J)." (citations omitted)*

52. His Honour held that the ACT legislation manifested an intention to preclude abuse of the statutory scheme by repetitive claims for the same work or related goods or services including an abuse of the process of obtaining a judgment.

53. Kennett J disagreed with the majority in Dualcorp that the principles of issue estoppel arose in that case. Instead, his Honour viewed the decision in Dualcorp as correct for the reasons of Allsop P.

54. Elkaim J, the third member of the Court, expressed himself in this way:

> *"[2] … Without rejecting the path taken by Kennett J, I generally prefer that taken by Lee J, in particular his reliance on the terms of the Building and Construction Industry (Security of Payment) Act 2009 (ACT)".*

55. There is, then, appellate authority from another jurisdiction in which the court disagreed with Dualcorp and the application of "issue estoppel", preferring instead to rely on "abuse of process" or "abuse of the statutory scheme" to achieve a similar result.

56. For completeness, it should be noted that both Tasmania and Western Australia have actually broadened the range of 'issues' to which, in those jurisdictions, issue estoppel can apply.

57. In Modscape Pty Ltd v Francis, [18] Blow CJ held that issue estoppel applies to findings of fact in adjudications.

> *[18] Modscape Pty Ltd v Francis (2017) 29 Tas R 288 at [4]-[5].*

58. In Salini-Impregilo S.P.A v Francis,[19] Archer J in reference to what her Honour termed 'adjudication estoppel' stated:

> *"[387] In my view, a form of issue estoppel applies under the Act to prevent, at least, the re-agitation of an issue that was fundamental to the assessment of the liability to pay and the quantum of the amount found to be payable under s 32(2)(b). The Adjudicator did not err in finding that the negative variation defence could not be re-agitated."*
>
> *[19] [2020] WASC 72.*

> *59. The position then is that there are inconsistent decisions of interstate appellate courts concerning the existence of "Dualcorp issue estoppel". There is, though, agreement that a party may be prevented from arguing for a particular conclusion on an issue where that issue has been raised and decided in an earlier arbitration decision. In this State, there has been a general acceptance of the availability of a form of issue estoppel*

and in the absence of a compelling argument to do otherwise I will follow the position in this State.…

1098. The estoppel between the parties preventing re-agitation between them of the fundamental issues in the dispute which formed the basis for the adjudicator's decision was described in the High Cout case of *Blair v Curran [1939] HCA 23* (at 531–532 (Dixon J)) as follows:

> *"…A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies.* ***The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered*** *or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between res judicata and issue-estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.*
>
> ***Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded****. In matters of fact the issue-estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established.*
>
> *Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough*

to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negatived. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order.

1099. From the above authorities, the estoppel preventing the re-agitation of certain issues must relates only to matters that are legally indispensable to a particular conclusion that has been previously reached in an earlier adjudication and that is subject to the qualification provided by section 87 of the Act, which provides;

"87 Valuation of work etc. in later adjudication application

(1) This section applies if, in deciding an adjudication application, an adjudicator has decided the value of—

(a) any construction work carried out under a construction contract; or

(b) any related goods and services supplied under a construction contract.

Note—

See section 72 for the valuation of construction work and related goods and services.

(2) ***Any adjudicator must, in any later adjudication application that involves the working out of the value of the construction work or of the related goods and services, give the work, or the goods and services, the same value as that previously decided by the adjudicator unless the claimant or respondent satisfies the adjudicator concerned***

> ***that the value of the work, or the goods and services, has changed since the previous decision***.
>
> *(3) However, if a decision or order of a court changes the value of the construction work or of the related goods and services, the adjudicator must give the work, or the goods and services, the same value as changed by the decision or order unless the claimant or respondent satisfies the adjudicator concerned that the value of the work, or the goods and services, has changed since the decision or order.*

Decision regarding Issue Estoppel

1100. Based on the above authorities, the Claimant is precluded from pursuing a progress payment inconsistently with the determination of an issue by an adjudicator which was fundamental to that decision.

1101. To the extent the Claimant has re-agitated an issue that is inconsistent with the determination of that same issue by a previous adjudicator (which was fundamental to that decision), I must apply the same determination.

1102. The only deduction previously considered in adjudication applications # 2573124, # 2602454 and # 2671069, that is relevant to this Adjudication Application is the deduction for consultant's fees.

1103. In relation to Consultant's fees the adjudicator of application #2602454 at paragraph 88. of the decision, said;

> *"88. The claimant has expressly stated that other than the deductions listed above [which were for "Defective Works", "Façade System" and Mechanical Works (CPVC pipework for*

fire sprinkler system), the balance of alleged defective works not being disputed by the claimant."

1104. There is no determination of a dispute relating to the deduction for certain Consultant Works[11]. In relation to that deduction, the adjudicator merely recorded the Claimant's consent to accept a certain deduction relating to consultants.

1105. In relation to Consultant's fees and Defective Ceilings & Partitions, the adjudicator of application #2573124 at paragraph 117. of the decision, said;

*"**the claimant does not expressly dispute** that there are defective works of works not in accordance with the contract [sic.]. The respondent's Scott schedules (are voluminous) and clearly identify defective work with photos of the various defects discussed above."*

1106. There is no determination of any dispute relating to the deduction for the Consultant Works or for the Defective Ceilings & Partitions[12]. In relation to that deduction, the adjudicator merely recorded the Claimant's consent to accept that deduction.

1107. None of the deductions considered by the adjudicator in adjudication application #2671069 are raised in this Adjudication Application.

1108. For the purposes of this Adjudication Application, I acknowledge the amounts previously accepted by the Claimant for deductions relating to Consultants, Ceilings & Partitions, and will not permit the Claimant to withdraw from that position.

[11] See paragraph 85 of the decision of adjudication application #260254
[12] See paragraph 120 of the decision of adjudication application #2573124

Decision

1109. I will consider first the overarching reasons for the 7 deductions and the Claimant's rebuttal.

1110. The Respondent asserts the value of the deduction noted in the appended schedule of the Payment Schedule, is the value of the works undertaken to date which have not been completed in accordance with the Contract. The Respondent asserts the total value of works completed as assessed in this schedule have been reduced by value of the deduction noted in the appended schedule of the Payment Schedule.

1111. The Respondent further submits that in the alternative, each deduction is made pursuant to clause 29.3 and/or 37.7 of the Contract, and/or Section 72(1)(b)(iv) of the BIFA.

1112. The Claimant asserts;

(a) There are no defects and the works identified by the Respondent as defective have been constructed in accordance with the Contract;

(b) The Respondent has failed to particularise each defect in the Payment Schedule and the Claimant is unable to meaningfully respond;

(c) The Respondent has not followed the process set out in clause 29.3 of the Contract relating to the rectification of defective work and the Respondent has not accrued any right to set off its claimed amounts under the Contract, which is confirmed by sections 71(a) and 72(1)(a) and 72(2)(a) of the Act;

(d) The Respondent has not accrued any right of set off under clause 37.3 because it has no "bona fide" claim; and

(e) The Respondent has failed to value each defect in accordance with sections 71(a) and 72(1)(a) and 72(2)(a) of the Act and, is not entitled to withhold payment for any alleged defective work.

Defective work under the Contract – Clause 29.3

1113. A "defect" is defined as follows in clause 1 of the Contract;

> *"means work that is in breach of the Contract by failing to meet a standard or quality specified by the Contract or otherwise required by legislative requirement;*

1114. The word "claim" is not defined in this Contract. Accordingly, its plain English meaning will be applied as required.

1115. The Contract provides the following process for the rectification of "defective work".

> *29.3 Defective work*
>
> *If the Superintendent becomes aware of work done (including material provided) by the Contractor which does not comply with the Contract,* ***the Superintendent will as soon as practicable give the Contractor written details thereof, and a timeframe in which the Principal requires rectification (being not less than 10 business days or such longer period as may be appropriate taking into account the nature of and circumstances relating to the defect****. If the subject work has not been rectified within the time frame required, the Superintendent may direct the Contractor to do any one or more of the following (including times for commencement and completion):*

a) remove the material from the site;

b) demolish the work;

c) reconstruct, replace or correct the work:

d) where the Contractor's design obligations apply, redesign the work; and

d) not deliver it to the site.

If:

e) the Contractor fails to comply with such a direction; and

f) that failure has not been made good within 8 days after the Contractor receives written notice from the Superintendent that the Principal intends to have the subject work rectified by others, ***the Principal may have that work so rectified and the Superintendent will certify the cost incurred as moneys due from the Contractor to the Principal.***

1116. Under clause 29.3 of the Contract, the Respondent did not accrue a right to take any steps until it had first given the Claimant the opportunity to rectify the defect itself.

1117. In order to accrue a right to rectify defective work, while the Contract was on foot, the Respondent was required to follow the process set out in clause 29.3 as follows;

(a) Issuing a 1st direction to the Contractor, providing written details of the defective work and directing the timeframe in which the

rectification was to be carried out (being not less than 10 business days);

(b) Issuing a 2nd direction to the Contractor to rectify the defective work within a certain time;

(c) If the Contractor still does not rectify the defective work, 8 days after the 2nd direction, issuing a 3rd direction informing the Contractor that the Principal now intends to have the subject work rectified by others.

1118. The Claimant admits the Respondent some site instructions to rectify defects but the Respondent never completed the process set out under clause 29.3, which it asserts was a condition precent to engaging others to carry out the defect rectification.

1119. The Respondent has not provided any evidence showing it followed the process required under clause 29.3.

1120. Furthermore, the Claimant argues that the Respondent was not entitled to deduct any amounts from money otherwise payable under the Contract to the Claimant until the defect had been rectified and the costs incurred by the Respondent.

Set off – Clause 37.7

1121. The Respondent asserts that it deducted the value of the defective work pursuant to clause 37.7 of the Contract.

1122. Clause 37.7 provides the Respondent a right of Set-off as follows.

> *"37.7 Set off*
>
> *The Principal may at any time deduct from, or set off against, any amounts due to the Contractor under this Contract, or otherwise at law in respect of the WUC* ***for amounts, damage, or losses due and payable by the Contractor*** *to the Principal under the Contract* ***and any amount in respect of a bona fide claim*** *which the Superintendent certifies (acting reasonably) against the Contractor under the Contract.*
>
> *Nothing in this subclause 37.7 limits any other right for the Principal to set off amounts under any other provision of this Contract.*

1123. The Claimant has argued that the defect rectification work was not carried out up to the time of termination, being 10 September 2024.

1124. Furthermore, the Respondent has not provided any evidence that it carried out any defect rectification work.

1125. Additionally, the Claimant argues that as the Respondent never followed the defect rectification process under clause 29.3 while the Contract was on foot and, therefore, never accrued a right to commence the defect rectification work and it never incurred costs of rectification, which the Superintendent could certify.

1126. In those circumstances, the Respondent could not argue that it had accrued any claim in relation to the future costs of defect rectification, because its right to make a claim only accrued on completing the process under clause 29.3

1127. I prefer the Claimant's argument and I am persuaded the Respondent did not follow the process set out in clause 29.3 and, therefore, never accrued a right to make a claim for the rectification of any defects.

1128. In those circumstances, the Respondent could not have accrued a Bonafide claim in relation to defect rectification because the Contract provides otherwise.

Defective work – particularised in the John Groom Reports

1129. The Respondent engaged a consultant J Groom Open Builder Licence QBCC #1189013to survey the completed work.

1130. Mr Groom produced reports dated 27 March 2024, 5 April 2024, 2 May 2024, 27 June 2024, 4 July 2024, 5 July 2024 and 14 August 2024 that identified certain aspects of the works (the **Defects**

Reports). Some items were clearly identified as non-complying with the Contract and or relevant Australian Standards, while other items recorded the inspector's preferences about constructing such as cleanliness of the work fronts.

1131. The reports were extensive and identified each item by at least one photograph and provided a short description of the defect or concern.

1132. There were also many entries in the Defects Reports that showed no defect but indicated the inspector's personal preferences or that failed to specifically identify the defect supposedly shown by the photograph. For example, Items 2, 6 and 9 of the 27 June 2024 report states;

> *"**The detail around the lift landing door on level five is starting to come together** in accordance with AES 1735.11, however **there are some other details around the bottom that need to be rectified** and all finished to meet the requirements of section C of the NCC.*
>
> *…*
>
> *"The rubbish chute and mechanical sub duct system are still not progressing through the building which is a concern.*
>
> *…*
>
> *There is a significant amount of installation to be tidied up and installed on level 5 that has not been done at the time of this inspection..*

1133. There were also many photographs of works in progress.

1134. Clearly, work in progress does not all of satisfy the requirements of the Contract until that item has been completed. Accordingly, I do not consider work in progress to be a defect for the purposes of the Contract. The examples above explain this point. There were many such examples in the Defects Reports.

Costs of rectifying the defective work

1135. The Respondent refers to these Defects Reports as "*Scott Schedules*". A Scott Schedule is a commonly used phrase and has a particular meaning in the Australian legal systems. A Scott Schedule is a document that sets out the parties' evidence with cost estimates for labour and material of each item claimed in regard to building defects, incomplete works or variations to the building contract and often involves technical or other complex matters. It is usually, but not always, prepared by a building or costs specialist and references the expert evidence.

1136. The Defects Reports do not provide cost estimates for labour and material of each defect claimed.

1137. The Respondent has provided 11 unsupported estimates (7 of these relate to this Adjudication Application) of the costs to rectify the defects and / or asserted non-compliant works as follows;

(a) Structural (considered under PC35) $696,500.00;

(b) Defective pipework (considered under PC35) $85,000.00;

(c) Defective Works (considered under PC35) $2,212,480.00

(d) Temporary Services (considered under PC35)

$28,830.92

(e) Consultants (includes some parts considered under PC35) $167,694.78;

(f) Diaphragm wall $205,000.00;

(g) Fastflow pipework $588,420.15;

(h) Swiss Park rectification $300,000.00;

(i) Topping & Grinding; $1,436,000.00;

(j) Ceilings $280,000.00;

(k) Partitions $150,000.00;

(l) Sub-total $6,149,925.85.

1138. The Respondent, however, has not provided any means of correlating these estimates with each of the alleged defects shown in the Defects Reports.

Sections 71 & 72 of the Act

1139. In the Payment Schedule, the Respondent relies on section 72 of the Act, which it asserts provides it the right to deduct the cost of rectification.

1140. Sections 71 and 72 of the Act provides the following;

"71 Amount of progress payment

The amount of a progress payment to which a person is entitled under a construction contract is—

(a) if the contract provides for the matter—the amount calculated in accordance with the contract; or

(b) if the contract does not provide for the matter—the amount calculated on the basis of the value of construction work carried out, or related goods and services supplied, by the person in accordance with the contract.

72 Valuation of construction work and related goods and services

(1) Construction work carried out under a construction contract is to be valued—

(a) if the contract provides for the matter—in accordance with the contract; or

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

(2) *Related goods and services supplied under a construction contract are to be valued—*

(a) *if the contract provides for the matter—in accordance with the contract; or*

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

(i) *the contract price for the goods and services; 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 goods are defective, the estimated cost of rectifying the defect***.

(3) *For subsection (2)(b), for materials and components that are to form part of any building, structure or work arising from construction work, the only materials and components to be included in the*

valuation are those that have become or, on payment, will become the property of the party or other person for whom construction work is being carried out.

(4) In this section—

contracted party, for a construction contract, means the party to the contract who is required to carry out the construction work under the contract.

contract price, for a construction contract, means the amount the contracted party is entitled to be paid under the contract or, if the amount can not be accurately calculated, the reasonable estimate of the amount the contracted party is entitled to be paid under the contract.

…"

1141. The Respondent relies on section ab)(iv) of the Act as providing its right to deduct amounts for the estimated cost of rectifying the defect.

1142. The Claimant asserts the Respondent has not provided sufficient details of the estimated cost of each defect and it cannot respond to the Respondent's gross claims for each of the deductions scheduled by the Respondent.

1143. Section 72(1)(b)(iv) makes it clear that; "***the estimated cost of rectifying the defect***" must be provided.

1144. The Respondent provided the estimated cost of rectifying all defects. In order to satisfy the requirements of section 72(1)(b)(iv) of the Act, the cost of rectifying each defect was to be provided.

1145. Providing the cost of rectifying each defect is essential and would have enabled the Claimant to consider its position and accept or reject each claimed cost. The authority supporting this conclusion is *Multiplex Constructions Pty Ltd v Luikens & Anor [2003] NSWSC 1140*.

1146. Satisfaction of section 72(1)(b)(iv) of the Act is a condition precedent to accruing the right to withhold payment under the Act.

1147. I accept the Claimant's argument because the global amounts provided by the Respondent cannot be broken down to correspond to each defect identified in the "Scott's Schedule" relied upon by the Respondent.

Insufficient reasons for the deductions

1148. The Claimant asserts the Respondent failed to provide sufficient details of each alleged defect and, accordingly, it is unable to respond meaningfully.

1149. Given the lack of reasons to explain the deductions, the Claimant asserts the Respondent has not made any valid deductions and is not entitled to withhold payment accordingly. The Claimant refers to refers *Multiplex Constructions Pty Ltd v Luikens & Anor [2003] NSWSC 1140* as authority.

1150. In *Multiplex Constructions Pty Ltd v Luikens & Anor [2003] NSWSC 1140*, Palmer J explained that prohibition as follows:13

> *[67] The evident purpose of s.13(1) and (2), s.14(1), (2) and (3), and s.20(2B) is to* ***require the parties to define clearly, expressly and as early as possible what are the issues in dispute between them****; the issues so defined are the only issues which the parties are entitled to agitate in their dispute and they are the only issues which the adjudicator is entitled to determine under s.22.* ***It would be entirely inimical to the quick and efficient adjudication of disputes which the scheme of the Act envisages if a respondent were able to reject a payment claim, serve a payment schedule which said nothing except that the claim was rejected, and then "ambush" the claimant by disclosing for the first time in its adjudication response that the reasons for the rejection were founded upon a certain construction of the contractual terms or upon a variety of calculations, valuations and assessments said to be made in accordance with the contractual terms but which the claimant has had no prior opportunity of checking or disputing****. In my opinion, the express words of s.14(3) and s.20(2B) are designed to prevent this from happening.*
>
> *[68] Section 14(3) requires that if the respondent to a payment claim has "any reason" for "withholding payment", it must indicate that reason in the payment schedule. To construe the phrase "withholding payment" as meaning "withholding payment only by reason of a set-off or cross claim" is to put a gloss on the words which their plain meaning cannot justify. The phrase, in the context of the subsection as a whole, simply means "withholding payment of all or any part of the claimed amount in the payment claim". If the respondent has any reason whatsoever for withholding payment of all or any part of the payment claim, s.14(3) requires that that reason be indicated in the*

[13] *Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC 1140, [67]-[68], [70] (Palmer J). See also *G W Enterprises Pty Ltd v Xentex Industries Pty Ltd & Ors* [2006] QSC 399, [37] (Lyons J).

payment schedule and s.20(2B) prevents the respondent from relying in its adjudication response upon any reason not indicated in the payment schedule. Correspondingly, s.22(d) requires the adjudicator to have regard only to those submissions which have been "duly made" by the respondent in support of the payment schedule, that is, made in support of a reason for withholding payment which has been indicated in the payment schedule in accordance with s.14(3).

…

[70] For a respondent merely to state in its payment schedule that a claim is rejected is no more informative than to say merely that payment of the claim is "withheld": the result is stated but not the reason for arriving at the result. Section 14(3) requires that reasons for withholding payment of a claim be indicated in the payment schedule with sufficient particularity to enable the claimant to understand, at least in broad outline, what is the issue between it and the respondent. This understanding is necessary so that the claimant may decide whether to pursue the claim and may know what is the nature of the respondent's case which it will have to meet if it decides to pursue the claim by referring it to adjudication."

1151. I will consider each of the deductions below;

Consultant – Architect – Invoices in connection with C&P – [$47,957.50 relate to this Adjudication Application]

1152. The Respondent has provided the following specific reason for deducting the Architect's costs from moneys otherwise payable to the Claimant;

Full details and particulars have been previously provided in the Scott Schedule/ John Groom reports issued to the

> ***Contractor by way of SI170, SI170A, SI209 and SI223*** *to date of works which are currently not in accordance with the Contract.*
>
> *The* ***value of the deduction noted herein is the value of the works undertaken to date which have not been completed in accordance with the Contract.*** *The total value of the C&P works completed as assessed earlier in this schedule are hereby reduced by this sum.*
>
> *In the alternative, the deduction is made pursuant to clause 29.3 and/or 37.7 of the Contract or section 72(1)(b)(iv) of the BIFA. The Contractor has not provided any shop drawings, submittals or recommendations as set out in Architectural specification 0522*

1153. I acknowledge that the Claimant previously accepted deductions for certain Architect's costs claimed against it under adjudication applications # 2573124, # 2602454 and # 2671069 in relation to ceilings and or partitions defective work.

1154. The Claimant, however, asserts that the Respondent has increased the deduction for the Architect by $47,957.50 since the previous payment schedule in relation to payment claim PC 35 but has provided no reason or invoice from the Architect. The Respondent does not reject that assertion. Accordingly, I assume this is a new deduction not contemplated in adjudication applications # 2573124, # 2602454 and # 2671069.

1155. The Respondent refers to the Scott Schedule and its site instructions SI 170, 170A, 209 and 223 and refers to; "*works not in accordance with the contract*" to explain the alleged defects.

1156. The Claimant asserts the Respondent has failed to particularise this claim and is unable to respond. The Claimant asserts that

lack of specificity of this deduction renders it invalid and relies on *Multiplex Constructions Pty Ltd v Luikens & Anor [2003] NSWSC 1140* as authority for that assertion.

1157. The Respondent has provided no evidence of what work the architect performed nor explained why the value of that the Architect's work ($47,957.50) was deducted from amounts previously certified amounts relating to ceilings and or partitions.

1158. The Respondent submits the Claimant failed to submit certain shop drawings. I do not understand how that is a reason for withholding payment because nothing in the Contract says provision of shop drawings means the Claimant is liable for the Architect's costs.

1159. Accordingly, I am not persuaded the architect did work that was necessary to rectify the alleged defects in the ceilings and partitions. Furthermore, the Respondent has not provided the Architect's – Invoices in connection with the alleged rectification of defects in the ceilings and or partitions.

1160. Accordingly, I have decided the Respondent is not entitled to deduct $47,957.50 from moneys otherwise payable to the Claimant.

Diaphragm Wall Defective Works

1161. The Respondent asserts it is entitled to deduct $205,000.00 in relation to defective diaphragm walls for the following reasons;

(a) "*Leaking of basement D wall. Patch, grind and inject waterproofing B7-B2 7 x $25,000.00 = $105,000.00 (excl. GST)*"

(b) "*Several sections of wall out of plumb = $100,000.00 (excl GST)*".

1162. The Claimant asserts that this work is not defective and points out that the Respondent has failed to provide any evidence in support of its assertions.

1163. The Claimant further asserts that the Respondent has not accrued any right to carry out the defect rectification work because it has not satisfied the conditions precent set out in clause 29.3 of the Contract.

1164. The Claimant asserts the Respondent has failed to particularise this claim any providing details of the alleged defects and is unable to respond. The Claimant asserts that lack of specificity of this deduction renders it invalid and relies on *Multiplex Constructions Pty Ltd v Luikens & Anor [2003] NSWSC 1140* as authority for that assertion.

1165. Accordingly, I am not persuaded the defects are such that they do not comply with the requirements of the Contract and relevant Australian Standards.

1166. Accordingly, I have decided the Respondent is not entitled to deduct $205,000.00 from moneys otherwise payable to the Claimant.

Fastflow Pipework

1167. The Respondent asserts it is entitled to deduct $588,420.15 in relation to defective Fastflow pipework for the following reasons;

(a) "*Fastflow Pipework installed is defective*"

(b) "*In SI119A the Contractor places a value on the new Fastflow items as =$513,420.15 (excl GST)*"

(c) "*Plus demolition costs associated with removing defective works = $75,000 (excl GST)*"

1168. The Claimant asserts that this work is not defective and points out that the Respondent has failed to provide any evidence in support of its assertions.

1169. The Claimant further asserts that the Respondent has not accrued any right to carry out the defect rectification work because it has not satisfied the conditions precent set out in clause 29.3 of the Contract.

1170. The Claimant asserts the Respondent has failed to particularise this claim any providing details of the alleged defects and is unable to respond. The Claimant asserts that lack of specificity of this deduction renders it invalid and relies on *Multiplex*

Constructions Pty Ltd v Luikens & Anor [2003] NSWSC 1140 as authority for that assertion.

1171. The Respondent refers to its instruction SI119A. This document was not provided and I have assumed the Respondent was referring to the Claimant's notice of intention to claim referenced HCV119A.

(a) HCV119A does not describe the defect. HCV119A is instead a notice of intention to claim for a variation made by the Claimant following a direction given under clause 36.1 of the Contract by Troy White Jennings on 21 December 2022; and

(b) HCV119A does not state the cost of rectification of Fastflow pipework is cost of $513,420.15. It provided notice that the cost of the variation was $458,858.11 less $174,042.94 for the Contract provision for the original design.

(c) Accordingly, I am not persuaded the defects are such that they do not comply with the requirements of the Contract and relevant Australian Standards because the Respondent has not provided details of the alleged defect not how each defect did not satisfy the requirements of the Contract and or any relevant Australian Standards.

1172. Accordingly, I have decided the Respondent is not entitled to deduct $588,420.15 from moneys otherwise payable to the Claimant.

Swiss Park Rectification Works

1173. The Respondent asserts it is entitled to deduct $300,000.00 in relation to defective Swiss Park works for the following reasons;

(a) "*Fixing steel landing plates = $200,000.00 (excl GST)*"

(b) "*Scabbling lift shaft works = $100,000.00 (excl GST)*"

1174. The Claimant asserts that this work is not defective and points out that the Respondent has failed to provide any evidence in support of its assertions.

1175. The Claimant further asserts that the Respondent has not accrued any right to carry out the defect rectification work because it has not satisfied the conditions precent set out in clause 29.3 of the Contract.

1176. The Claimant asserts the Respondent has failed to particularise this claim any providing details of the alleged defects and is unable to respond. The Claimant asserts that lack of specificity of this deduction renders it invalid and relies on *Multiplex Constructions Pty Ltd v Luikens & Anor [2003] NSWSC 1140* as authority for that assertion.

1177. The Respondent refers to *Fixing steel landing plates* and *Scabbling lift shaft works* as defective work.

1178. The Claimant rejects that assertion and explained the steel landing plates refer to an unexecuted variation. The Claimant provided extracts of drawings CD2009 original and latest revision) in support of its claim.

1179. The Claimant asserts no scabbling was required, sae for a small amount valued at $22,750.00 which is the subject of adjudication application # 2671069.

1180. On the documents provided by the Respondent in the Payment Schedule it is not possible to understand the defect asserted by the Respondent for lack of detail.

1181. Accordingly, I have decided the Respondent is not entitled to deduct $300,000.00 from moneys otherwise payable to the Claimant.

Topping & grinding to existing structural slab floors

1182. The Respondent asserts it is entitled to deduct $1,436,000.00 in relation to defective structural slab floors for the following reasons;

(a) *"Associated surveying work, allow $3,000 x 37 levels = $111,000.00 (excl GST)"*

(b) *"The Claimant asserts that this work is not defective and points out that the Respondent has failed to provide any evidence in support of its assertions."*

1183. The Claimant asserts that this work is not defective and points out that the Respondent has failed to provide any evidence in support of its assertions.

1184. The Claimant further asserts that the Respondent has not accrued any right to carry out the defect rectification work because it has not satisfied the conditions precent set out in clause 29.3 of the Contract.

1185. The Claimant asserts the Respondent has failed to particularise this claim any providing details of the alleged defects and is unable to respond. The Claimant asserts that lack of specificity of this deduction renders it invalid and relies on *Multiplex Constructions Pty Ltd v Luikens & Anor [2003] NSWSC 1140* as authority for that assertion.

1186. The Claimant explains that the alleged defect relates to the deflections in the slabs. This deflection was the natural consequence of the slab design provided by the Respondent. The Claimant asserts it constructed in accordance with the Respondent's structural designs.

1187. On the documents provided by the Respondent in the Payment Schedule it is not possible to understand the defect asserted by the Respondent for lack of detail.

1188. Accordingly, I have decided the Respondent is not entitled to deduct $1,436,000.00 from moneys otherwise payable to the Claimant.

Ceilings

1189. The Respondent asserts it is entitled to deduct $280,000.00 in relation to defective ceilings and partitions for the following reasons;

(a) *"Rectification and removing ceilings for pelmets to be rectified. Allow $20,000 x 14 levels = $280,000. As noted in multiple instructions the requirements of Section 0522 of the Arch Spec have not been complied with, including submittals. Works are not in accordance with Contract."*

(b) *"Refer to the Principal's response to the Contractor's first show cause notice Ceilings and Partitions dated 8 March 2024 Including enclosures being the Cottee Parker Review and ADP Review and the Principal's response to the Contractor's second show cause notice dated 20 March 2024 including its enclosures, as well as the Principal's show cause notice dated 28 March 2024 and delivered to the Contractor on 2 April 2024 for further reasons why the works are not in accordance with the Contract."*

1190. The Claimant asserts that this work is not defective and points out that the Respondent has failed to provide any evidence in support of its assertions.

1191. The Claimant informs me that on 25 July 2023, an inspection of apartment 501 was arranged with the architect. The architect informed the Claimant that it required a 60 mm seamless pelmet depth and indicated the "*ceiling height will vary from room to room*".

1192. The Claimant asserts as of 27 July 2023, ceiling framing to various apartments had been completed in accordance with the apartment RCPs which show ceilings at 2800 height, and curtain pelmets at 2850 height to achieve a 50mm curtain pelmet. In areas under balcony folds where there are planned slab deflections, the 50mm curtain pelmet was not achieved.

Similarly in areas of curtain wall J brackets, the 50mm curtain pelmet was not achieved.

1193. The Claimant further asserts 18 apartments required the ceilings to be altered, which it estimated would cost $62,355.70.

1194. I am persuaded that there was a defect in the design based on the architect's comment that it required a 60 mm seamless pelmet depth and indicated the "*ceiling height will vary from room to room*". The architect also did not assert in its email dated 26 July 2024 that the work is not in accordance with its specification. I could not find any reference to ceiling height varying from room to room in the specification.

1195. The Claimant further asserts that the Respondent has not accrued any right to carry out the defect rectification work because it has not satisfied the conditions precent set out in clause 29.3 of the Contract.

1196. The Respondent should have provided a survey showing the extent to which each ceiling it asserts did not comply nor satisfy the requirements of the Contract.

1197. The Claimant asserts the Respondent has failed to particularise this claim any providing details of the alleged defects and is unable to respond. The Claimant asserts that lack of specificity of this deduction renders it invalid and relies on *Multiplex Constructions Pty Ltd v Luikens & Anor [2003] NSWSC 1140* as authority for that assertion.

1198. Accordingly, I have decided the Respondent is not entitled to deduct $280,000 from moneys otherwise payable to the Claimant.

Partitions

1199. The Respondent asserts it is entitled to deduct $150,000.00 in relation to defective ceilings and partitions for the following reasons;

(a) *Rebuilding non-compliant PW03 walls, allow $15,000 x 10 levels = $150,000 (excl GST);*

1200. The Claimant asserts that this work is not defective and points out that the Respondent has failed to provide any evidence in support of its assertions.

1201. The Claimant further asserts that the Respondent has not accrued any right to carry out the defect rectification work because it has not satisfied the conditions precent set out in clause 29.3 of the Contract.

1202. The Respondent should have provided a survey showing the extent to which each wall it asserts did not comply nor satisfy the requirements of the Contract.

1203. The Claimant asserts the Respondent has failed to particularise this claim any providing details of the alleged defects and is

unable to respond. The Claimant asserts that lack of specificity of this deduction renders it invalid and relies on *Multiplex Constructions Pty Ltd v Luikens & Anor [2003] NSWSC 1140* as authority for that assertion.

1204. Accordingly, I have decided the Respondent is not entitled to deduct $150,000.00 from moneys otherwise payable to the Claimant.

Summary of decisions for deductions

1205. In summary, I have decided that the Respondent is not entitled to apply any of the deductions relating to this Adjudication Application that are summarised above at paragraph 1092).

1206. The reasons for this decision are set out above and summarised as follows;

(a) The Respondent failed to provide sufficient explanation to show that each item claimed in the Defects Reports was actually defective by reference to the Contract and or a relevant Australian Standard(s);

(b) The Respondent failed to follow the process set out in clause 29.3 of the Contract and has not accrued a right to deduct any costs relating to the defects including for the reason it has not yet incurred any such cost of rectification. Refer to my reasons above at paragraphs 1113) to 1120).

(c) The Respondent did not have a "*bona fide claim*" because it failed to follow the process for defect rectification and could not exercise its right under clause 37.3. Refer to my reasons above at paragraphs 1121) to 1128).

(d) The Respondent failed to particularise each defect and its estimated cost of rectification as required under section 72(1)(b)(iv) and or 72(1)(b)(iv). Refer to my reasons above at paragraphs 1139) to 1147).

RESPONDENT'S DEDUCTION FOR EXTRA-OVER COST TO COMPLETE

1207. The Respondent has set-off the amount of $44,590,744.77 asserting those will be its extra-over costs to complete the works.

1208. I have decided above that the Claimant lawfully terminated the Contract on 10 September 2024.

1209. I have also decided above that the Respondent's notice under 39.4 issued on 12 September 2024 to take the work out of the Claimant's hand was void as the Contract was lawfully terminated on 10 September 2024 by the Claimant.

1210. In the abovementioned circumstance there was no provision in the Contract, nor at law that entitled the Respondent to set-off its asserted extra-over costs to complete the works.

1211. Even though it is not relevant in this case, under clause 39.6 of the Contract, the Respondent would have accrued a right to set-off its extra-over costs at the time it actually incurred the extra over costs and such extra-over costs then had been certified by the Superintendent before they became due and payable.

1212. Accordingly, I have decided the Respondent is not entitled to payment of its claim for extra-over costs to complete the works.

VALUATION OF THE PAYMENT CLAIM

1213. Accordingly, I have decided the Claimant is entitled to payment of the claimed amount which was $9,098,702.42 excl. GST or $10,008,572.66 incl. GST.

1214. A summary of the adjudicated amounts is set out in the table below;

	Description	Subject of PC36 Claimed 16/10/2024	Amount in dispute	*Respondent scheduled amount*	Adjudicated
1.6	Reinforcement (Supply & Install)	$37,302.12	$37,302.12	*$0.00*	$37,302.12
1.8	Post Tensioning	$12,000.00	$12,000.00	*$0.00*	$12,000.00
1.9	Waterproofing System	$25,646.89	$25,646.89	*$0.00*	$24,764.51
1.10	Masonry / Precast Walls	$4,500.00	$4,500.00	*$0.00*	$4,500.00
1.13	Metalwork and Balustrade	$74,200.17	$74,200.17	*$0.00*	$74,200.15
1.14	Doors & Door Frames	$30,709.58	$30,709.58	*$0.00*	$30,709.58
1.17	Curtain Walls, Aluminium Windows and Doors	$1,697,875.17	$1,697,875.17	*$0.00*	$1,697,875.17
1.19	Electrical Services	$319,245.81	$319,245.81	*$0.00*	$319,245.81
1.21	Mechanical Services	$330,275.11	$330,275.11	*$0.00*	$330,275.11
1.23	Lift Services	$4,104,148.57	$4,104,148.57	*$0.00*	$4,104,148.57
1.26	Ceilings, Partitions & Carpentry	$714,674.14	$714,674.14	*$0.00*	$714,674.17
1.28	Tiling Wall & Floor	$99,750.00	$97,250.00	*$2,500.00*	$99,750.00
1.29	Painting & Rendering	$4,896.32	$4,896.32	*$0.00*	$4,896.00
	Sub-total Original Contract works	**$7,455,223.88**	**$7,452,723.88**	***$2,500.00***	**$7,454,341.19**

	Variations	Subject of PC36 Claimed 16/10/2024	Amount in dispute	*Respondent scheduled amount*	Adjudicated
HCV113	Revised Mechanical Drawings for B1 - M03 [A] to M2010 [C2]	$17,943.00	$17,943.00	*$0.00*	$17,943.00

HCV126	Jackhammer CW1 for FS03 Construction - RFI162	$13,273.42	$13,273.42	*$0.00*	$8,540.55
HCV177	Structural Window Posts	$154,382.08	$154,382.08	*$0.00*	$0.00
HCV179	Slab Deflection - as built survey	$44,187.30	$44,187.30	*$0.00*	$34,261.92
HCV197	Hydraulic Design Changes - Level 5 - Level 17	$37,849.34	$37,849.34	*$0.00*	$23,921.91
HCV207	Levels 18 - 22 steam shower tundish and floor wastes	$10,294.77	$9,370.77	*$924.00*	$8,029.94
HCV208	PW03 Wall Custom Niches and Boxed Studs	$137,141.01	$137,141.01	*$0.00*	$0.00
HCV209	150mm backflow device	$13,604.11	$13,604.11	*$0.00*	$0.00
HCV210	Hydraulic design change - Level 18 to 35	$72,830.54	$42,609.86	*$30,220.68*	$60,085.97
HCV211	Fridge taps	$11,519.16	$11,519.16	*$0.00*	$11,184.67
HCV212	Hydraulic design change - Level 36	$6,145.50	$6,145.50	*$0.00*	$5,460.71
HCV214	SI42 Misc Works / Works to L2 and L5	$19,445.63	$19,445.63	*$0.00*	$7,546.77
HCV219	Basement B07 Earthing Pits	$7,995.98	$7,995.98	*$0.00*	$5,975.09
HCV220	Screed to Balconies	$195,923.07	$195,923.07	*$0.00*	$98,455.73
HCV222	Level 2 Infill Slab Over Garbage Room	$12,095.60	$12,095.60	*$0.00*	$0.00
HCV226	Chemical Fixings to Balcony Sliders and Windows	$28,439.16	$28,439.16	*$0.00*	$0.00
HCV227	Lobby Relief Slab Extension	$30,144.53	$30,144.53	*$0.00*	$26,005.59
HCV228	50Mpa to Door Ways	$10,479.50	$10,479.50	*$0.00*	$0.00
HCV231	Basement Speed Panel to Supply Air Riser	$23,707.02	$23,707.02	*$0.00*	$17,240.42
HCV234	Additional waterproofing to lightweight balcony walls	$73,135.36	$73,135.36	*$0.00*	$53,594.77
HCV243	PW03 walls change from 92 stud to 92 Rondo QuietStud	$10,699.59	$10,699.59	*$0.00*	$9,307.89
HCV251	Compensable Delay Cost - Approved EOT21	$47,259.30	$47,259.30	*$0.00*	$42,963.00

HCV252	Termination Claim	$11,469,628.92	$11,469,628.92	*$0.00*	$1,213,843.30
	Sub-total Variations	$12,448,123.89	$12,416,979.21	*$31,144.68*	$1,644,361.23
	TOTAL CONTRACT + VARIATIONS	**$19,903,347.77**	**$19,869,703.09**	***$33,644.68***	**$9,098,702.42**

	Superintendent's deductions				
	Defective Works - Diaphragm Wall	$0.00	$205,000.00	*-$205,000.00*	$0.00
	Fastflow Pipework	$0.00	$588,420.16	*-$588,420.16*	$0.00
	Rectification Works _ Swiss Park	$0.00	$300,000.00	*-$300,000.00*	$0.00
	Topping & Grinding of existing slabs	$0.00	$1,436,000.00	*-$1,436,000.00*	$0.00
	Ceilings	$0.00	$280,000.00	*-$280,000.00*	$0.00
	Partitions	$0.00	$150,000.00	*-$150,000.00*	$0.00
	Consultants	$0.00	$47,957.50	*-$47,957.50*	$0.00
	Sub-total Superintendent's deductions	$0.00	$3,007,377.66	***-$3,007,377.66***	$0.00

TIME FOR PAYMENT

1215. Clause 37.2 of the Contract sets out the time for payment as follows;

37.2 Certificates

…

Subject to clause 37.2A, the Principal will within 5 business days after receiving the progress certificate, or within 15 business days after the Superintendent receives the progress claim, whichever is the earlier, pay to the Contractor an amount not less than the amount shown in the progress certificate as due to the Contractor. If the progress certificate shows an amount payable by the Contractor to the Principal, the Contractor will pay that amount to the Principal within 5 business days after receiving the progress certificate.

…"

1216. In these circumstances, the due date for the Payment Claim was issued on 16 October 2024 and the Payment Certificate was issued on 30 October 2024. The due date was, therefore; 6 November 2024.

1217. Section 73 of the Act provides;

Due date for payment

(1) A progress payment under a construction contract becomes payable—

(a) if the contract provides for the matter—on the day on which the payment becomes payable under the contract; or

Notes—

1A 'pay when paid' provision in a construction contract has no effect, see section 74.

2A provision in a construction management trade contract or subcontract providing for payment of a progress payment later than 25 business days is void, see the Queensland Building and Construction Commission Act 1991, section 67U.

3A provision in a commercial building contract providing for payment of a progress payment later than 15 business days is void, see the Queensland Building and Construction Commission Act 1991, section 67W.

(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.

(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.

(4) Each of the following construction contracts are taken to be a contract to which subsection (1)(b) applies—

(a) a construction contract that includes a 'pay when paid' provision;

(b) a construction management trade contract or subcontract mentioned in the Queensland Building and Construction Commission Act 1991, section 67U;

(c) a commercial building contract mentioned in the Queensland Building and Construction Commission Act 1991, section 67W.

(5) In this section—

'pay when paid' provision, of a construction contract, see section 74.

1218. Pursuant to s.73(1)(a) of the Act payment became due on the date provided for by the Contract, which was 6 November 2024.

1219. Pursuant to section 90(a) of the Act, the Respondent is required to pay the adjudicated amount on or before 5 business days after the date on which the adjudicator's decision is served on the Respondent.

PAYMENT OF INTEREST

1220. Item 30 of Annexure Part A and clause 37.5 of the Contract sets out the interest to be paid on overdue payments as follows;

> *"…*
>
> *30 interest on overdue payments (subclause 37.5*
>
> *As per section 67P of the QBCC Act*
>
> *…"*

1221. Pursuant to section 73(2) of the Act;

> *"…*
>
> *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"*

1222. Section 59 of the *Civil Proceedings Act 2011* provides:

> *"…*
>
> *59 Interest after money order*
>
> *(1) This section does not apply in relation to a proceeding for a cause of action arising before 21 December 1972.*

(2) Interest is payable from the date of a money order on the money order debt unless the court otherwise orders.

(3) The interest is payable at the rate prescribed under a practice direction made under the Supreme Court of Queensland Act 1991 unless the court otherwise orders.

(4) However—

(a) if the money order includes an amount for damages and the damages are paid within 21 days of the date of the order, interest on the damages is not payable unless the court otherwise orders; and

(b) if the money order includes an amount for costs and the costs are paid within 21 days after assessment, interest on the costs is not payable unless the court otherwise orders."

1223. Under section 59(3) of the *Civil Proceedings Act 2011,* the interest rate for a money order debt is 10.35%.

1224. As of 11 December 2024, the RBA 90 day bill rate is 4.410%

1225. Accordingly, under Supreme Court Practice Direction 22/2012, the interest rate is 10%.

1226. Pursuant to section 67P of the QBCC Act, the interest rate to be paid on the overdue payment is 14.410% per annum.

ADJUDICATOR'S FEES AND EXPENSES

1227. Both parties have supported their claims. However, both parties appear to have failed in the proper administration of the Contract and that casual early approach has led to this series of disputes and complex adjudications.

1228. The Respondent accepted an onerous set of design management obligations in Part H of the Annexure that was, in my experience, unusual for construct only contracts. The Respondent's failure to provide designs in accordance with Part H of the Annexure was clear from early in 2023. The Claimant complained about the lack of coordination and detailed design but did not bring the issues to a head until March of 2024.

1229. I am not persuaded by either party that I should alter the provision set out in section 95(5) of the Act that Claimant and Respondent are each liable to contribute to the payment of the adjudicator's fees and expenses in equal proportions.

1230. Pursuant to section 96 of the Act, I decide that the parties are liable for the adjudicator's fees in the proportions set out below:

(a) Claimant 50%.

(b) Respondent 50%.



John Tuhtan

Registered Senior Adjudicator # J1190798. Dated: 8 April 2025.