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Pursuant to the

Construction Contracts (Security of Payments) CCA 2004

Adjudication Number	35.14.03
Prescribed Appointor	RICS Dispute Resolution Service
Adjudicator	John Tuhtan¹
Applicant:	
Respondent:	
Project:	
Amount to be paid by Respondent	\$3,586,078.89 incl. GST including GST
Due date for payment	Within 7 days of release of determination
Adjudication Fees Apportionment	Applicant: 50% Respondent: 50%
Date of Determination or Disposal	15 August 2014
Payment Claim	Claimed Amount : \$19,107,504.59 including GST Dated : 3 March 2014
Notice of Dispute / Response to Payment Claim	Notice of Dispute Amount : Nil
Adjudication Application	Dated: 27 June 2014
Adjudicator Acceptance	Dated: 30 June 2014
Adjudication Response	Dated: 11 July 2014

¹ Registered Adjudicator Number 35

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DETERMINATION

- 1) I, John Tuhtan², the adjudicator appointed pursuant to section 30(1)(a) of the *Construction Contracts (Security of Payments) Act (NT) (CCA)*, for the reasons set out below, determine that:
 - a) The amount to be paid by the respondent to the applicant is \$3,586,078.89 incl. GST.
 - b) Interest is due on the adjudicated amount at a rate of 8.50% per annum from 2 April 2014.
 - c) The respondent is to pay the adjudicated amount to the applicant within 7 days of the date of the determination being released.

BACKGROUND

- 2) The application arises from an unpaid payment claim made by the applicant on the respondent under section 8(a) of the CCA for construction work carried out under a construction contract for the '*Borrooloola Upgrade Stage 1 and 2A project in the Northern Territory*' (**Project**).

APPOINTMENT OF ADJUDICATOR

- 3) Pursuant to section 28(1)(c)(iii) of the CCA, the applicant served its adjudication application on the RICS Dispute Resolution Service, which is a prescribed appointor under the CCA.
- 4) The adjudication application was referred to me as adjudicator on 30 June 2014 by the RICS Dispute Resolution Service pursuant to section 30(1)(a) of the CCA.
- 5) The RICS Dispute Resolution Service served a notice of my acceptance of the appointment on the claimant and the respondent on 30 June 2014.

DOCUMENTS

- 6) The following documents were provided to me:
 - a) Adjudication application submissions dated 27 June 2014 on 30 June 2014; and
 - b) Adjudication response dated 11 July 2014 on the same date.
 - c) The applicant's further submissions dated 23 July 2014.
 - d) The respondent's reply to the applicant's further submissions dated 24 July 2014.

² Registered Adjudicator Number 35

PAYMENT CLAIM (SUBSTITUTED PC 37)

- 7) The applicant served the respondent with Substituted PC37 on 3 March 2014, which was the **payment claim** for the purposes of the CCA.
- 8) The payment claim was comprised of claims relating to the schedule of rates and claims for variations.
- 9) The claims relating to the schedule of rates in the Contract were referenced;
 - a) Items 1.1, 1.13, 2.1(i), 2.3, 2.4(i), 2.5(i), 2.8(i), 2.8(ii), 6.20, 7.5, for which the applicant accepts the respondent's determination of \$NIL.
 - b) Item 2.1(iii), claim for completing 1659 m of excavation greater than 5m in the amount of \$882,600.00;
 - c) Item 2.5(iii), claim for completing 1601 m backfilling of trenches greater than 5m in the amount of \$112,920.00;
 - d) Item 4.1(ii), claim for [works description omitted] construction DN225PVC in the amount of \$102,000.00;
 - e) Item 4.7(ii), claim for [works description omitted] in the amount of \$1,372.80. The respondent accepts the applicant's claim in the full amount claimed;
 - f) Item 4.9(i); claim for [works description and project site omitted] in the amount of \$1,730.00. The respondent accepts the applicant's claim in the full amount claimed;
- 10) The claims for variations were;
 - a) Item 26, claim for variation – 'minor variation item from April 2013' in the amount of \$6,477.38;
 - b) Item 27, claim for variation – 'unsuitable material; excavate 450 mm below trench bottom for > 5m deep and remove' in the amount of \$375,965.00;
 - c) Item 28, claim for variation – 'unsuitable material; winning and screening river run gravel and transport to work locations' in the amount of \$48,400.00;
 - d) Item 29, claim for variation – 'unsuitable material; place river run gravel in deep trenches' in the amount of \$285,690.00;
 - e) Item 30, claim for variation 1 arising from failure to give access to [works description omitted] in the amount of \$1,549,116.80;

- f) Item 31, claim for variation 2 arising from suspension of works – Stage 1 works in the amount of \$5,793,498.70;
 - g) Item 32, claim for variation 3 arising from changes to design of Stage 1 [works description omitted] in the amount of \$566,329.40;
 - h) Item 33, claim for variation 4 arising from consequential delay of remobilising to site following end of suspension in the amount of \$1,549,116.80;
 - i) Item 34, claim for variation 5 arising from consequential delay of remobilising to site following end of suspension in the amount of \$287,756.70;
 - j) Item 35, claim for variation 6 arising from consequential delay of 5 days of inclement weather in the amount of \$144,745.10;
 - k) Item 36, claim for variation 7 arising from consequential delay of 2012 Christmas period in the amount of \$372,257.60;
 - l) Item 37, claim for variation 8 arising from failure to give access to site, consequential delay 2013 wet season in the amount of \$1,498,336.40;
 - m) Item 38, claim for variation 9 arising from rectification [works description omitted] in the amount of \$3,450,949.70;
 - n) Item 39, claim for variation 10 arising from consequential delay 2013 wet season in the amount of \$345,664.00;
 - o) Item 40, claim for variation 11 arising from consequential delay survey of rectification work and 2014 wet season in the amount of \$302,542.90;
- 11) Clause 2.13 of the Amendments to the General Conditions of Contract states;
- '...The Contractor shall submit to the Superintendent a Tax Invoice every month showing the Contract value of the Work carried out in performance of the Contract and incorporated in the Works.'*
- 12) The payment claim identifies the work carried out in performance of the Contract and showed the Contract value of the Work carried out in performance of the Contract as \$33,592,866.35 incl. GST and includes the applicant's Tax Invoice for the amount of \$19,107,504.58 incl. GST.

- 13) The payment claim, therefore, complies with the requirements of the Contract and the CCA.

PAYMENT CERTIFICATE

- 14) The respondent received the applicant's payment claim on 3 March 2014 and issued a payment certificate on 17 March 2014 in response to the payment claim (Payment Certificate). The payment certificate was comprised as follows.
- 15) The determinations of claims relating to the schedule of rates in the Contract were;
- a) Items 1.1, 1.13, 2.1(i), 2.3, 2.4(i), 2.5(i), 2.8(i), 2.8(ii), 6.20, 7.5, the applicant has determined that the applicant is entitled to \$NIL and the applicant has advised in paragraph 2.2 of the submissions attached to the application for adjudication that it accepts the respondent's determination.
 - b) Item 2.1(iii), the respondent has determined that the applicant is entitled to \$NIL;
 - c) Item 2.5(iii), the respondent has determined that the applicant is entitled to \$NIL;
 - d) Item 4.1(ii), the respondent has determined that the applicant is entitled to \$NIL;
 - e) Item 4.7(ii), the respondent has certified that the applicant is entitled to \$1,372.80;
 - f) Item 4.9(i); the respondent has certified that the applicant is entitled to \$1,730.00;
- 16) Determinations of claims for variations were;
- a) Item 26, claim for variation –'minor variation item from April 2013' in the amount of \$6,477.38, which the respondent determined that the applicant is entitled to \$NIL. In the Payment Certificate, the respondent further pointed out that the superintendent had previously determined that the applicant is entitled to \$NIL in relation to the same claim by way of a letter dated 14 April 2013;
 - b) Item 27, claim for variation –'unsuitable material; excavate 450 mm below trench bottom for > 5m deep and remove' in the amount of \$375,965.00, the respondent has determined that the applicant is entitled to \$NIL;

- c) Item 28, claim for variation –‘unsuitable material; winning and screening river run gravel and transport to work locations’ in the amount of \$48,400.00, the respondent has determined that the applicant is entitled to \$NIL;
- d) Item 29, claim for variation –‘unsuitable material; place river run gravel in deep trenches’ in the amount of \$285,690.00, the respondent has determined that the applicant is entitled to \$NIL;
- e) Item 30, claim for variation 1 arising from failure to give access to [site description omitted] – Stage 1 works in the amount of \$1,549,116.80, the respondent has determined that the applicant is entitled to \$NIL;
- f) Item 31, claim for variation 2 arising from suspension of works – Stage 1 works in the amount of \$5,793,498.70, the respondent has determined that the applicant is entitled to \$NIL;
- g) Item 32, claim for variation 3 arising from changes to design of Stage 1 [omitted] works in the amount of \$566,329.40, the respondent has determined that the applicant is entitled to \$NIL;
- h) Item 33, claim for variation 4 arising from consequential delay of remobilising to site following end of suspension in the amount of \$1,342,863.50, the respondent has determined that the applicant is entitled to \$NIL;
- i) Item 34, claim for variation 5 arising from consequential delay of remobilising to site following end of suspension in the amount of \$287,756.70, the respondent has determined that the applicant is entitled to \$NIL;
- j) Item 35, claim for variation 6 arising from consequential delay of 5 days of inclement weather in the amount of \$144,745.10, the respondent has determined that the applicant is entitled to \$NIL;
- k) Item 36, claim for variation 7 arising from consequential delay of 2012 Christmas period in the amount of \$372,257.60, the respondent has determined that the applicant is entitled to \$NIL;
- l) Item 37, claim for variation 8 arising from failure to give access to site, consequential delay 2013 wet season in the amount of \$1,498,336.40, the respondent has determined that the applicant is entitled to \$NIL;
- m) Item 38, claim for variation 9 arising from rectification to [particular works] in the amount of \$3,450,949.70, the respondent has determined that the applicant is entitled to \$NIL;
- n) Item 39, claim for variation 10 arising from consequential delay 2013 wet season in the amount of \$345,664.00, the respondent has determined that

the applicant is entitled to \$NIL;

- o) Item 40, claim for variation 11 arising from consequential delay survey of rectification work and 2014 wet season in the amount of \$302,542.90, the respondent has determined that the applicant is entitled to \$NIL;
 - p) The respondent has determined that the applicant has failed to achieve practical completion by the date for practical completion. Pursuant to clause 2.14 of the amendments to the General Conditions and to clause 46 of the General Conditions of Contract the respondent has deducted liquidated damages in the amount of \$3,594,192.00
- 17) The respondent has certified the value of completed work relating to payment claim 37 in the amount of \$3,102.80 incl. GST and has applied liquidated damages concluding that the applicant is liable to pay the respondent \$3,591,089.20.
 - 18) The respondent certified the payment claim within the time prescribed in clause 2.13 of the Amendments to the General Conditions of Contract.
 - 19) The payment certificate, therefore, complies with the requirements of the Contract and the CCA.

DATE OF PAYMENT DISPUTE

- 20) Pursuant to section 8(a) of the CCA, the payment dispute occurred on the day the amount claimed in the payment claim was due to be paid but was not been paid in full or the claim was rejected or wholly or partly disputed.
- 21) On 17 March 2014, the respondent indicated by way of its payment certificate that the claim was rejected and partly disputed.
- 22) Pursuant to clause 2.13 of the amendments to the General Conditions and to clause 42.1 of the General Conditions of Contract, the payment claim was due to be paid within 30 days of receipt of the payment claim³, which is by 2 April 2014. Accordingly the payment dispute arose on 3 April 2014 for the purposes of this determination.

APPLICATION FOR ADJUDICATION

- 23) Section 28(1) of the CCA entitles an applicant to make an application for adjudication of a payment dispute within 90 days of the occurrence of the payment dispute.
- 24) I am satisfied that the payment dispute occurred on 3 April 2014.
- 25) The applicant applied for adjudication of the payment dispute on 27 June 2014, which is within the time permitted by and in accordance with section 28(1) of

³ *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd [2012] NTSC 22 at 20.*

the CCA. Specifically;

- a) The application is in writing as required by section 28(1)(a) and 28(2) of the CCA.
 - b) The application was served on the respondent on 27 June 2014, pursuant to section 28(1)(b) of the CCA.
 - c) The application was served on RICS Dispute Resolution Service on 27 June 2014, pursuant to section 28(1)(c)(iii) of the CCA.
 - d) The adjudicator requested a \$20,000.00 deposit or security for the costs of the adjudication, which was paid by the applicant on 9 July 2014 and by the respondent on 8 July 2014.
- 26) I am, therefore, satisfied that the adjudication application satisfies the requirements of section 28 of the CCA.

ADJUDICATION RESPONSE

- 27) Pursuant to section 29(1) of the CCA, the respondent has 10 working days after the date on which it is served with an application for adjudication to prepare and serve its written response on the adjudicator and the applicant.
- 28) The respondent served its adjudication response on 11 July 2014.
- 29) I am satisfied, therefore, that the respondent served its response within the timeframes prescribed in the CCA.

JURISDICTION

- 30) The parties entered into a contract to carry out [work details omitted] relating to the Project (Contract) on the [site details omitted] on or about 20 October 2010.
- 31) The Contract was entered into after the commencement of section 9 of the CCA.
- 32) The work carried out under the Contract is '*construction work*' as defined in section 6(1) of the CCA.
- 33) Accordingly, the Contract is a construction contract as defined in section 5(1) of the CCA and the CCA applies to payment disputes arising under the Contract.

- 34) Pursuant to section 9 of the CCA, the applicant claimed an amount in a *'payment claim'* under the Contract. Under the Contract, the payment claim was due for payment on 3 April 2014. The amount claimed in the payment claim was not paid in full and, accordingly, a payment dispute arose on 2 April 2014 for the purposes of the CCA.
- 35) Pursuant to section 27 of the CCA, the applicant is a party to the Contract under which the payment dispute has arisen and is, therefore, entitled to apply to have the dispute adjudicated.
- 36) The applicant submitted an application for adjudication on 27 June 2014 in accordance with the CCA. The respondent submitted its response on 11 July 2014 in accordance with the CCA.
- 37) I am not aware of any unresolved application for adjudication or order, judgment or finding by an arbitrator or other person or court or other body dealing with a matter arising under the Contract as referred to in sections 27(a) or 27(b) of the CCA.
- 38) I am, therefore, satisfied that I have jurisdiction to determine the adjudication application pursuant to the CCA.

JURISDICTIONAL CHALLENGES RAISED BY THE RESPONDENT IN THE RESPONSE

- 39) In the response, the respondent raised a number of jurisdictional challenges and asserts that I have no jurisdiction and ought not to proceed to a determination.
- 40) As the jurisdictional challenges were raised after the applicant submitted its application for adjudication, the applicant did not have the opportunity to reply to the respondent's jurisdictional challenges.
- 41) Accordingly, on 19 July 2014 pursuant to section 34(2)(a) of the CCA, in order to ensure that the applicant was afforded natural justice, I wrote to the parties and requested the applicant to provide me its submissions in response to the jurisdictional challenges raised by the respondent by 23 July 2014.
- 42) The respondent made a further un-solicited submission on 22 July 2014 asserting that the request for further submissions was in fact; a *'call for additional submissions in support of the application for adjudication'*.
- 43) On 22 July 2014, I wrote to the parties and informed the respondent that I rejected its argument because the request for submissions was for the sole purpose of providing the applicant an opportunity to reply to jurisdictional challenges raised in the response. To avoid doubt, I reiterated that limitation to the applicant and further invited the respondent to indicate which, if any, of the applicant's further submissions was not in accordance with my request.
- 44) On 23 July 2014, the applicant provided me its response to my further submissions.

- 45) On 24 July 2014, the respondent provided me its objections to paragraphs 3.1 to 3.14 and 7.1 to 7.6 of the applicant's further submissions asserting that those were; *'were addressed...in the Applicant's Adjudication Application.'*
- 46) I will deal with the applicant's further submissions and the respondent's objections to the further submissions below.

DETERMINATION OF THE RESPONDENT'S JURISDICTIONAL CHALLENGES

- 47) The respondent alleges there the payment claim was not made in accordance with the Contract and, therefore, it was not a payment claim under the CCA. Accordingly, there could be no payment dispute for the purposes of the CCA. The respondent then asserts that the adjudicator does not have jurisdiction to determine the payment dispute.
- 48) Section 4 of the CCA sets out the test as to whether the payment claim was a valid payment claim for the purposes of the CCA not the terms of the Contract.
- 49) Section 4 of the CCA states:

'payment claim means a claim made under a construction contract:

 - (a) *by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract;'*
- 50) The CCA requires the payment claim to be for construction work carried in the performance of a construction contract. There is nothing in the CCA that requires the payment claim to satisfy the terms of the Contract in order to qualify as a valid payment claim for the purposes of the CCA. Accordingly, I do not accept the respondent's assertion.
- 51) The alleged non-compliances of the payment claim do not relate to jurisdiction but rather go to prove that the applicant has not accrued a right to payment under the Contract because the claim was not made in accordance with the Contract.
- 52) In support of my conclusion, I refer to *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor [2011] NTCA 1*. In that case, His Honour Southwood J clarified what constitutes a valid payment claim for the purposes of the CCA as follows:

[48] In any event, it is the definition of 'payment claim' in the Act, not the terms of the Subcontract that determines whether a claim is a payment claim for the purposes of the Act. As I stated in *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Another* it was not the intention of the legislature that an adjudicator's determination should be void if a payment claim which was the subject of a payment dispute was not made in accordance with, or did not strictly comply with, the relevant provisions of the construction contract. The Construction Contracts Security of Payments Act (NT) contains no such requirement. Indeed, as is demonstrated above, the Act contemplates that there may be payment disputes about whether a payment claim is compliant or non-compliant with a particular construction contract.

[49] The definition of payment claim in s 4 of the Construction Contracts (Security of Payments) Act (NT) does not require that a payment claim must strictly comply with the express terms of the relevant construction contract or be in accordance with the express terms of the construction contract for there to be a payment claim within the meaning of the Act. So far as is relevant to this case, s 4 of the Act defines a payment claim as a claim made "by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract." In other words, it must be a claim "for the payment of the Subcontract price" based on performance by the subcontractor of its obligations under the subcontract. The word 'under', which is used in the stem of the definition of 'payment claim' in s 4 of the Act, admits of degrees of precision and exactness on the one hand and of looseness and inexactness on the other. The degree of precision and exactness intended in any particular case depends on the context in which the word is used. The reason why the words, "a claim made under a construction contract [Emphasis added]" are used in the stem of the definition of 'payment claim' in the Act is to denote the class or category of payment claims which are subject to the Act or that fall within the scope of the application of the Act. So far as a contractor or subcontractor is concerned, it is a claim made for payment of an amount for work performed by virtue of a construction contract.

[50] The Construction Contracts (Security of Payments) Act 2004 (NT) is concerned with payment claims and disputes involving, or relating to, or arising out of construction contracts and no other contracts. The unpaid tax invoices therefore fall within the definition of "payment claim" in the Act. To construe the definition of 'payment claim' otherwise would have the effect that the operation of s 20 of the Act with regard to clauses 6(1)(b)(ii), (2)(a)(ii), (2)(b), and (3)(f) in Div 5 of the Schedule of the Act was redundant or completely otiose and that cannot have been the intention of the legislature.

[51] Of course, if a payment claim does not comply with the definition in the Act then there may be no payment dispute capable of adjudication under the Act. Further, if a payment claim does not comply with the construction contract, it may have the consequence that an application for adjudication is unsuccessful because the adjudicator finds the principal is not liable to make the payment because it is not due and payable under the contract. [Emphasis added]

53) Nonetheless, I will consider the respondent's alleged non-compliances in the payment claim and its assertion below as these may affect my further considerations of the applicant's contractual entitlement to amounts claimed under its payment claim.

54) Section 4 of the CCA states:

'payment claim means a claim made under a construction contract:

(a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract; or...' [Emphasis added]

55) There is no dispute that the applicant carried out construction work under a construction contract for the purposes of the CCA.

56) The respondent asserts that the application was not prepared and served in accordance with section 28 of the CCA because the payment claim was invalid and, therefore, no payment dispute arose. Specifically, it is alleged that the payment claim was invalid for the following reasons;

a) **'Substituted PC37 was not served in accordance with the Contract'**

- i) At paragraph 2.2 of the submissions to the response, the respondent admits that Substituted PC37 is the progress claim for February [2014]. The respondent issued its Payment Certificate in response to Substituted PC37 on 17 March 2014.
- ii) At paragraph 6.12 of the submissions to the response, the respondent asserts that Substituted PC37 was not '*served on the Superintendent as required by the construction contract...*'.
- iii) Clause 7.2 of the General Conditions sets out the methods by which the applicant can effect service of document. The contract does not define the word '*document*'. The plain English meaning of '*document*' is a written or printed paper furnishing information or evidence.
- iv) Specifically, clause 7.2 states;

7.2 SERVICE OF DOCUMENTS ON PRINCIPAL OR SUPERINTENDENT

Any document which is to be or may be issued or given to or served upon the Principal or the Superintendent under the Contract shall be deemed to be sufficiently issued or given to or served upon the Principal or the Superintendent, as the case requires, if it is handed to the Principal or the Superintendent or is sent by prepaid post to or is left at the address of the Principal or of the Superintendent stated in the Annexure hereto. [Emphasis added]

- v) I conclude that a 'document which is to be or may be issued or given to the Principal or Superintendent under the Contract' includes the service of a payment claim on the Superintendent.
- vi) Similarly, the phrase 'handed to the Principal or Superintendent' is not defined in the contract. I have interpreted that phrase to mean personal service on the Principal or Superintendent, which is admitted by the respondent.
- vii) Accordingly, clause 7.2 permits service of payment claims as follows:
- By way of personal service on the Superintendent;
 - By way of prepaid post to the address of the Superintendent; or
 - Left at the Superintendent's address.
- viii) Clause 7.2 refers to Item 9 of the Annexure to the General Conditions (Annexure), which states that the 'address' of the Superintendent for the service of documents is; '[respondent's postal address details omitted]' (**Mailing Address**).
- ix) The contract does not define the word 'address'. The plain English meaning of 'address' is the place or the name of the place where a person, organisation, or the like is located or may be reached.
- x) Service of payment claims may be effected by personal service, pre-paid post or leaving the payment claim at the address of the Superintendent, which is supposed to be stated in the Annexure.
- xi) The Annexure, however, only provides the Mailing Address and not the address of the Superintendent.

- xii) It is not possible to effect personal service of a payment claim by delivery to the Mailing Address. The Mailing Address is required only for the purpose of effecting service by way of prepaid post.
- xiii) Similarly, service of the payment claim could not be effected by leaving the payment claim at the Mailing Address. It is only possible to leave the payment claim at a Mailing Address if it is sent by pre-paid post.
- xiv) The Annexure, therefore, does not provide any address for the applicant to effect personal service or identify a place where a payment claim may be left to effect service.
- xv) In that context, I have assumed that the Contract permits the applicant to serve a payment claim by way of personal service or to leave it at the address where the Superintendent is located or to send a payment claim by way of pre-paid post to the address stated in the Annexure, which is the Mailing Address.
- xvi) [Superintendent's personal details omitted] is the named Superintendent. The [respondent's] web-page indicates that the [relevant] division of the [respondent] is located at [respondent's physical address omitted].
- xvii) Accordingly, if the applicant addressed the payment claim to [the] Superintendent and left it at [the respondent's physical address] by the date and time stated in the contract, that will constitute effective service of the payment claim pursuant to clause 7.2 of the Contract.
- xviii) The applicant's [AS] states in his statutory declaration;

...on the morning of Monday 3 March 2014, [the Applicant] hand delivered and emailed to the Superintendent a covering letter dated 3 March 2013 which enclosed a substituted progress claim 37.
- xix) The applicant's [CH] states at paragraph 74 of her statutory declaration;

...That morning [3 March 2014], the letter enclosing Substituted PC37 and its attachments was then hand delivered to the Superintendent at [the Respondent's head office].

- xx) I note that the respondent has not disputed the statements of [AS] or [CH] and has not adduced any evidence that disputes that the payment claim was left for the Superintendent at the [Respondent's head office address] on 3 March 2014.
 - xxi) Clause 2.13 of the Amendments to the General Conditions of Contract states;

'...The Contractor shall submit to the Superintendent a Tax Invoice every month showing the Contract value of the Work carried out in performance of the Contract and incorporated in the Works.'
 - xxii) There is no requirement to submit the payment claim on any particular day of the month stated in the Contract.
 - xxiii) It is of concern that the respondent admits that it received the payment claim, considered the payment claim and determined a certified value of work complete that it notified by way of sending a progress certificate on 17 March 2014 and now relies on a fine technical argument for asserting that the payment claim is invalid. I will not, however, further deal with this issue as it does not affect my determination.
 - xxiv) For the reasons set out above supported by the statutory declaration of [AS] and [CH], I determine that the applicant effected service of the payment claim on the Superintendent on 3 March 2014. Accordingly, I do not accept the respondent's arguments on this point.
 - xxv) Further, the question as to whether or not the payment claim was served in accordance with the Contract does not affect an applicant's entitlement to make an application for adjudication of a payment dispute under the CCA.
 - xxvi) Accordingly, I do not accept the respondent's argument that I do not have jurisdiction on this point and further I determine that the payment claim was submitted in accordance with the Contract.
- b) ***'The amounts for the costs claims have not been claimed in accordance with the Contract and those amounts in Substituted PC37 are not in respect of a payment claim under the Act'***
- i) At paragraph 6.17 of the response, the respondent asserts that the payment claim was not submitted in accordance with clause 42.1 of the Contract and was, therefore, not a payment claim for which a payment dispute could arise under the CCA.
 - ii) Among other things, the respondent asserts the payment claim

should only have included the value of the work carried out for that month and impliedly the payment claim was invalid because it included the value of the work carried out over many preceding months.

- iii) Clause 2.13 of the Amendments to the General Conditions of Contract, which amend clause 42.1 of the General Conditions states;

'...The Contractor shall submit to the Superintendent a Tax Invoice every month showing the Contract value of the work carried out in performance of the Contract and incorporated in the Works [Emphasis added]'.

- iv) The payment claims shows the Contract value of the work carried out in performance of the Contract and incorporated in the Works up to the end of February 2014, which includes costs arising from delays allegedly caused by the respondent up to the end of February 2014.
- v) There is nothing in the Contract, however, that states that if a preceding payment claim failed to claim any part of the completed work carried out in performance of the Contract and incorporated in the Works up to the end of that month the applicant would be restricted from claiming it in a subsequent payment claim.
- vi) Accordingly, I reject the respondent's assertion that the payment claim should only have included the value of the work carried out for that month. The applicant submitted a payment claim in accordance with Clause 2.13 of the Amendments to the General Conditions of Contract, which amend clause 42.1 of the General Conditions.
- vii) Additionally, at paragraph 6.18 of the respondent's submissions, the respondent asserts that payment claim bundles up claims for damages arising due to delays for which the Principal is allegedly liable and claims them as variations under clause 42.1 of the General Conditions and that mischaracterisation of those claims renders the payment claim invalid.
- viii) There is nothing in the Contract that requires the amounts claimed to be characterised in any particular manner. For the avoidance of doubt, clause 42.1 of the Contract only requires the applicant to submit to the Superintendent a Tax Invoice every month showing the Contract value of the work carried out in performance of the Contract and incorporated in the Works.
- ix) Accordingly I reject the respondent's assertion that the payment

claim was invalid because some of the claims that were included in the payment claim were identified broadly as 'variations' and claimed under clause 42.1. There is nothing in the CCA that requires a payment claim (or the parts that comprise the payment claim) to be identify under which term(s) of the contract the right to payment of the payment claim (or the parts that comprise the payment claim) arises.

- x) Generally, it is for the applicant to follow the Contract in order to accrue any right to payment. Similarly, the respondent must follow the Contract and determine whether or not the applicant is entitled to be paid the amount claimed under the Contract. The fact that an applicant may have mischaracterised part of its payment claim by claiming its right to payment arises under a different term of the Contract does not in any way affect its right to payment for the value of the work carried out in performance of the Contract and incorporated in the Works.
- xi) At paragraphs 6.18 and 6.19, the respondent asserts that the purported claims for variations are in fact claims for damages arising due to delays for which the Principal is allegedly liable. Specifically, the claims for damages are either;
- A claim for extra costs under clause 34.5 by reason of any suspension under clause 34.2 or 34.3 attributable to an act, default or omission of the Principal or its employees; and
 - A claim for delay costs under clause 35.4 arising from any extension of time;

The respondent then asserts that the determination of such claims requires the prior determination as to whether acts of prevention by the respondent actually entitle the applicant to an extension of time and ultimately delay damages associated with that extension of time. The respondent asserts that an adjudicator does not have jurisdiction to determine such claims.

- xii) Clause 2 of the Contract defines 'the Superintendent' as;

'the person named in the Annexure hereto as the Superintendent or other person from time to time appointed in writing by the Principal to be the Superintendent for the purposes of the Contract, and notified as such in writing to the Contractor by the Principal' [Emphasis added].

Accordingly, the Superintendent is an agent of the respondent for the purposes of the Contract.

xiii) The Contract requires the Superintendent to determine claims for variations made under clause 40.1.

xiv) Similarly, the Contract requires the Superintendent to determine claims for extension of time under clause 35.4 of the General Conditions arising by an act, default or omission of the Principal or any other cause for which the Principal is liable, which includes delays arising under clauses 34.2 or 34.3.

xv) Clause 40.2 states:

'A variation shall be valued in accordance with the rates included in the Priced Bill of Quantities or Schedule of Rates or in a schedule of prices if and in so far as the Superintendent determines that those rates are applicable to the variation. Where the Superintendent determines that the rates included in the Priced Bill of Quantities or Schedule of Rates or in a schedule of prices do not apply to a variation, the rate or price payable for the variation shall be determined by agreement between the Contractor and the Superintendent, but if the Contractor and the Superintendent fail to agree on the rate or price the Superintendent shall determine such rate or price as he considers reasonable or he may direct that the variation shall be carried out as Daywork.'

xvi) Clause 35.4 states:

'...No claim for extra costs incurred by the Contractor by reason of or as a result of or arising from the exercise by the Superintendent of the power to grant or allow any extension of time under this sub-clause shall be entertained by the Principal unless the need for the extension of time was due to any breach of the provisions of the Contract by or any other act or omission on the part of the Principal, the Superintendent or the employees, professional consultants or agents of the Principal.'

xvii) Clause 34.5 states:

'The extra cost, if any, of completing the Works incurred by the Contractor by reason of any suspension under sub-clause 34.2 or sub-clause 34.3 shall be borne and paid for by the Contractor PROVIDED HOWEVER that if the suspension is due to an act, default or omission of the Principal or an employee, professional consultant or agent of the Principal the Contractor shall be entitled to payment of the amount of any extra cost of completing the Works incurred by him that is attributable to such an act, default or omission.'

- xviii) In summary, clause 40.2 requires the Superintendent to value variations and clauses 34.5 and 35.4 make it clear that the applicant will be entitled to the extra costs arising due to a suspension or an extension of time for which the respondent is liable.
- xix) Additionally, pursuant to clause 34.5, the Superintendent may;
'at any time and at any for any reason he thinks is sufficient, by notice addressed to the Contractor extend time for Practical Completion of the Works...'
- xx) The Superintendent determined the applicant's payment claim including claims for variations, claims for costs arising from suspension of the works and costs arising from extensions of time and issued a payment certificate as agent for the respondent on 17 March 2014.
- xxi) Section 8 of the CCA states;
'A payment dispute arises if:

(a) when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed; or...' [Emphasis added]
- xxii) Section 33 of the CCA states;
'(1) An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a):

...

(b) ... – determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment or to return any security and, if so, determine:

(i) the amount to be paid, or security to be returned, and any interest payable on it under section 35; and

(ii) the date on or before which the amount must be paid or the security must be returned.' [Emphasis added]

- xxiii) The applicant's payment claim included claims for extension of time from the basis of its claims for costs arising from carrying out variations, costs incurred due to suspension of work and costs due to acts, defaults or omissions of the respondent under the Contract.
- xxiv) Accordingly, the Superintendent determined the amount payable which was due 30 days from the receipt of the payment claim being 3 April 2014. That gave rise to the payment dispute and entitled the applicant to make an application for adjudication.
- xxv) In the context that the payment claim is a valid payment claim for the purposes of the CCA and the Contract the Superintendent determined the payment claim that gave rise to the payment dispute, pursuant to reasons stated above at paragraphs 48) to 52) and sections 8 and 33 of the CCA, I have jurisdiction to decide this application for adjudication.
- xxvi) For the reasons stated above at paragraphs 48) to 52), I do not accept the respondent's further assertion that claims for costs included in a payment claim arising from the respondent's act, default or omission cannot be adjudicated until the parties have undergone the dispute resolution provisions set out in clause 45 of the General Conditions.
- xxvii) Accordingly, I do not accept the respondent's argument that I do not have jurisdiction on this point and I determine that the payment claim does comply with clause 2.13 of the Amendments to the General Conditions of Contract, which amend clause 42.1 of the General Conditions.
- c) *'There is no due date and no payment dispute for the costs claims referred to in Substituted PC 37 given that the Principal cannot entertain them.'*
- i) At paragraphs 6.24 and 6.25 of the submissions to the response, the respondent asserts that the payment claims include;
- costs arising out of suspensions that the respondent never instructed;
 - delay costs arising from extensions of time claims that were previously rejected by the respondent;
- ii) The respondent argues that since the respondent previously rejected those claims there can be no due date for payment and, therefore, there is no payment dispute under the CCA.
- iii) The implication of the respondent's assertion is that a due date can only arise if a payment claim is certified for payment by the

Superintendent. That proposition is flawed because it is inconsistent with the CCA.

iv) Section 8 of the CCA states;

'A payment dispute arises if:

(a) when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed; or... [Emphasis added]

v) Section 33 of the CCA states;

'(1) An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a):

...

(b) otherwise – determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment or to return any security and, if so, determine:

(i) the amount to be paid, or security to be returned, and any interest payable on it under section 35; and

(ii) the date on or before which the amount must be paid or the security must be returned.'

vi) Under the Contract and for the purposes of section 8 of the CCA, the amount claimed in the payment claim became due for payment on 3 April 2014 subject to the applicant's entitlement to payment pursuant to the Contract.

vii) There was no payment made on 2 April 2014 and a payment dispute arose by operation of section 8 of the CCA.

viii) Clauses 8(a) and 33(b) of the CCA make it clear that in the event that a payment claim gives rise to a payment dispute, the adjudicator must by reference to the Contract determine whether any party to the payment dispute is liable to make a payment.

ix) In support of the above conclusions I refer to *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Ors* [2011] NTCA 1 (**K&J Burns**) In *K&J Burns* her Honour Kelly J said:

'[116] If a construction contract contains a written provision about payment claims, the Act defines "payment claim" by

reference to the terms of the construction contract actually made by the parties: s 4 of the Act. It is to that contract that the adjudicator must go to determine whether there is a "payment claim" and hence a "payment dispute" for him to adjudicate. If the construction contract does not contain such a written provision, the Act implies into the contract the relevant contractual provisions in the Schedule of the Act.'

- x) The respondent's argument makes no sense because, if the applicant cannot make an application for adjudication of an amount rejected by the respondent but can only make an application to pay by the due date an amount certified by the Superintendent, the only payment disputes that could arise would be in the nature of a recovery of a liquidated debt or for species of breach of contract not covered by the Contract. In that case, the adjudicator would not be required to refer to the Contract because the determination of whether a liquidated debt should be paid is not within the jurisdiction of the adjudicator. Similarly, an adjudicator has no jurisdiction to decide claims for breach of contract that are not dealt with under the contract.
- xi) Accordingly, I do not accept the respondent's argument that I do not have jurisdiction on this point and further I determine that the due date for the payment claim was 2 April 2014 in accordance with clause 2.13 of the Amendments to the General Conditions of Contract.
- d) *'There is no due date and no payment dispute for the Costs Claims referred to in Substituted PC 37 given that extension of time claims to which they relate are time barred'*
 - i) The respondent asserts that the applicant's claims should be dismissed because the extension of time claims upon which the payment claim was based were time barred by the operation of clauses 35.4 and 48 of the General Conditions.
 - ii) For the reasons stated above at paragraphs 48) to 52) does not relate to jurisdiction. That question relates to whether the applicant accrued any right to payment for any of its claims under the Contract, which is a matter for the adjudicator to determine.
 - iii) Clause 35.4 states:

EXTENSION OF TIME FOR COMPLETION

Where the Contractor is delayed in the execution of the Works by any cause arising out of any breach of the provisions of the Contract or out of any other act or omission on the part of the Principal, the Superintendent or the employees, professional consultants or agents of the Principal or by any other cause (except a cause arising out of any breach of the provisions of the Contract or any other act or omission on his own part or on the part of his employees, agents or sub-contractors or their employees or agents) which he considers to be such as to justify an extension of the time fixed by the Contract for Practical Completion of the Works, the Contractor shall, if he desires to claim an extension of time for Practical Completion of the Works, give to the Superintendent not later than twenty eight days after the cause of delay arose notice in writing of his claim for an extension of time for Practical Completion of the Works, together with a statement of the facts on which he bases his claim.

If the Superintendent determines that the cause of the delay is such as to justify an extension of time for Practical Completion of the Works, the Superintendent shall grant the Contractor such extension of time for Practical Completion of the Works as the Superintendent thinks fit and shall, as soon as practicable after he has granted that extension of time, notify the Contractor thereof.

If the Superintendent determines that the cause of the delay is not such as to justify an extension of time for Practical Completion of the Works, the Superintendent shall, as soon as practicable thereafter notify the Contractor of that determination.

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

...

No claim for extra costs incurred by the Contractor by reason of or as a result of or arising from the exercise by the Superintendent of the power to grant or allow any extension of time under this sub-clause shall be entertained by the Principal unless the need for the extension of time was due to any breach of the provisions of the Contract by or any other act or omission on the part of the Principal, the Superintendent or the employees, professional consultants or agents of the Principal. [Emphasis added]

iv) Clause 48 states:

The Principal shall not be liable upon any claim by the Contractor in respect of any matter arising out of the Contract unless the claim together with full particulars thereof, is lodged in writing with the Principal not later than twenty-eight days after the date of the occurrence of the events or circumstances on which the claim is based or written notice of intention to make the claim specifying the nature of the claim is lodged with the Principal within that time and the claim, together with full particulars thereof, is lodged in writing with the Principal before the issue of the Final Certificate.

v) It is clear that the applicant failed to claim an extension of time within 28 days of the cause of the delay arising pursuant to clause 35.4 of the Contract.

vi) Similarly, it is clear that the applicant failed to claim an extension of time pursuant to clause 48 of the Contract.

vii) Accordingly, the applicant is not entitled to claim any extension of time.

viii) The respondent, however, caused the delays. The Superintendent should have considered the delays for which the respondent was liable and had a duty to grant a fair extension of time Pursuant to clause 35.4.

ix) The respondent, similarly, had an obligation to ensure that the Superintendent acted in a fair and honest manner. The respondent failed to perform that obligation and now seeks to profit from that breach by way of applying liquidated damages.

x) In relation to any suspension that may have occurred for which the respondent was liable, clause 34.2 states:

'Where the suspension of the whole or any part of the work under the Contract becomes necessary -

- (a) because of an act, default or omission of :
- (i) the Principal or an employee or professional consultant or agent of the Principal; or
 - (ii) the Contractor or an employee or agent of the Contractor; or
 - (iii) a sub-contractor or an employee or agent of that sub-contractor; or

(b) for the protection or safety of:

- (i) the employees or agents of the Contractor or of a sub-contractor or the employees, professional consultants or agents of the Principal or any other person concerned in the performance of the whole or any part of the work under the Contract; or
- (ii) the executed work or any part of the executed work; or
- (iii) the public or any property;

the Superintendent shall order the Contractor to suspend the progress of the whole or any part of the work under the Contract specified in the order for such time or times as the Superintendent may think fit.'

- xii) The respondent gave the applicant possession of the site on 26 October 2010. Suspension of the work to the [site] became necessary because the respondent was not able to provide access to the part of the site where the applicant was to perform the Stage 1 Works at the time that the applicant had intended to commence that work.
- xiii) The court in *Peninsula Balmain* held that the power of the superintendent to extend time at will is for the benefit of both the principal and contractor, and the superintendent is under a duty to consider whether to extend time even where the contractor is otherwise not entitled to make a claim.
- xiv) The *Building and Construction Industry Payments Act 2004* (Qld) sets out similar duties and powers for an adjudicator to those provided under the Construction Contracts (Security of Payment) Act (NT). In *Hervey Bay (JV) Pty Ltd v Civil Mining and Construction Pty Ltd and Ors* [2008] QSC 58, *McMurdo J* considered that it was open to the Adjudicator to decide what the superintendent should

have done in response to the claims made and to conclude that the superintendent, acting fairly, would have granted the extensions which the Adjudicator found were justified.

- xiv) In *Gaymark Investments Pty Ltd v Walter Construction Group Pty Ltd [1999] NTSC 143*, the Court held that the prevention principle was triggered where a contractor is not entitled to an EOT due to its failure to give notice, unless the superintendent had discretionary power to extend time at will.
- xv) In *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty. Ltd. & Ors [2005] NSWCA 229*, Hodgson JA discussed the circumstances in which 'damages' may validly fall within the jurisdiction of the NSW Act. This is where the contract contains mechanisms for such amounts to be claimed, such that the requirement in section 9(a) of the NSW Act is engaged. At [41] and [42] His Honour said:

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.

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...and which are then to be included in progress payments...They are therefore prima facie within section 9(a) of the Act.

It is now generally accepted that amounts on account of delay and disruption costs are claimable under the NSW Act providing there is a contractual right for the claimant to pursue such claim for costs of delay or disruption. However, intertwined with that entitlement to delay and disruption costs generally stems from an extension of time entitlement under the contract.

- xvi) In the context of the above case law, the superintendent had a duty to grant an extension of time for delays arising from the respondent's failure to give access to the applicant to the Stage 1 Works and from the superintendent's breach by failing to order a suspension accordingly. That was necessary to ensure that the respondent would not profit from those breaches.
 - xvii) If the superintendent had no such power, then by the operation of Gaymark, the respondent would not be entitled to apply liquidated damages in the event that the applicant did not achieve Practical Completion by the Date for Practical Completion. As the superintendent had such a power and a duty to exercise that power, the respondent remains entitled to apply liquidated damages the applicant did not achieve Practical Completion by the Date for Practical Completion.
 - xviii) Further, the applicant's claims for cost arise under the Contract and are not claims for damages that are not contemplated by the Contract. The superintendent, therefore, was required to determine the applicant's claims for costs arising from delays caused by the respondent.
 - xix) Therefore, under the CCA, I am required to determine what the superintendent should have done in response to the claims made and to conclude that the superintendent, acting fairly, would have granted the extensions which the Adjudicator found were justified.
 - xx) Accordingly, I do not accept the respondent's argument that I do not have jurisdiction on this point and further I determine that the due date for the payment claim was 2 April 2014 in accordance with clause 2.13 of the Amendments to the General Conditions of Contract.
- e) *'The subject of the application is subject to finding by an 'other person' within the meaning of section 33(1)(a)(iii) of the Act.'*
- i) I reject the respondent's interpretation of the CCA for the following reasons.
 - ii) Section 33(1)(a)(iii) of the Act states:
 - (1) *An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a):*
 - (a) *dismiss the application without making a determination of its merits if:*
 - (iii) *an arbitrator or other person or a court or other body dealing with a matter*

arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or..."

- iii) The respondent asserts that the Superintendent under the Contract is an *'other person'* for the purposes of the CCA. The respondent further asserts that the Superintendent's determination of the *'Cost Claims'* is an *'other finding about the dispute'* under section 33(1)(a)(iii).
- iv) Specifically, the respondent asserts that if the Superintendent has made a determination, then the adjudicator must dismiss the application for adjudication. This interpretation is inconsistent with the stated objectives of the CCA and judicial interpretation of the role of the adjudicator, which would be patently untenable if the respondent's interpretation was correct. I refer the respondent to the above extract from K&J Burns.
- v) Additionally, the phrase *'an arbitrator or other person or a court or other body'* is used in sections 47(1) and 47(4)(a) of the CCA and provide further clarity as to the meaning of *'other person'*.

Section 47(1) entitles a party under a construction contract to commence civil proceedings before an *'an arbitrator or other person or a court or other body'* in relation to a dispute or other matter arising under the contract.

Section 47(2) requires the adjudicator to continue to determine an application for adjudication until all the parties require the adjudicator to cease.

Section 47(4) refers to *'award, judgment or order'* (including orders for restitution) made by *'an arbitrator or other person or a court or other body'*. Awards, judgments and orders are only powers available to persons acting judicially.

The Superintendent had no power under the Contract to make any *'award, judgement or order'*

- vi) Accordingly, I determine that since the superintendent or respondent or its employees are not a *'other person'* for the purposes of section 33(1)(a)(iii) of the CCA.
- vii) I am not aware of any *'arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application'*

- viii) Accordingly, I reject the respondent's assertion on this point.
- f) *'It is not possible to fairly make a determination of the application because of the complexity of the matter.'*
- i) The respondent asserts that this adjudication is too complex and it is not possible for the adjudicator to fairly make a determination.
- ii) In light of the respondent's assertion, I reviewed the materials provided by the parties and note that:
- The applicant's application for adjudication consists of 7 volumes and the respondent response consists of 3 volumes. The documents provided are such that they can reasonably be reviewed and considered in the time available to the Adjudicator;
 - the payment claim involves issues that are within the adjudicator's jurisdiction to determine the application;
 - the application for adjudication is of a type for which the CCA was enacted to ensure applicant's claims under a construction contract are determined informally and rapidly thereby promoting security of payment and cash flow; and
 - adjudicators are often asked to determine the causes of delay for works under construction contracts and the applicant's corresponding entitlement to extension of time. Similarly, adjudicators are often required to determine costs to which an applicant is entitled under a construction contract regardless that they have not been involved in the works on a day-to-day basis.

- iii) The respondent has referred me to *Classic Stone (Qld) Pty Ltd and Julie Mauretta Pitcher [2012] WASAT 80 (Classic Stone)* in support of its assertion that this application is too complex and should be dismissed by me.
- iv) In *Classic Stone*, the State Administrative Tribunal upheld the adjudicator's dismissal of the application, which was made because the adjudicator could not determine;
- whether a contract existed;
 - the parties to the contract; and
 - the terms of the contract relating to purchase orders; and

The complexity related to uncertainty of relationship of the parties and agreed terms and that case, therefore, is not relevant to the extant circumstances.

- v) Neither party to this application for adjudication contest the existence of a construction contract or its terms. Additionally, the parties have provided detailed submissions and supporting documents required to comprehend the payment dispute and make a determination accordingly.
- vi) For the reasons set out in above paragraph 47), I determine that there exists a payment dispute under section 9 of the CCA, that the adjudication application complies with 28 of the CCA and that I have jurisdiction under the CCA to determine the application for adjudication.

REASONS FOR THE DETERMINATION

- 57) Pursuant to section 34 of the CCA, I have considered the following matters in making this determination:
- a) the adjudication application and its attachments;
 - b) the response and its attachments; and
 - c) the further written submissions validly made by the parties.

Summary of relevant events

- 58) On 14 October 2010, the respondent awarded the applicant the Contract for the [project details omitted] (**Works**) on the basis of a schedule of rates in the extended amount of \$14,777,588.17 incl. GST.

Formation of the Contract

- 59) In June 2010, the respondent invited the applicant to submit its tender for the Works. The tender documents included the following:
- a) Tender Addendum 1 to 4;
 - b) Request for tender, which included;
 - i) Conditions of tendering;
 - ii) Amendments to the General Conditions of Contract;
 - iii) Special Conditions of Contract;
 - iv) Occupational health and safety and the environment requirements;
 - v) Scope of works and referenced drawings, standard drawings and 2 Geotechnical Reports;
 - vi) Annexure to the General Conditions;
 - vii) Project control requirements
 - viii) Environmental management requirements;
 - ix) General requirements;
 - x) Provision for traffic requirements;
 - xi) [work details omitted];
 - xii) [work details omitted]
 - xiii) [work details omitted];
 - xiv) [work details omitted];
 - xv) [work details omitted];
 - xvi) [work details omitted];
 - xvii) [work details omitted];
 - xviii) [work details omitted];
 - xix) [work details omitted];
 - xx) Electrical works and controls requirements;
 - xxi) Concrete standard class requirements;

- xxii) Concrete special class requirements;
- xxiii) Concrete placement requirements;
- xxiv) [work details omitted];
- xxv) Irrigation system requirements;
- xxvi) General electrical requirements;
- xxvii) Electrical installation requirements;
- xxviii) Switchboards requirements;
- xxix) Instrumentation requirements;
- xxx) General Conditions of Contract NWPC Edition 3 (1981);

- 60) On 18 August 2010, the applicant submitted its tender in accordance with the Request for tender. The tender included;
- a) A cover letter setting out its offer to carry out the works set out in Tender NWK01519-10 for the amount of \$14,777,588.17 incl. GST.
 - b) Tender Form – Addendum 2;
 - c) A schedule of rates provided by the respondent that set out the quantities of various items against which the applicant submitted its unit rate and extended amount;
 - d) A declaration of business status form;
 - e) A schedule of acceptance form referring to section 2 of the Request for tender;
 - f) A schedule of insurance form;
 - g) A schedule of proposed sub-contractors form;
 - h) A claims against assessment criteria form;
 - i) An occupational health and safety plan proposal form;
 - j) A job safety and environmental analysis proposal form;
 - k) An environmental management proposal form;
 - l) A certificate of inspection form of the contract requirements, the sites and conditions affecting the execution of the Contract;
 - m) An indigenous development plan form;

- n) Confirmation that a bar chart showing the execution of the works would be submitted prior to commencement of the Works;
 - o) A draft conformation plan for the entire project form;
 - p) An industry participation plan form;
 - q) A company profile;
 - r) A business organisation chart;
 - s) The CVs of [names omitted];
 - t) Financial statements and reports for the year ended 30 June 2008;
 - u) A project quality plan;
 - v) An occupational health and safety plan;
 - w) A contractor environmental management plan;
 - x) An industry participation plan;
 - y) An indigenous development plan;
- 61) On 14 October 2010, the respondent sent a Notice of Acceptance of the applicant's tender referenced NWK01519-10. The Notice of Acceptance referenced the above Request for Tender and Addendums 1 to 4 and the schedule of rates prepared by the claimant for the execution of the Works for an extended amount of \$14,777,588.17 incl. GST.
- 62) On 12 April 2011, the parties executed a Formal Instrument of Agreement that referenced the Request for Tender and Addendums 1 to 4, the applicant's tender and the Notice of Acceptance of the applicant's tender and confirmed that the parties would perform their respective obligations in accordance with these documents, which collectively formed the Contract.

Particulars of the Contract

- 63) The Contract Works are identified as Stage 1 and Stage 2A but these are not separable portions under the Contract.

- 64) The date of acceptance of tender was 14 October 2010 and, pursuant to Item 15 of the Annexure, the time for giving possession of the site to the applicant was 14 days from the acceptance of tender, which was 28 October 2010.
- 65) Pursuant to Item 16 of the Annexure, the applicant was required to achieve Practical Completion within 30 weeks of the date of acceptance of tender, which was 12 May 2011.
- 66) The scope of work under the Contract was set out in drawings and specifications referenced in the Request for Tender.
- 67) The quantities of various items of work, the unit prices that the applicant was entitled to be paid for the various items of work and the extended price based on the respondent's measured quantities for which the applicant was entitled to be paid were set out in the applicant's tender.

Item 30 – Cost claim 1 - failure to give access to [site] Stage 1 works

- 68) On 3 March 2014, the applicant sent to the respondent its payment claim. The amount claimed was set out in a spreadsheet that described the work performed on the basis of the schedule of rates that forms a part of the Contract and it included other items referred to as '*variations/further costs*'. In support of its payment claim, the applicant attached notices that the applicant had previously sent to the superintendent.
- 69) Relevant to Item 30 Cost claim 1, which was set out in the payment claim, were the following notices that had been previously sent to the respondent:
- a) On 27 February 2014, the applicant sent a notice to the respondent entitled; '*Notice of Delay/Suspension Costs No. 1: Failure to give access to site: [site description omitted]*' (Notice 1).
 - i) Notice 1 claimed extra costs arising from the respondent's delay in the amount of \$1,549,116.80 incl. GST that were subsequently claimed in the payment claim.
 - ii) Notice 1 was based on a claimed extension of time of 97 days arising from delays that the applicant claims to have suffered during the period 21 April 2011 to 26 July 2011 because the respondent failed to give the applicant access to a part of the site referred to as '*[omitted]*' where the applicant was required to carry out works under the Contract referred to as '*Stage 1 Works*'.
 - b) Notice 1 referred to the applicant's previous claim for extension of time entitled; '*Notice of Claim for an extension of time for Practical Completion of the Works (in accordance with clause 35.4)*', which was dated 20 February 2014 (EOT Claim).
 - i) The EOT Claim referred to 12 previous notices of delay that were sent to the respondent during the period 22 December 2010 to 19 February 2014, provided a program showing the effects of those delays and claimed an extension of time to 6 February 2014.
 - ii) Relevant to Notice 1, the applicant had claimed 97 days extension of time in the EOT Claim. That extension of time was comprised of 22 days delay between 22 April 2011 and 12 May 2011 due the closure of [road details omitted] and 75 days from 23 May 2011 to 26 July 2011, which was the date that the superintendent suspended the Stage 1 Works.

- 70) The respondent determined Item 30 Cost claim 1 and certified that the applicant is entitled to \$NIL in its payment certificate entitled; 'Superintendent's assessment of Progress Claim 37 dated 3 March 2014 & Notice of Dispute' dated 17 March 2014 in response to the payment claim (Payment Certificate).

The respondent's reasons for withholding payment

- 71) In the Payment Certificate, the superintendent provided its reasons for withholding payment as follows:

- a) The Payment Certificate referred to a letter entitled; 'Response to the Contractor's Notice of Claim for Extension of Time to the Date for Practical Completion dated 20 February 2014' dated 17 March 2014 (Letter 3) that was attached to the Payment Certificate.
- b) In paragraph 2.2 of Letter 3, the respondent admits that the Date for Practical Completion was previously extended to 24 November 2011 due to;

'...suspension of works from October 2010 to April 2011 and for extensions of time previously sought by the Contractor in respect of Variations 2 and 3 and not because of any delay in access to the [site].'

- c) In Letter 3, the superintendent states that the extension of time claimed by the applicant on 20 February 2014, had been previously claimed by the applicant on 30 September 2012 and 10 May 2013, which the superintendent rejected in a letter that he provided to the applicant dated 24 October 2013.
- d) At paragraph 2.6 of Letter 3, the superintendent states;

'The Superintendent's previous reasons for rejecting the Contractor's claims are as follows:

- (a) *any EOT claim by the Contractor was required, by sub-clause 35.4 of the General Conditions of Contract (GCC), to be notified to the Superintendent no later than 20 June 2011 and the Superintendent has previously determined that the Contractor's claim was out of time pursuant to sub-clause 35.4 (Reason 1); and*
- (b) *the Contractor's slow progress in performing the Works were such that any delay in providing access to the [omitted] site had no delaying effect on the progress of the Contract Works achieving Practical Completion by the Date for Practical Completion or in achieving Practical Completion at all (Reason 2).*

- e) At paragraph 2.10 of Letter 3, the respondent asserted;

'The Superintendent does not accept that the period from 22 April 2011 to 27 July 2011 should be considered as "part of the overall suspension period" because, as a matter of fact, no suspension has been directed in respect of the relevant period (Reason 3). Further, during the relevant period the Contractor was not delayed in achieving Practical Completion because the Contractor had mobilised to the site and commenced work on the Stage 2A works, consistent with the Contractor's Construction Program (Reason 4).'

- f) At paragraph 2.9 of Letter 3, the respondent further asserts that;

'...despite access to the [omitted] work site being delayed, at no time was the Contractor in a position to complete the Contract Works by the Date for Practical Completion because of its own acts, omissions, delays and failings in the performance of the Works. In fact, the Stage 2A Contract Works remain incomplete as at today's date.'

- g) In Letter 3, the respondent relied on the time bar set out in clause 35.4 and the assertion that the respondent's delay in failing to grant access to the [site] so that the applicant could carry out the Stage 1 Works had no effect on the Works achieving Practical Completion by the Date for Practical completion to reject the applicant's claim for extension of time.

- h) The Payment Certificate referred to a further letter dated 17 March 2014 (Letter 6) entitled; 'Response to Notice of Delay/Suspension Costs No. 1 dated 27 February 2014' that was attached to the Payment Certificate.

- i) Letter 6 provided additional reasons for withholding money as follows:

'The superintendent rejects the whole of the claim the subject of the Contractors Notice of Delay/Suspension Costs No. 1 dated 27 February 2014 (Claim). The reasons for rejection of the Claim are set out below.

First, the Contractor has not complied with the requirements of clause 48 of the General Conditions of Contract...(Reason 5)

Second, to the extent that the Contractor relies on clause 35.4...the Contractor has no entitlement because no extension of time has been granted in respect of the subject of the Contractor's claim and the Contractor is not entitled to an extension of time in the amount claimed or at all...(Reason 6)

Third, to the extent that the Contractor relies on clause 34.5...

(a) *the entitlement (if any) is dependent on a suspension being ordered by the Superintendent under clause 34.2 or granted under 34.3. No suspension was ordered... (Reason 3)*

(b) *the costs that are claimed by the Contractor:*

(i) are not extra costs of completing the Works...attributable to the alleged delay in access (Reason 7); and

(ii) are not costs to the Contractor at all (Reason 8).

Fourth the Superintendent rejects the quantum assessment [and sets out further reasons]’ (Reason 9)

- 72) I will deal with Reasons 7 to 10 below when I determine the quantum (if any) to which the applicant is entitled.
- 73) The respondent, however, did not reject the applicant’s assertion that it failed to provide access to the [site] to the applicant during the claimed period of delay.

Background

- 74) On 26 October 2010, [PL] (the superintendent’s representative) sent a notice to the applicant that stated;

‘Pursuant to sub-clause 27.1 of the General Conditions of Contract, Possession of the Site, as defined in the above contract, is hereby given....’

The notice, made it clear that possession was given subject to the applicant first providing security, evidence of insurance and an occupation health safety and environment plan in accordance with the Contract.

- 75) Neither party asserts that the applicant was not given possession of any part the site at about that time.
- 76) On or about 24 November 2010, the applicant and the respondent held a pre-start meeting to discuss commencing work on site. It appears that the applicant requested and the respondent agreed to a suspension of the commencement of the works due to the onset of the wet season.
- 77) On 22 December 2010, the applicant sent a letter to the respondent that stated;

‘...we confirm that we wish to apply for a suspension of the project until 1 April 2011 or until ground conditions allow us to commence ground works after the wet. [Emphasis added]

We acknowledge that the date for resumption of the contract will be determined by the Superintendent’s Representative on review of site and

weather patterns.'

- 78) On 22 December 2010, [TD] (the superintendent's representative) sent a letter to the applicant that stated:

'...your request for suspension of the works under the above Contract and as detailed in your letter dated 22nd December 2010 is approved.

The Works shall be suspended until 1st April 2011 unless a mutually agreed earlier start date is determined or unless a further suspension is requested and approved due to ongoing wet conditions.' [Emphasis added]

- 79) On or about 1 April 2011, the respondent and applicant agreed to further extend the date for commencement to 21 April 2014, which is confirmed in paragraph 5.1(c) of a letter that the superintendent sent to the applicant dated 24 October 2013 that stated:

'As a result of the suspension of works pursuant to sub-clause 35.3 the Superintendent grants the Contractor an extension of time, without liability for any costs, of 27 weeks, being that period from 20 October 2010 to 21 April 2011.'

- 80) [Name omitted] of the applicant has deposed that on or about 19 April 2011, the applicant provided its construction program to the respondent (Program). The respondent did not dispute that statement in its response.

- 81) The Program indicated:

- a) The applicant would commence performance of its work under the Contract on 5 May 2011;
- b) The applicant would achieve Practical Completion on 29 November 2011;
- c) The Stage 2A work would commence on 5 May 2011 and be completed by 23 September 2011;
- d) The Stage 1 work would commence on 12 May 2011 and be completed by 13 August 2011.

- 82) There is no dispute that applicant commenced work (which includes mobilisation of the applicant's equipment and personnel) on site during the period 13 May 2011 and 17 May 2011. The applicant says it was 13 May 2011 and the respondent says it was 'prior to 17 May 2011'.
- 83) At some point in time prior to the applicant mobilising to site, the respondent and the superintendent became aware that possession of the Stage 1 [site description omitted] part of the site could not be given to the applicant because the respondent had not completed negotiating a lease arrangement with the land owners.
- 84) Upon mobilising to site, the superintendent's representative instructed the applicant that it was not permitted to access the Stage 1 Works area.
- 85) At paragraph 1.1(a)(iii) of a letter dated 24 October 2013 that the superintendent sent to the applicant, he admitted:

'To the extent that the Contractor claims to have been delayed in the execution of the Works due to lack of access to that part of the site required for the performance of the [works description omitted](Stage 1), the cause of delay arose on 3 May 2011, when the Contractor became aware that access had not been provided. Furthermore the Contractor was fully apprised of the extent of any delay upon access being granted and when the works commenced.'

- 86) There is also no dispute that the applicant carried out some of the Stage 2A Works under the Contract during the period 21 April 2011 to 27 July 2011 for which it claims to have suffered delays. The applicant claims the respondent was liable for the costs due to those delays.
- 87) The claim for extension of time due to the respondent's failure to provide access to the [site description omitted] to carry out the Stage 1 Works included a delay period of 21 April 2011 to 12 May 2011 where the applicant says:

'...was also the period that the Contractor could not transport its heavy materials due to load limitations on the [(which delay is effectively an extension of the delay for which extension of time has been granted for the deferral of works commencing until after the 2011/2012 Wet Season)'

- 88) On Friday 20 May 2011, Phil Harris, the Regional Director of the Department of Construction and Infrastructure sent an email to the applicant that stated:

'Earlier in the week we lifted all restrictions on the [road] with exception to No Overmass...'

- 89) At paragraph 5.1(c) of a letter dated 24 October 2013 that the superintendent sent to the applicant, I note that the superintendent granted the applicant an extension of time to 17 November 2011. That date appears to have been calculated on the basis that the date for commencement on site was suspended

to 21 April 2011 and the period for carrying out the Works under the Contract that was stated in the Annexure was 30 weeks.

- 90) At paragraph 5.2(b) of a letter dated 24 October 2013 that the superintendent sent to the applicant, the superintendent granted a further extension of time to 24 November 2011.

What the superintendent should have done when the respondent was unable to provide the applicant access to the Stage 1 Works part of the site

- 91) The applicant's payment claim indicates that it made preparations and mobilised to site on or about 13 May 2011. The respondent has not disputed that claim.
- 92) The applicant has indicated in its Program that it intended to commence the Stage 1 Works on 5 May 2011. It would have had certain labour and equipment scheduled to carry out that work.
- 93) At the time that the superintendent became aware that the respondent could not provide access to the applicant to commence the Stage 1 Works, the superintendent should have immediately issued the applicant a notice to suspend that part of the Works.
- 94) Clause 34.2(a) of the Contract states:

'Where the suspension of the whole or any part of the work under the Contract becomes necessary -

(a) because of an act, default or omission of :

(i) the Principal or an employee or professional consultant or agent of the Principal; or

...

the Superintendent shall order the Contractor to suspend the progress of the whole or any part of the work under the Contract specified in the order for such time or times as the Superintendent may think fit.

- 95) The superintendent had no discretion as to whether he would give a notice of suspension under clause 34.2(a). Clause 34.2(a) of the Contract made it mandatory for the superintendent to issue of a notice of suspension.
- 96) The superintendent breached the Contract when it failed to issue a notice of suspension for the Stage 1 Works and specify the period of suspension.
- 97) Pursuant to clause 34.2(a), suspension of the Stage 1 Works was necessary because of the respondent failed to give the applicant access to the Stage 1 Works part of the site. The superintendent was required to issue a notice of suspension under clause 34.2(a) from 21 April 2011, which was the date that the agreed suspension ended. The superintendent also failed to specify the period

of the suspension.

Applicant's right to claim an extension of time

98) Clause 35.4 sets out the applicant's entitlements to extension of time as follows:

'... Where the Contractor is delayed in the execution of the Works by any cause arising out of any breach of the provisions of the Contract or out of any other act or omission on the part of the Principal, the Superintendent or the employees, professional consultants or agents of the Principal or by any other cause (except a cause arising out of any breach of the provisions of the Contract or any other act or omission on his own part or on the part of his employees, agents or sub-contractors or their employees or agents) which he considers to be such as to justify an extension of the time fixed by the Contract for Practical Completion of the Works, the Contractor shall, if he desires to claim an extension of time for Practical Completion of the Works, give to the Superintendent not later than twenty eight days after the cause of delay arose notice in writing of his claim for an extension of time for Practical Completion of the Works, together with a statement of the facts on which he bases his claim.

If the Superintendent determines that the cause of the delay is such as to justify an extension of time for Practical Completion of the Works, the Superintendent shall grant the Contractor such extension of time for Practical Completion of the Works as the Superintendent thinks fit and shall, as soon as practicable after he has granted that extension of time, notify the Contractor thereof.

If the Superintendent determines that the cause of the delay is not such as to justify an extension of time for Practical Completion of the Works, the Superintendent shall, as soon as practicable thereafter notify the Contractor of that determination.

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

...

Any extension or extensions of time granted or allowed by the Superintendent pursuant to this sub-clause may be granted or allowed at any time before the issue of the Final Certificate.

No claim for extra costs incurred by the Contractor by reason of or as a

result of or arising from the exercise by the Superintendent of the power to grant or allow any extension of time under this sub-clause shall be entertained by the Principal unless the need for the extension of time was due to any breach of the provisions of the Contract by or any other act or omission on the part of the Principal, the Superintendent or the employees, professional consultants or agents of the Principal.'

- 99) Clause 35.4 of the General Conditions makes it clear that the applicant was entitled to claim an extension of time (if it wished to do so) within 20 days of the occurrence of the event that caused the applicant to suffer a delay during the period 21 April 2011 to 27 July 2011. That event was the superintendent's breach by failing to issue a notice of suspension, which occurred at the time that the applicant mobilised to site.
- 100) Clause 34.5 by itself does not make it clear that if the applicant failed to claim an extension of time within the prescribed period then it would never more be entitled to claim an extension of time.
- 101) Clause 34.5 and clause 48 of the General Conditions when read together, however, make it clear that the applicant was only entitled to claim an extension of time within a certain period after the event that gave rise to the delay occurred. Specifically clause 48 of the General Conditions states:

'The Principal shall not be liable upon any claim by the Contractor in respect of any matter arising out of the Contract unless the claim together with full particulars thereof, is lodged in writing with the Principal not later than twenty-eight days after the date of the occurrence of the events or circumstances on which the claim is based or written notice of intention to make the claim specifying the nature of the claim is lodged with the Principal within that time and the claim, together with full particulars thereof, is lodged in writing with the Principal before the issue of the Final Certificate.'

- 102) The applicant has not provided me any evidence that it made a claim or submitted a notice of intention to claim for extension of time pursuant to clause 34.5 of the General Conditions for a delay from 21 April 2011 to 27 July 2011 arising from the superintendent's failure to instruct a suspension of Stage I Works under clause 34.2(a).
- 103) It appears to me that the applicant first made a claim for extension for time for the delay period of 21 April 2011 to 27 July 2012 on 30 September 2012.
- 104) Accordingly, by the operation of clauses 34.5 and 48 of the General Conditions, the applicant is not entitled to claim an extension of time for 21 April 2011 to 27 July 2011 set out in its notice dated 20 February 2014.

The respondent's obligation to grant an extension of time due to the suspension that the superintendent should have instructed

- 105) The conclusion set out in above paragraph 104), however, does not mean that the superintendent had no obligations to extend the date for Practical Completion if;
- a) the respondent delayed the applicant from achieving Practical Completion by the Date for Practical Completion;
 - b) nor does it mean that the applicant was not entitled to payment of its costs incurred due to such delay even if it failed to claim an extension of time within the period prescribed in clause 35.4 of the Contract.
- 106) Clause 34.5 of the Contract provided the means whereby the applicant could be granted an extension of time arising from the superintendent's failure to instruct a notice of suspension under clause 34.2(a) and the actual suspension of the Stage 1 Works that followed.
- 107) The applicant was entitled to an extension of time by operation of the Contract because:
- a) The respondent failed to provide access to sufficient of the site to enable the applicant to perform the Stage 1 Works as it intended during the period 12 May 2011 to 26 July 2011;
 - b) The superintendent had the power to grant an extension of time under clause 34.5 regardless that the applicant did not claim the extension of time to which it was entitled pursuant to clause 35.4;
 - c) The superintendent had a duty to grant an appropriate extension of time to prevent the respondent from becoming entitled to deducting liquidated damages in excess of the liquidated damages to which the respondent would otherwise have been entitled arising from the applicant's failure to carry out the works in accordance with the Contract; and
 - d) The superintendent had a duty to grant an appropriate extension of time to enable the applicant to claim its costs arising from the actual suspension of the Stage 1 Works during the period 12 May 2011 to 26 July 2011.
- 108) In the decision of the New South Wales Court of Appeal in *Peninsula Balmain Pty Ltd v Abigroup Contractors* [2002] NSWCA 211, the contract conferred on the superintendent a unilateral power to extend time. The court held that the superintendent must exercise that power must in the interests of both parties and despite any time bars stipulated by the contract.
- 109) In decision in *Hervey Bay (JV) Pty Ltd v Civil Mining and Construction Pty Ltd* [2008] QSC 128 His Honour McMurdo J upheld the decision of *Peninsula Balmain v Abigroup Contractors Pty Ltd* and confirmed that in the absence of certain amendments to the standard form of AS2124, the Superintendent must exercise his power to grant an extension of time, absent of an entitlement to one, honestly and impartially and for the benefit of either the contractor or the

principal.

- 110) His Honour further held that if a contract makes it clear that the superintendent is under '*no obligation*' to exercise his power for the benefit of the contractor, such terms will be, if unambiguous, upheld by a court.
- 111) There is no such clause in the Contract and, therefore, I am persuaded that the superintendent had a duty to act honestly and impartially and for the benefit of either the applicant or the respondent.
- 112) The respondent has argued that the applicant was not entitled to an extension of time because, among other reasons, its failure to carry out the works in a timely manner was such that the Date of Completion would occur after any the Date for Completion amended to account for the delays for which the respondent was liable.
- 113) The superintendent stated in the Payment Certificate that the applicant was not entitled to costs arising from the suspension because of the applicant's failure to carry out the works in a timely manner caused it to suffer additional costs. That argument is flawed.
- 114) The applicant was not entitled to claim the delay costs arising from its failure to carry out the works in accordance with the Contract. To the extent, however, that the applicant suffered delay costs due to the respondent caused delays (the suspension of the Stage 1 Works), then the respondent was liable for such costs. Clause 34.5 supports that conclusion as follows:

The extra cost, if any, of completing the Works incurred by the Contractor by reason of any suspension under sub-clause 34.2 or sub-clause 34.3 shall be borne and paid for by the Contractor PROVIDED HOWEVER that if the suspension is due to an act, default or omission of the Principal or an employee, professional consultant or agent of the Principal the Contractor shall be entitled to payment of the amount of any extra cost of completing the Works incurred by him that is attributable to such an act, default or omission.

- 115) At paragraph 2.6 of Letter 3, the respondent states:

'...at the time the Contract was negotiated the Principal was unaware and did not know there would be any particular difficulty in obtaining access to the [omitted] work site'

- 116) The fact that the respondent was unaware that it could not provide the applicant access to the Stage 1 Works part of the site when it mobilised to site does not change the applicant's entitlement to be granted an extension of time because of the suspension of the work to that part of the site.
- 117) There is no dispute that the respondent failed to give access to the applicant to the [site] area during the period 21 April 2011 to 27 July 2011.

- 118) The Program that the applicant gave to the respondent indicated that it intended to commence the Stage 1 Works on 5 May 2011.
- 119) Whether or not the respondent knew or should have known that it could not give the applicant possession of the [omitted] site is of no consequence. The material fact is that the respondent did not and could not give the applicant possession of the [omitted] site from 21 April 2011 and up to 27 July 2011 and the superintendent should have suspended the works under clause 34.2(a).
- 120) I will determine below the applicant's entitlement to an extension of time to the Date for Practical Completion caused by the suspension and the applicant's costs arising from the suspension for which the respondent is liable.

Who bore the risk of the closure of the [road]?

- 121) The applicant intended to commence the Stage 1 Works on 5 May 2011 but was prevented from doing so because the [road] was closed up to about 20 May 2011.
- 122) The applicant provided the superintendent its program on or about 19 April 2011.
- 123) From the Program, the superintendent knew or should have known that the applicant intended to mobilise to site during the period 21 April 2011 to 5 May 2011 and should have suspended the Stage 1 Works accordingly in order to mitigate any costs that would be incurred by the applicant arising from the respondent's inability to provide access to the Stage 1 Works.
- 124) The applicant says it commenced work on site on or about 13 May 2011.

- 125) Pursuant to clause 34.5 of the Contract, the applicant is not entitled to payment of any costs for the period up to 21 April 2011 because it requested the suspension on 22 December 2010 under clause 34.3. The superintendent instructed the suspension accordingly.
- 126) Pursuant to clause 34.5, however, the applicant was entitled to costs arising from that suspension of the Stage 1 Works.
- 127) For the reasons stated in the preceding section, the superintendent should have granted an extension of time for the period 21 April 2011 to 27 July 2011 to enable the applicant to claim such costs incurred.

Applicant was entitled to payment for a suspension under clause 34.2(a)

- 128) Clause 34.5 of the General Conditions provides that in the event that the superintendent instructs a suspension under clause 34.2, the applicant accrues certain entitlements relating to the suspension. Specifically, clause 34.5 of the General Conditions sets out the applicant's entitlement to payment of costs arising from such suspension as follows:

'The extra cost, if any, of completing the Works incurred by the Contractor by reason of any suspension under sub-clause 34.2 or sub-clause 34.3 shall be borne and paid for by the Contractor PROVIDED HOWEVER that if the suspension is due to an act, default or omission of the Principal or an employee, professional consultant or agent of the Principal the Contractor shall be entitled to payment of the amount of any extra cost of completing the Works incurred by him that is attributable to such an act, default or omission.' [Emphasis added]

- 129) A suspension was necessary due to an act, default or omission of the respondent, which was its failure to provide access to the Stage 1 Works part of the site and the superintendent's failure to order a suspension accordingly.
- 130) In those circumstances, the superintendent had a duty to exercise its power and grant the applicant an appropriate extension of time for the purposes of ascertaining delay costs arising from the suspension and to ensure that the respondent could not become entitled to deduct liquidated damages arising from its failure to provide access to the Stage I Works area.
- 131) If the superintendent had discharged its duty and granted an extension of time under clause 34.5, the applicant would have become entitled to claim the costs it suffered due to the suspension at any time during the course of the Contract.
- 132) The Contract may even go so far as to require the respondent to pay the applicant such costs even in circumstances where the applicant has not claimed payment for costs incurred due to suspension of the works pursuant to clause 34.2(a) of the General Conditions. That proposition, however, is not claimed by the applicant and I will consider it no further.

Superintendent's duty to grant an extension of time

- 133) The superintendent has an absolute discretion to extend the date for Practical Completion even in circumstances where the applicant made no claim for extension of time. Specifically, clause 34.5 states:

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

- 134) Regardless that the applicant failed to claim the extension of time by 20 June 2011 (which the respondent asserts was the last day that the applicant could claim an extension of time for the delay period of 21 April 2011 to 27 July 2011), the superintendent should have, within a reasonable time, considered the delays for which the respondent was liable, assessed and granted an appropriate extension of time under clause 35.4 and then fairly assessed any claim for such costs made by the applicant during the course of the Contract.

- 135) Given that:

- a) the respondent failed to provide access to the Stage 1 Works as it was required to do under the Contract;
- b) the applicant failed to claim an extension of time under clause 34.5 for the suspension;
- c) the superintendent failed to instruct a notice of suspension under clause 34.2(a);

then unless the superintendent exercised its power under clause 35.4, the applicant would never be paid the amount that it was entitled to be paid under the Contract and the respondent would profit from its own failure to provide timely access to the Stage 1 Works area.

Respondent's right to apply liquidated damages

- 136) *Gaymark Investments v Walter Construction Group (1999) NTSC 143* confirmed that a principal is not entitled to apply liquidated damages to the extent that such liquidated damages arose from the principal's failures if there was no mechanism in the contract permitting the superintendent to grant an extension an extension of time when the contractor had failed to claim the extension of time within the time limits set out in the contract.

- 137) Specifically, Gaymark confirms the rule that the respondent must not be allowed profit from its own breach of Contract. Specifically, in Gaymark, His Honour Bailey J stated:

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

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

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

[68] I consider that the arbitrator was correct to distinguish both the Co-ordinated Industries Case, supra and the Austotel Case, supra. In neither case were acts for which the principal was responsible the cause of actual delay in preventing the contractor from achieving the date for practical completion. As the arbitrator observed:

"G43 The situation then, as I see it, is that in none of the cases to which I have been referred has the precise situation being considered here been looked at. (Hence I do not regard the decisions as being relevant to the present matter.)

G44 That situation is one where, if it proves that the acts of the owner either in person or through the Superintendent, have been responsible at least in part for actually preventing the contractor from achieving the date for completion, this is in the context of a contract in which, if the detailed requirements for notifications of EOTs have not been met, the Superintendent has no independent power to extend time."

[69] Acceptance of Gaymark's submissions would result in an entirely unmeritorious award of liquidated damages for delays of its own making (and this in addition to the avoidance of Concrete Constructions delay costs because of that company's failure to

comply with the notice provisions of SC 19). The effect of re-drafting GC 35 of the contract (to delete GC 35.4 and substitute SC 19) has been to remove the power of the Superintendent to grant or allow extensions of time. SC 19 makes provision for an extension of time for delays for which Gaymark directly or indirectly is responsible – but the right to such an extension is dependent on strict compliance with SC 19 (and in particular the notice provisions of SC 19.1). In the absence of such strict compliance (and where Concrete Constructions has been actually delayed by an act, omission or breach for which Gaymark is responsible) there is no provision for an extension of time because GC 35.4 which contains a provision which would allow for this (and is expressly referred to in GC 35.2 and GC 35.5) has been deleted.

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

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

[71] *In the circumstances of the present case, I consider that this principle presents a formidable barrier to Gaymark’s claim for liquidated damages based on delays of its own making.*

- 138) The facts in Gaymark were that the principal caused certain delays, the contractor failed to exercise its right to claim an extension of time and the contract did not empower the superintendent to grant an extension of time in such instances. His Honour upheld the arbitrator’s finding that the ‘prevention principle’ enunciated in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd (1970) 1 BLR 111* applied and prevented the principal from applying liquidated damages.
- 139) If the superintendent did not have any duty to grant an extension of time in the manner that I have determined above, then the respondent would have no right to apply any liquidated damages by the operation of the prevention principle confirmed by Gaymark.
- 140) In this case, the superintendent had such a power under clause 34.5 and further had a duty to exercise its power and grant an extension of time arising from delays for which the respondent is liable.
- 141) In these circumstances, Gaymark will be of no relevance and the respondent will

remain entitled to deduct liquidated damages for the applicant's failure to achieve Practical Completion by the Date for Practical Completion arising from its own failure to carry out the works in accordance with the Contract and other delays for which the applicant was liable.

- 142) The respondent caused the delay for which a suspension was required under clause 34.2(a) and the superintendent failed to instruct a suspension of the Stage 1 Works.
- 143) The superintendent further failed to exercise its powers under clause 35.4 and grant an appropriate extension of time due to the respondent's breach of Contract.
- 144) I will, therefore, determine what the superintendent should have done and determine the applicant's entitlement to extension of time arising from such delays and delay costs accordingly.
- 145) In these circumstances, the respondent would also be entitled to apply liquidated damages under clause 35.5 of the General Conditions arising from the respondent's and the superintendent's breach of Contract.
- 146) In the Payment Certificate, the respondent has deducted liquidated damages in the amount of \$3,594,192.00 from the moneys otherwise due to the applicant and now claims that the applicant is indebted to the respondent for the amount of \$3,591,089.20. I will determine below the liquidated damages that the respondent was entitled to deduct.

Determination

- 147) For the reasons stated above, I have determined that the applicant was entitled to an extension of time for the period 21 April 2011 to 26 July 2011.
- 148) I do not accept the respondent's Reasons 2 because, under the Contract, the applicant's rate of progress has nothing to do with whether or not it is entitled to an extension of time arising from a respondent caused delay. The applicant was entitled to an extension of time in these circumstances for the reasons stated above.
- 149) I do not accept the respondent's Reason for that the applicant was not entitled to an extension of time because it was not delayed in achieving Practical Completion due to the respondent caused delay. If that was the case, then the applicant would not be entitled to claim delay costs that it suffered from the respondent caused delay. Clearly that proposition does not make sense in light of the applicant's entitlement to delay costs under clause 34.5 of the Contract. Accordingly, I reject Reason 4.
- 150) I do not accept the Respondent's Reason 3 because the superintendent should have ordered a suspension. For the reasons stated above, it is of no consequence that the superintendent did not order a suspension for the

purposes of determining the applicant's entitlement. The relevant question is should the superintendent ordered a suspension. I have determined above that the superintendent should have ordered the suspension and will determine the applicant's entitlement under its payment claim accordingly.

- 151) I do not accept the Respondent's Reason 6 because the superintendent should have granted an extension of time. For the reasons stated above, it is of no consequence that the superintendent did not grant an extension of time for the purposes of determining the applicant's entitlement. The relevant question is should the superintendent granted an extension of time. I have determined above that the superintendent should have granted an extension of time and will determine the applicant's entitlement under its payment claim accordingly.
- 152) In relation to the Respondent's Reason 1 and Reason 5, the applicant was not entitled to claim an extension of time under clause 35.4 and was barred from doing so by the operation of clause 48.
- 153) That, however, does not mean that the applicant was not entitled to an extension of time or to payment for the delay costs arising from the superintendent's and respondent's breaches. For the reasons stated above, the superintendent should have granted an extension of time under clause 34.5 and he should have determined and certified the delay costs arising from that extension of time.
- 154) In a letter dated 24 October 2013, the superintendent determined the Date for Practical Completion was 24 November 2011.
- 155) On the basis of my determination above, **the Date for Practical Completion should have been adjusted to 29 February 2012.**
- 156) Similarly, the respondent was entitled to apply liquidated damages from the adjusted Date for Practical Completion that take account of the delay for which it is liable to the actual Date of Practical Completion.
- 157) The applicant is further entitled to be paid the costs it incurred arising from the delay to the Stage 1 Works during the period 21 April 2011 to 26 July 2011.
- 158) I will consider the respondent's Reasons 7, 8 and 9 below and determine the costs for which the applicant is entitled due to the respondent's failure to grant access to the applicant to the [site] during the period 21 April 2011 to 26 July 2011 and the liquidated damages for which the respondent is entitled due to the applicant's failure to complete by the date for completion.

Item 31 - Claim for variation 2 – Suspension of the Works by Superintendent: [omitted] Stage 1 Works

- 159) On 3 March 2014, the applicant sent to the respondent its payment claim. The amount claimed was set out in a spreadsheet that described the work performed on the basis of the schedule of rates that forms a part of the Contract and it included other items referred to as '*variations/further costs*'. In support of its payment claim, the applicant attached notices that the applicant had previously sent to the superintendent.
- 160) Relevant to Item 31 Cost claim 2, which was set out in the payment claim, were the following notices that had been previously sent to the respondent:
- a) On 27 February 2014, the applicant sent a notice to the respondent entitled; '*Notice 2 Suspension Costs: Suspension of Works by Superintendent: [omitted] Stage 1 Works*' (Notice 2).
 - i) Notice 2 claimed extra costs arising from the respondent's delay in the amount of \$5,793,498.70 incl. GST in the payment claim.
 - ii) Notice 2 indicated a delay period of 302 days that the applicant claims to have suffered during the period 27 July 2011 to 23 May 2012 because the respondent suspended the Stage 1 Works due to its inability to give the applicant access to the [site].
 - b) Notice 2 was based on and referred to the applicant's the claim for extension of time entitled; '*Notice of Claim for an extension of time for Practical Completion of the Works (in accordance with clause 35.4)*', which was dated 20 February 2014 (EOT Claim).
 - i) The EOT Claim referred to 12 previous notices of delay that were sent to the respondent during the period 22 December 2010 to 19 February 2014, provided a program showing the effects of those delays and claimed an extension of time to 6 February 2014.
- 161) The respondent determined that the applicant is entitled to \$NIL for Item 31 Cost claim 2, which it certified accordingly in its payment certificate entitled; '*Superintendent's assessment of Progress Claim 37 dated 3 March 2014 & Notice of Dispute*' dated 17 March 2014 in response to the payment claim (Payment Certificate).

The respondent's reasons for withholding payment

- 162) In the Payment Certificate, the superintendent provided its reasons for withholding payment as follows:
- a) The Payment Certificate referred to a letter entitled; '*Response to the Contractor's Notice of Claim for Extension of Time to the Date for Practical Completion dated 20 February 2014*' dated 17 March 2014

(Letter 3) that was attached to the Payment Certificate.

b) In Letter 3, the superintendent states that the extension of time claimed by the applicant on 20 February 2014, had been previously claimed by the applicant on 30 September 2012 and 10 May 2013, which the superintendent rejected in a letter that he provided to the applicant dated 24 October 2014.

c) At paragraph 3.5 of Letter 3, the superintendent states;

'The Superintendent's previous reasons for rejecting the Contractor's claims are as follows:

(a) any EOT claim by the Contractor was required, by sub-clause 35.4 of the General Conditions of Contract (GCC), to be notified to the Superintendent no later than 20 June 2011 and the Superintendent has previously determined that the Contractor's claim was out of time pursuant to sub-clause 35.4 (Reason 1); and

(b) the Contractor's slow progress in performing the Works were such that any delay in providing access to the [omitted] site had no delaying effect on the progress of the Contract Works (Reason 2).'

d) In Letter 3, the respondent relied on the time bar set out in clause 35.4 and the assertion that the respondent's instruction related to delaying only the on-site work.

e) At paragraph 3.9 of Letter 3, the respondent asserted;

'The Contractor was not precluded from progressing non-site based works for Stage 1.'

f) At paragraph 3.11 of Letter 3, the respondent further asserts that;

'...despite access to the [omitted] work site being delayed, at no time was the Contractor in a position to complete the Contract Works by the Date for Practical Completion because of its own acts, omissions, delays and failings in the performance of the Works. In fact, the Stage 2A Contract Works which the Contractor continued to work on during the period in respect of which an EOT is claimed, remain incomplete as at today's date.'

g) The Payment Certificate referred to a further letter dated 17 March 2014 (Letter 7) entitled; 'Response to Notice Suspension Costs No. 2 dated 27 February 2014' that was attached to the Payment Certificate.

a) Letter 6 provided additional reasons for withholding money as follows.

'The superintendent rejects the whole of the claim the subject of the Contractors Notice of Delay/Suspension Costs No. 1 dated 27 February 2014 (Claim). The reasons for rejection of the Claim are set out below.

First, the Contractor has not complied with the requirements of clause 48 of the General Conditions of Contract...(Reason 3)

Second, to the extent that the Contractor relies on clause 35.4...the Contractor has no entitlement because no extension of time has been granted in respect of the matters the subject of the Contractor's claim and the Contractor is not entitled to an extension of time in the amount claimed or at all...(Reason 4)

Third, to the extent that the Contractor relies on clause 34.5...

- (a) there is no automatic entitlement to costs under clause 34.5... (Reason 5)*
- (b) the Contractor's entitlement arises where the suspension is due to an act, default or omission of the Principal;*
- (c) In circumstances referred to (b) above, the Contractor's entitlement is to a payment of the amount of any extra cost of completing the Works incurred by him that is attributable to such an act, default or omission (Reason 6)*

Fourth, while accepting the suspension of the works was due to an omission of the Principal, the Superintendent finds that the costs claimed by the Contractor:

- (a) are not extra costs of completing the Works...attributable to the alleged delay in access (Reason 7); and*
- (b) are not costs to the Contractor at all (Reason 8).*

Fifth,... the Superintendent rejects the quantum assessment [and sets out further reasons]' (Reason 9)

163) I will deal with Reasons 7 to 9 below when I determine the quantum (if any) to which the applicant is entitled.

164) The respondent, however, did not reject the applicant's assertion that it failed to provide access to the [site] to the applicant during the claimed period of delay.

Background The applicant's right to claim an extension of time

165) On 27 July 2011, the Superintendent issued a notice of suspension pursuant to clause 34.2(a) of the General Conditions that stated;

'In accordance with clause 34.2(a) of the General Conditions of Contract, work on site for Stage 1 is suspended due to an omission of the Principal.

The suspension of the work for Stage 1 [site description omitted] is required until a lease agreement is negotiated between [the respondent] and the land owners. This suspension will apply until further advised by the Superintendent.'

- 166) There is no dispute that the respondent suspended the Stage 2 Works to the [project site] on 27 July 2014.

The applicant's right to claim an extension of time

- 167) The applicant has not provided me any evidence that it made a claim or submitted a notice of intention to claim for extension of time pursuant to clause 34.5 of the General Conditions for a delay from 27 July 2011 to 23 May 2012 arising from the Principal's failure to provide access to the [particular location] (which was a part of the site) to enable it to carry out the Stage I Works. It appears that the applicant first made a claim for extension for time for the delay on 30 September 2012.
- 168) I refer to my analysis of the applicant's rights to claim an extension of time at above paragraphs 98) to 104). By the operation of clauses 34.5 and 48 of the General Conditions, the applicant is not entitled to claim an extension of time for the period 27 July 2011 to 23 May 2012 set out in its notice dated 20 February 2014.

The respondent's obligation to grant an extension of time

- 169) The conclusion set out in above paragraph 168), however, does not mean that the superintendent had no obligations to extend the date for Practical Completion if the respondent was liable for a delay and that the applicant was not entitled to payment of its costs incurred due to such delay.
- 170) I refer to the analysis of the respondent's obligation to grant an extension of time at above paragraphs 105) to 114) as it is relevant to this point.
- 171) In the circumstances that the superintendent suspended the Stage 1 Works and given that the applicant failed to claim an extension of time pursuant to clause 35.4, the superintendent should have assessed the delay arising from the suspension and within a reasonable period exercised its power under and granted an extension of time under clause 35.4 of the General Conditions.
- 172) Notwithstanding the superintendent's obligations in the circumstances to grant an appropriate extension of time where he relied on the time bar in clause 35.4, the superintendent considered the applicant's EOT claim of 20 February 2014 and rejected the EOT claim at paragraph 3.5(b) of Letter 3 on the basis that;

'...the Contractor's slow progress in performing the Works were such that any delay in providing access to the [omitted] site had no delaying effect on the progress of the Contract Works.'

- 173) Clause 35.4 of the General Conditions required the superintendent to assess the suspension of the Stage 1 Works in the following manner:

'If the Superintendent determines that the cause of the delay is such as to justify an extension of time for Practical Completion of the Works, the Superintendent shall grant the Contractor such extension of time for Practical Completion of the Works as the Superintendent thinks fit and shall, as soon as practicable after he has granted that extension of time, notify the Contractor thereof.'

- 174) The respondent has provided no explanation, analysis or evidence as to how the superintendent determined that the suspension of the Stage 1 Works had no delaying effect on the Progress of the Contract Works.
- 175) The superintendent was required to carry out some analysis of the delay caused by the Suspension of the Stage 1 Works to determine whether the applicant was due to an extension of time.
- 176) I do not accept, therefore, that the respondent was entitled to reject the applicant's claim arising from the suspension of the Stage 1 Works merely on the basis of the *'Contractor's slow progress in performing the Works'*.
- 177) The respondent delayed the Stage 1 Works from 27 July 2011 to 23 May 2011. In the context that the Date for Practical Completion had been extended to 17 November 2011 due to the suspension requested by the applicant and ordered by the superintendent, it is untenable to argue that the respondent's further order given on 27 July 2011 to suspend the Stage 1 Works to 23 May 2012 had no effect on delaying the Date for Practical Completion.

Determination

- 178) I determined above that the respondent had caused delays to the Stage 1 Works during the period 21 April 2011 to 26 July 2011 and determined that the Date for Practical Completion should have been adjusted to 29 February 2012.
- 179) I do not accept the respondent's Reason 2 because, under the Contract, the applicant's rate of progress has nothing to do with whether or not it is entitled to an extension of time arising from a respondent caused delay. The applicant was entitled to an extension of time in these circumstances for the reasons stated above.
- 180) I do not accept the respondent's Reason 4 for that the applicant was not entitled to an extension of time because it was not delayed in achieving Practical Completion due to the respondent caused delay. If that was the case, then the applicant would not be entitled to claim delay costs that it suffered from the

respondent caused delay. Clearly that proposition does not make sense in light of the applicant's entitlement to delay costs under clause 34.5 of the Contract. Accordingly, I reject Reason 4.

- 181) I do not accept the Respondent's Reason 6 because the superintendent should have granted an extension of time. For the reasons stated above, it is of no consequence that the superintendent did not grant an extension of time for the purposes of determining the applicant's entitlement. The relevant question is should the superintendent granted an extension of time. I have determined above that the superintendent should have granted an extension of time and will determine the applicant's entitlement under its payment claim accordingly.
- 182) In relation to the Respondent's Reason 1 and Reason 3, the applicant was not entitled to claim an extension of time under clause 35.4 and was barred from doing so by the operation of clause 48.
- 183) That, however, does not mean that the applicant was not entitled to an extension of time or to payment for the delay costs arising from the superintendent's and respondent's breaches. For the reasons stated above, the superintendent should have granted an extension of time under clause 34.5 and he should have determined and certified the delay costs arising from that extension of time.
- 184) I do not accept the respondent's Reason 5 for the reasons that I determined above that the applicant did accrue a right to payment under clause 34.5 for the effects of the suspension ordered under clause 34.2(a).
- 185) The applicant is entitled to be paid the costs it incurred arising from the delay to the Stage 1 Works during the period 27 July 2011 to 23 May 2012.
- 186) I will consider the respondent's Reasons 7, 8 and 9 below and determine the costs for which the applicant is entitled due to the respondent's failure to grant access to the applicant to the [site] during the period 27 July 2011 to 23 May 2012 and the liquidated damages for which the respondent is entitled due to the applicant's failure to complete by the date for completion.
- 187) In the Program that the applicant gave to the respondent on or about 19 April 2011, the applicant indicated that it had intended to commence the Stage 1 Works on 2011 on 12 May 2011.
- 188) As a minimum, if the applicant had planned to commence the Stage 1 Works on 12 May 2011 and it indicated that it would take 62 days to complete that work, which it indicated in the Program, and the suspension was up to 23 May 2012 days, then the earliest that the applicant could finish the work was 377 days plus 62 days after 12 May 2011. For the avoidance of doubt, the period of time from 12 May 2011 to 23 May 2012 is 377 days.
- 189) Based on the Program, the applicant indicated it would complete the Stage 1 Works on 13 August 2011. The Date for Practical Completion (adjusted for the

agreed period of suspension up to 21 April 2011) was 17 November 2011. Accordingly, the applicant had a contingency in its Program of 97 days to complete the Stage 1 Works by the Date for Practical Completion (Float).

- 190) There is nothing in clause 34.5, or the Contract generally, that states that the respondent is entitled to consider and take the applicant's Float in determining the Date for Practical Completion. In other words, the adjusted Date for Practical Completion is calculated on the basis of the existing Date for Practical Completion plus the delay for which the respondent is liable.
- 191) The superintendent determined that the Date for Practical Completion was 24 November 2011. **Accordingly, the superintendent should have extended the Date for Practical Completion to 27 December 2012** due to the delay from 27 July 2011 to 23 May 2012, for which the respondent was liable.
- 192) The respondent was entitled to apply liquidated damages from the Date for Practical Completion adjusted to take account of the delay for which it is liable to the actual Date of Practical Completion.
- 193) The applicant is further entitled to be paid the costs it incurred arising from the delay to the Stage 1 Works during the period 27 July 2011 to 23 May 2012.

Item 32 – Cost claim 3 – Design changes to Stage 1 [site] Works

- 194) On 3 March 2014, the applicant sent to the respondent its payment claim. The amount claimed was set out in a spreadsheet that described the work performed on the basis of the schedule of rates that forms a part of the Contract and the applicant included other items referred to as '*variations/further costs*'. The applicant also attached notices that it had previously sent to the superintendent in support of its payment claim.
- 195) Relevant to Item 32 Cost claim 3 set out in the payment claim were the following notices previously sent to the respondent:
 - a) On 27 February 2014, the applicant sent a notice to the respondent entitled; '*Notice 3 Delay Costs: Design changes to Stage 1 [site] Works*'.
 - i) The notice indicated a delay period of 29 days that the applicant claims to have suffered during the period 24 May 2012 to 21 June 2012 because the respondent directed major re-design of Stage 1 Works, effectively delaying remobilisation of the Stage 1 Pond Works and extending the period of suspension, until the completion of the redesign and detailed drawings becoming available to the Contractor.
 - ii) The notice claimed extra costs arising from the respondent's delay in the amount of \$556,329.40.00 incl. GST in the payment claim.

- b) The above notice dated 27 February 2014 was based on the applicant's the claim for extension of time entitled; 'Notice of Claim for an extension of time for Practical Completion of the Works (in accordance with clause 35.4)', which was sent to the respondent and dated 20 February 2014 **(EOT Claim)**.
- i) The EOT claim referred to 12 previous notices of delay that were sent to the respondent during the period 22 December 2010 to 19 February 2014, provided a program showing the effects of those delays and claimed an extension of time to 6 February 2014 accordingly.

196) The respondent determined that the applicant is entitled to \$NIL for Item 32 Cost claim 3, which it certified accordingly in its payment certificate entitled; 'Superintendent's assessment of Progress Claim 37 dated 3 March 2014 & Notice of Dispute' dated 17 March 2014 in response to the payment claim (Payment Certificate).

The respondent's reasons for withholding payment

197) In the Payment Certificate, the superintendent provided its reasons for withholding payment. The Payment Certificate referred to a letter entitled; 'Response to the Contractor's Notice of Claim for Extension of Time to the Date for Practical Completion dated 20 February 2014' dated 17 March 2014 (Letter 3) that was attached to the Payment Certificate.

198) At paragraph 4.5 of Letter 3, the superintendent states;

'The Superintendent's previous reasons for rejecting the Contractor's claims are as follows:

*(a) the Superintendent did not accept that the design changes to the [site] (Stage 1) Works resulted in any delay to the Completion of the Works and notes that the Contractor had sufficient works to carry out in undertaking the ground works and construction of the concrete panels for Pond 1 which was not affected by the design changes **(Reason 1)**; and*

*(b) any delay, and to the extent of the delay, occasioned by this event arose no later than 21 June 2012 when the Contractor was fully apprised of the design changes and, as such, any claim for extension of time based on this event is out of time pursuant to sub-clause 35.4. **(Reason 2)**' [Emphasis added]*

199) In Letter 3, the respondent relied on the time bar set out in clause 35.4 and the assertion that the respondent's instruction did not cause any delay to the works achieving completion by the Date for Practical Completion.

200) At paragraph 4.8 of Letter 3, the respondent asserted;

'...the Contractor's own acts, omissions and delays and failings in the performance of the Works has [sic] been the cause of the Contractor failure to progress the Works in a timely manner and to achieve practical completion.' **(Reason 3)**

- 201) The Payment Certificate referred to a further letter dated 17 March 2014 (Letter 8) entitled; 'Response to Notice of Delay/Suspension Costs No. 3 dated 27 February 2014' that was attached to the Payment Certificate.
- 202) Letter 6 provided additional reasons for withholding money as follows.

'The superintendent rejects the whole of the claim the subject of the Contractors Notice of Delay/Suspension Costs No. 3 dated 27 February 2014 (Claim). The reasons for rejection of the Claim are set out below.

First, the Contractor has not complied with the requirements of clause 48 of the General Conditions of Contract...(Reason 4)

Second, to the extent that the Contractor relies on clause 35.4...the Contractor has no entitlement because no extension of time has been granted in respect of the subject of the Contractor's claim and the Contractor is not entitled to an extension of time in the amount claimed or at all...(Reason 5)

Third, in respect of the individual heads of quantum claimed, the Superintendent rejects the quantum assessment [and sets out further reasons]'. (Reason 6)

Background

- 203) On 27 July 2011, the Superintendent issued a notice of suspension pursuant to clause 34.2(a) of the General Conditions that stated;

'In accordance with clause 34.2(a) of the General Conditions of Contract, work on site for Stage 1 is suspended due to an omission of the Principal.

The suspension of the work for Stage 1 [site/works description omitted] is required until a lease agreement is negotiated between [the respondent] and the land owners. This suspension will apply until further advised by the Superintendent.'

- 204) On 23 May 2012, the superintendent's representative sent an email to the applicant that stated:

'Good news, we have the OK to access the [site] at last. As discussed earlier we will be changing the scope as below:

[6 design changes were identified]

I will issue some revised drawings and raise the appropriate variation by the end of the week.

In the meantime it would be possible to commence on the manufacture of the concrete panels for the primary pond and commence on the associated earthworks.'

The applicant's right to claim an extension of time

- 205) The applicant has not provided me any evidence that it made a claim or submitted a notice of intention to claim for extension of time pursuant to clause 34.5 of the General Conditions for a delay from 27 July 2011 to 23 May 2012 arising from the Principal's failure to provide access to the [particular location] (which was a part of the Site) to enable it to carry out the Stage I Works. It appears that the applicant first made a claim for extension for time for the delay on 30 September 2012.
- 206) I refer to my analysis of the applicant's rights to claim an extension of time at above paragraphs 98) to 104). By the operation of clauses 34.5 and 48 of the General Conditions, the applicant is not entitled to claim an extension of time for the period 23 May 2012 to 21 June 2012 set out in its notice dated 20 February 2014.

The respondent's obligation to grant an extension of time

- 207) The conclusion set out in above paragraph 206), however, does not mean that the superintendent had no obligations to extend the date for Practical Completion if the respondent was liable for a delay nor does it mean that the applicant was not entitled to payment of its costs incurred due to such delay.
- 208) I refer to the analysis of the respondent's obligation to grant an extension of time at above paragraphs 105) to 114) as it is relevant to this point.
- 209) In the circumstances that the superintendent changed some part of the design of Stage 1 Works and given that the applicant failed to claim an extension of time pursuant to clause 35.4, the superintendent should have assessed the delay arising from the suspension and within a reasonable period exercised its power under and granted an appropriate extension of time under clause 35.4 of the General Conditions.

Principal was required to provide reasons for rejecting any part of the payment claim

- 210) Notwithstanding the superintendent's obligations in the circumstances to grant an appropriate extension of time where he relied on the time bar in clause 35.4, the superintendent claims to have considered the applicant's EOT claim of 20 February 2014 and rejected the EOT claim at paragraph 3.5(b) of Letter 3 on the basis that;

'...the Superintendent did not accept that the design changes to the

[omitted] (Stage 1) Works resulted in any delay to the Completion of the Works and notes that the Contractor had sufficient works to carry out in undertaking the ground works and construction of the concrete panels for Pond 1 which was not affected by the design changes'

211) Clause 2.13 of the Amendments to the General Conditions states:

'...Principal shall issue a progress certificate and make payments within thirty (30) days of receipt of claims that are correct and in order for payment.'

212) I note the following issues with that clause.

- a) The clause requires the Principal to issue a progress certificate.
- b) There is no express obligation on the respondent to provide reasons for withholding payment in relation to any part of the payment claim that it disputes.

213) In relation to the first issue raised above, in the Payment Certificate, the superintendent states:

'This letter and its enclosures also constitute the Principal's notice of dispute in respect of the Contractors Progress Payment Claim 37 which Superintendent has been specifically authorised to issue on its behalf.'

214) I accept that the respondent authorised the superintendent to issue the Payment Certificate under clause 2.13 of the Amendments to the General Conditions for the following reasons:

- a) The superintendent is also a senior executive of the respondent. I have no reason to believe that the superintendent did obtain the requisite power of attorney from the respondent prior to issuing the Payment Certificates on its behalf.
- b) The Contract clearly articulates the powers of the superintendent and I conclude from the Contract that the superintendent was the agent of the respondent for the purposes of the Contract and, therefore, it is unsurprising that the respondent would authorise the superintendent to issue progress certificates and this Payment Certificate on its behalf.
- c) The applicant has not challenged the superintendent's authority to issue the Payment Certificate on behalf of the respondent.

215) Section 20 of the CCA states:

The provisions in the Schedule, Division 5 about the following matters are implied in a construction contract that does not have a written provision about the matter:

- (a) *when and how a party must respond to a payment claim made by another party;*
- (b) *by when a payment must be made.*

216) Division 5 of the Schedule to the CCA states:

Responding to payment claim by notice of dispute or payment

- (1) *This clause applies if:*
 - (a) *a party receives a payment claim under this contract;*
and
 - (b) *the party:*
 - (i) *believes the claim should be rejected because the claim has not been made in accordance with this contract; or*
 - (ii) *disputes the whole or part of the claim.*
- (2) *The party must:*
 - (a) *within 14 days after receiving the payment claim:*
 - (i) *give the claimant a notice of dispute; and*
 - (ii) *if the party disputes part of the claim – pay the amount of the claim that is not disputed; or*
 - (b) *within 28 days after receiving the payment claim, pay the whole of the amount of the claim.*
- (3) *The notice of dispute must:*
 - (a) *be in writing; and*
 - (b) *be addressed to the claimant; and*
 - (c) *state the name of the party giving the notice; and*
 - (d) *state the date of the notice; and*
 - (e) *identify the claim to which the notice relates; and*
 - (f) *if the claim is being rejected under subclause (1)(b)(i) – state the reasons for believing the claim has not been made in accordance with this contract; and*
 - (g) *if the claim is being disputed under subclause (1)(b)(ii)*

– identify each item of the claim that is disputed and state, for each of the items, the reasons for disputing it; and

(h) be signed by the party giving the notice.

(4) If under this contract the principal is entitled to retain part of an amount payable by the principal to the contractor:

(a) subclause (2)(b) does not affect the entitlement; and

(b) the principal must advise the contractor in writing (either in a notice of dispute or separately) of an amount retained under the entitlement.

217) As the Contract does not require the superintendent to provide reasons for withholding any part of the payment claim, pursuant to section 20 of the CCA, it is an implied term of the Contract that the superintendent is required to provide reasons for rejecting any part of the payment claim.

Was Reason 1 a valid reason for rejecting Item 32 of the payment claim and withholding payment?

218) Clause 35.4 of the General Conditions required the superintendent to assess the suspension of the Stage 1 Works in the following manner:

'If the Superintendent determines that the cause of the delay is such as to justify an extension of time for Practical Completion of the Works, the Superintendent shall grant the Contractor such extension of time for Practical Completion of the Works as the Superintendent thinks fit and shall, as soon as practicable after he has granted that extension of time, notify the Contractor thereof.'

219) The process of determination required more of the superintendent than making a decision without some reasonable assessment of the effects of the delay on the Date for Practical Completion. This should have been done by consideration of the applicant's Program, which the respondent referred to in relation to the EOT Claim in its Letter 3 at paragraphs 1.4(c), 1.4(d) and 2.10.

220) As set out above at paragraphs 105) to 114), the superintendent had an obligation to act fairly particularly if the acts, omissions or default of the respondent are such that the applicant could become liable for liquidated damages due to such acts. In such circumstances, the superintendent must fairly determine the effects of any delay for which the respondent is liable and grant the applicant an extension of time if that delay affects the Date for Practical Completion.

221) The superintendent should have made a determination of the delaying effect of such design changes on the Date for Practical Completion and granted an

extension of time, if required.

- 222) In light of the superintendent's overarching duty to act fairly, such determination must involve consideration of when the applicant was entitled to carry out the work affected by the design changes, whether there was other work that the applicant could carry out instead of the work affected by the delay and whether the delay caused by the design change affected that work and the Date for Practical Completion.
- 223) It was open to the superintendent to suspend the work affected by the design change and to instruct the applicant to re-sequence the work if the delay affected the programmed work. If there was other work that had been planned to be carried out after the affected works, then it may have been possible to swap those two activities so that the affected works would be carried out later in time. I was not, however, given any evidence of any such consideration.
- 224) If the delay was such that it did not affect the applicant's programmed work, then the superintendent will have fairly determined whether to applicant was entitled to any extension of time and be entitled to reject the applicant's claim. It is, however, untenable to argue that the design changes instructed after the Date for Completion (as it was at that time) did not affect the Date for Completion.
- 225) I refer to the respondent's Reason 1 for rejecting Item 32 of the payment claim set out above at paragraph 198). The fact that the applicant had other work to carry on with per se at the time the respondent made design changes to the Stage 1 Works does not mean that the design changes did not cause a delay to the progress of the works or delay the Date for Practical Completion.
- 226) The superintendent should have considered when the applicant could commence the part of the Stage 1 Works that were subject to design changes, considered the time to carry out such design changes and then determined the effect of the design changes on the Date for Practical Completion. If that work (properly executed) finished after the Date for Practical Completion, then there inevitably occurred a delay to the works and a delay to the Date for Practical Completion, for which the respondent was liable and for which the superintendent should have granted an extension of time. The superintendent has provided no evidence of such consideration, which would constitute an appropriate reason for rejecting the EOT claim and any claim for costs that followed the EOT claim.
- 227) The respondent relied in part on Reason 1 for rejecting the applicant's payment claim relating to Item 32 Claim for Variation 3. As that was not a reason for the purposes of the Contract and the CCA, I will not consider Reason 1 any further.

Was reason 2 a valid reason for rejecting Item 32 of the payment claim and withholding payment?

- 228) The respondent has relied on the time bar set out in clause 35.4.
- 229) The respondent has provided no explanation, analysis or evidence as to how the superintendent determined that the suspension of the Stage 1 Works had no delaying effect on the Progress of the Contract Works.
- 230) The superintendent was required to carry out some analysis of the delay caused by the Suspension of the Stage 1 Works to determine whether the applicant was entitled to an extension of time.
- 231) I have determined this reason for withholding payment above and that determination similarly applies to this claim. The superintendent had an obligation to consider the EOT Claim and grant an extension of time if appropriate, in the circumstances that the respondent caused a delay by instructing that parts of the Stage 1 Works be delayed until revised delays were provided.
- 232) The respondent admits that the revised designs were provided on 21 June 2012.
- 233) I do not accept, therefore, that the respondent was entitled to reject the applicant's claim arising from the suspension of the Stage 1 Works merely on the assertion of the *'Contractor's slow progress in performing the Works'*.

Was reason 3 a valid reason for rejecting Item 32 of the payment claim and withholding payment?

- 234) The respondent asserts that *'...the Contractor's own acts, omissions and delays and failings in the performance of the Works has been the cause of the Contractor failure to progress the Works in a timely manner and to achieve practical completion'* was a reason for rejecting this claim.
- 235) I have considered the same reason relied upon by the respondent for rejecting the applicants above claims. I have determined that was not a reason because the superintendent was required to consider the effects of the delay for which the respondent was liable and its effect on the Date for Practical Completion.
- 236) Accordingly, I do not accept the respondent's Reason 3 for rejecting this claim.

Was reason 4 a valid reason for rejecting Item 32 of the payment claim and withholding payment?

- 237) I have considered the respondent's Reason 4 for withholding payment and have made a determination on that point above at paragraph 104).

Was reason 5 a valid reason for rejecting Item 32 of the payment claim and withholding payment?

- 238) I have considered the respondent's Reason 5 for withholding payment and have made a determination on that point above.

Was reason 6 a valid reason for rejecting Item 32 of the payment claim and withholding payment?

239) I will consider the respondent's Reason 6 relating to quantum below.

Determination of extension of time to which the applicant was entitled

- 240) The respondent delayed the Stage 1 Works from 23 May 2011 to 21 June. In the context that the Date for Practical Completion had been extended to 17 November 2011 due to the suspension requested by the applicant and ordered by the superintendent, it is untenable to argue that the respondent's further instruction given on 23 May 2012 to delay the Stage 1 Works to 21 June 2012 had no effect on delaying the Date for Practical Completion. That delay alone has made it impossible for the applicant to commence the Stage 1 Works until after the Date for Practical Completion that was certified by the superintendent. The further design changes caused further delays that prevented certain parts of the works. Accordingly, I reject the respondent's Reason 1.
- 241) I determined above that the respondent had caused delays to the Stage 1 Works during the period 21 April 2011 to 26 July 2011.
- 242) In the Program that the applicant gave to the respondent on or about 19 April 2011, the applicant indicated that it had intended to commence the Stage 1 Works on 2011 on 12 May 2011.
- 243) As a minimum, if the applicant had planned to commence the Stage 1 Works on 12 May 2011 and it indicated that it would take 62 days to complete that work, which it indicated in the Program, and the suspension was up to 23 May 2012 days, then the earliest that the applicant could finish the work was 377 days plus 62 days after 12 May 2011. For the avoidance of doubt, the period of time from 12 May 2011 to 23 May 2012 is 377 days.
- 244) Neither the applicant nor the respondent has argued that the amended design relating to the Stage 1 Works required more or less time to carry out. Accordingly, I will presume that any change did not require more time.
- 245) In the context that the respondent's change of design could not be carried out for a further 29 days from the date that the suspension ceased, the **superintendent should have extended the Date for Practical Completion to 25 January 2013.**
- 246) I will determine below the extension of time and the costs for which the applicant is entitled due to the respondent's suspension of the Stage 1 Works during the period 24 May 2012 to 21 June 2012.

Item 33 – Cost claim 4 – Consequential delay of remobilising to site following end of suspension

- 247) On 3 March 2014, the applicant sent to the respondent its payment claim. The amount claimed was set out in a spreadsheet that described the work performed on the basis of the schedule of rates that forms a part of the Contract and the applicant included other items referred to as *'variations/further costs'*. The applicant also attached notices that it had previously sent to the superintendent in support of its payment claim.
- 248) Relevant to Item 33 Cost claim 4 set out in the payment claim were the following notices previously sent to the respondent:
- a) On 27 February 2014, the applicant sent a notice to the respondent entitled; *'Notice of Delay/Suspension Costs No. 4: Consequential delay of remobilising to site following end of Suspension'*.
- i) The notice indicated a delay period of 70 days that the applicant claims to have suffered during the period 22 June 2012 to 30 August 2012 because the respondent's direction to suspend the Works during the period 21 July 2013 to 23 May 2012 caused a further delay during the period 22 June 2012 to 30 August 2012.
- ii) The notice claimed extra costs arising from the respondent's delay in the amount of \$1,342,863.50 incl. GST in the payment claim.
- b) The above notice dated 27 February 2014 was based on the applicant's the claim for extension of time entitled; 'Notice of Claim for an extension of time for Practical Completion of the Works (in accordance with clause 35.4)', which was sent to the respondent and dated 20 February 2014 (EOT Claim).
- i) The EOT claim referred to 12 previous notices of delay that were sent to the respondent during the period 22 December 2010 to 19 February 2014, provided a program showing the effects of those delays and claimed an extension of time to 6 February 2014 accordingly.
- 249) The respondent determined that the applicant is entitled to \$NIL for Item 33 Cost claim 4, which it certified accordingly in its payment certificate entitled; 'Superintendent's assessment of Progress Claim 37 dated 3 March 2014 & Notice of Dispute' dated 17 March 2014 in response to the payment claim (Payment Certificate).

The respondent's reasons for withholding payment

- 250) In the Payment Certificate, the superintendent provided its reasons for withholding payment. The Payment Certificate referred to a letter entitled; 'Response to the Contractor's Notice of Claim for Extension of Time to the Date

for Practical Completion dated 20 February 2014' dated 17 March 2014 (Letter 3) that was attached to the Payment Certificate.

a) At paragraph 5.5 of Letter 3, the superintendent states;

'The Superintendent's previous reasons for rejecting the Contractor's claims, which are also relied upon in this assessment, are as follows:

(a) *any delay by the Contractor relating to the delay access was required, by clause 35.4 to be notified to the Superintendent no later than 20 June 2012 and the Superintendent found the Contractor's claim was out of time pursuant to sub-clause 35.4 (Reason 1)' [Emphasis added]*

(b) *the Contractor's slow progress were such that any delay by the Principal in providing access to the [site] had no delaying effect on the progress of the Contract Works (Reason 2);*

(c) *the design changes to the [particular site works] (Stage 1) did not result in any delay to the Works achieving Practical Completion by the Date for Practical Completion or at all and notes that the Contractor had sufficient works to carry out in undertaking the ground works and construction of the concrete panels for Pond 1, which was not affected by the design changes (Reason 3); and*

(d) *any delay, and to the extent of the delay, occasioned by this event arose no later than 21 June 2012 when the Contractor was fully apprised of the design changes and, as such, any claim for extension of time based on this event is out of time pursuant to sub-clause 35.4.*

b) In Letter 3, the respondent relied on the time bar set out in clause 35.4 and the assertion that the respondent's instruction did not cause any delay to the works achieving completion by the Date for Practical Completion.

c) At paragraph 5.9 of Letter 3, the respondent asserted;

'...the Contractor's own acts, omissions and delays and failings in the performance of the Works has [sic] been the cause of the Contractor failure to progress the Works in a timely manner and to achieve practical completion.' (Reason 4)

d) The Payment Certificate referred to a further letter dated 17 March 2014 (Letter 9) entitled; '*Response to Notice of Delay/Suspension Costs No. 4 dated 27 February 2014*' that was attached to the Payment Certificate.

e) Letter 9 provided additional reasons for withholding money as follows.

'The superintendent rejects the whole of the claim the subject of the Contractors Notice of Delay/Suspension Costs No. 3 dated 27 February 2014 (Claim). The reasons for rejection of the Claim are set out below.

First, the Contractor has not complied with the requirements of clause 48 of the General Conditions of Contract...(Reason 5)

Second, to the extent that the Contractor relies on clause 35.4...the Contractor has no entitlement because no extension of time has been granted in respect of the subject of the Contractor's claim and the Contractor is not entitled to an extension of time in the amount claimed or at all...

Third, to the extent that the Contractor relies on clause 34.5 of the General Conditions of Contract:

- (a) the entitlement (if any) under clause 34.5 is dependant upon a suspension being ordered by the Superintendent. No suspension was ordered or granted in respect of the period the subject of the Contractor's claim, with the result that the Contractor has no basis of claim or entitlement under clause 34.4; and*
- (b) the costs that are claimed by the Contractor:*
 - (i) are not extra costs of completing the Works that have been incurred by the Contractor which are attributable to the alleged delay in access (Reason 6); and*
 - (ii) are not extra Costs to the Contractor at all. (Reason 7)*

Fourth, in respect of the individual heads of quantum claimed, the Superintendent rejects the quantum assessment [and sets out further reasons]'. (Reason 8)

Background

251) On 22 July 2011, the applicant notified the respondent as follows:

'...Further to our site meeting on 13th July 2011 on site at omitted], please advise current status of clearances to the [omitted] site...

As you are aware we had scheduled to commence work in this critical area already and have since incurred delays as a result of the issues preventing access to same.

Our earthworks subcontractor has postponed his mobilisation to site as a result but is now in a position where he must either move to site early next week or deploy his resources elsewhere.

If the former is the course, then his gear must be stood down on site

until such time as clearances are obtained. If the latter is the adopted course, there is to be a minimum of 3 weeks until he is available to mobilise to site once clearances are obtained. [Emphasis added]

- 252) On 27 July 2011, the Superintendent issued a notice of suspension pursuant to clause 34.2(a) of the General Conditions that stated;

'In accordance with clause 34.2(a) of the General Conditions of Contract, work on site for Stage 1 is suspended due to an omission of the Principal.

The suspension of the work for Stage 1 [works description omitted] is required until a lease agreement is negotiated between [the respondent] and the land owners. This suspension will apply until further advised by the Superintendent.'

- 253) On 23 May 2012, the superintendent's representative sent an email to the applicant that stated:

'Good news, we have the OK to access the [site] at last. As discussed earlier we will be changing the scope as below:

[6 design changes were identified]

I will issue some revised drawings and raise the appropriate variation by the end of the week.

In the meantime it would be possible to commence on the manufacture of the concrete panels for the [works] and commence on the associated earthworks.'

- 254) At clause 6.2.2 of the EOT Claim, the applicant stated:

'As the Contractor could not give any reasonable prior notice to the proposed earthworks subcontractor of when the suspension could be reasonably anticipated to be lifted and their subcontractor works could commence on site (that would have enabled a planned mobilisation of an earthworks contractor to (site location)]for the Dry Season of 2012 the Contractor's earthworks subcontractor [name omitted] withdrew from the project.'

The applicant's right to claim an extension of time

- 255) On 23 May 2012, the respondent notified the applicant that the suspension to the Stage 1 Works had been lifted in the following terms:

'Good news, we have the OK to access the [site] at last. As discussed earlier we will be changing the scope as below:

[6 design changes were identified]

I will issue some revised drawings and raise the appropriate variation by the end of the week. [Emphasis added]

- 256) The applicant has not provided me any evidence that it made a claim or submitted a notice of intention to claim for extension of time pursuant to clause 34.5 of the General Conditions for a delay from 22 June 2012 to 30 August 2012 arising from the Principal's failure to provide access to the [particular location] (which was a part of the Site) to enable it to carry out the Stage I Works. It appears that the applicant first made a claim for extension for time for the delay on 30 September 2012.
- 257) I refer to my analysis of the applicant's rights to claim an extension of time at above paragraphs 98) to 104). By the operation of clauses 34.5 and 48 of the General Conditions, the applicant is not entitled to claim an extension of time for the period 22 June 2012 to 30 August 2012 set out in its notice dated 20 February 2014.

The respondent's obligation to grant an extension of time

- 258) The conclusion set out in above paragraph 257), however, does not mean that the superintendent had no obligations to extend the date for Practical Completion if the respondent was liable for a delay nor does it mean that the applicant was not entitled to payment of its costs incurred due to such delay.
- 259) I refer to the analysis of the respondent's obligation to grant an extension of time at above paragraphs 105) to 114) as it is relevant to this point.
- 260) In the circumstances that the superintendent failed to comply with its obligations under clause 34.2(a) of the General Conditions and given that the applicant failed to claim an extension of time pursuant to clause 35.4, the superintendent should have assessed the delay arising from the suspension and within a reasonable period exercised its power under and granted an appropriate extension of time under clause 35.4 of the General Conditions.

Determination of the reasons

- 261) I have dealt with Reason 1 above and my conclusion equally applies to the facts relating to the superintendent's decision in this instance. Accordingly, I reject the respondent's reason for withholding payment pursuant to Reason 1.
- 262) I have dealt with Reason 2 above and my conclusion equally applies to the facts relating to the superintendent's decision in this instance. Accordingly, I reject the respondent's reason for withholding payment pursuant to Reason 2.
- 263) I have dealt with Reason 3 above and my conclusion equally applies to the facts relating to the superintendent's decision in this instance. Accordingly, I reject the respondent's reasons for withholding payment pursuant to Reason 3.
- 264) I have dealt with Reason 4 above and my conclusion equally applies to the facts

relating to the superintendent's decision in this instance.

- 265) I have dealt with Reason 5 above and my conclusion equally applies to the facts relating to the superintendent's decision in this instance.

Determination of extension of time to which the applicant was entitled

- 266) On 13 July 2011, the applicant notified that the indefinite suspension caused its earthworks subcontractor to postpone mobilising to site. The applicant advised the superintendent that it would require about 3 weeks notice to mobilise its subcontractor.
- 267) The applicant claims that due to the extended suspension, the subcontractor was unwilling or unable to return to the site to carry out the earthworks part of the Stage 1 Works.
- 268) The respondent has not made any submission or provided any evidence about whether the delay arising from the change of design to the Stage 1 Works prevented the applicant from continuing with the earthworks for which it had to engage another subcontractor at the time the suspension ceased on 23 May 2012.
- 269) The applicant claims that it could not commence arranging for a new subcontractor until it was given the amended Stage 1 Works design.
- 270) As I have no evidence that assists me to determine at which stage the subcontractor could commence making arrangements for another earthworks subcontractor, I must accept the applicant's claim that that time was when it was provided the amended design for the Stage 1 Works.
- 271) Given the notice provided by the applicant to the superintendent's representative on 13 July 2011, the suspension of the Stage 1 Works from 21 April 2011 to 21 June 2012 and the remoteness of the site, I determine that the applicant's claim is not unreasonable.
- 272) The respondent delayed the Stage 1 Works from 23 May 2011 to 21 June 2011.
- 273) In the context that the Date for Practical Completion had been extended to 17 November 2011 due to the suspension requested by the applicant and ordered by the superintendent and then further extended to 24 November 2011 by the superintendent, it is untenable to argue that the respondent's further instruction given on 23 May 2012 to delay the Stage 1 Works to 21 June 2012, had no effect on delaying the Date for Practical Completion.
- 274) At above paragraph 178), I determined that the respondent had caused delays to the Stage 1 Works during the period 27 July 2011 to 23 May 2012 and determined that adjusted Date for Practical Completion was 27 December 2012.
- 275) In the Program that the applicant gave to the respondent on or about 19 April

2011, the applicant indicated that it had intended to commence the Stage 1 Works on 12 May 2011.

- 276) As a minimum, if the applicant had planned to commence the Stage 1 Works on 12 May 2011 and it indicated that it would take 62 days to complete that work in the Program, and the suspension was up to 23 May 2012 days, then the earliest that the applicant could finish the work was 377 days plus 62 days after 12 May 2011. For the avoidance of doubt, the period of time from 12 May 2011 to 23 May 2012 is 377 days.
- 277) In the context that the respondent's change of design could not be carried out for a further 29 days from the date that the suspension ceased, the **superintendent should have extended the Date for Practical Completion to 5 April 2013.**
- 278) I will determine below the extension of time and the costs for which the applicant is entitled due to the respondent's suspension of the Stage 1 Works during the period 24 May 2012 to 21 June 2012.
- 279) Accordingly, the superintendent should have extended the Date for Practical Completion to 20 September 2012.
- 280) I have considered the respondents Reasons 6, 7 and 8 and I do not accept that the applicant is entitled to the entire costs it claimed relating to Item 33 of the payment claim. I have set out my reasons and determined the costs relating to the extension of time to which the applicant is entitled below.

Item 34 – Cost claim 5 – Consequential delay of remobilising to site following end of suspension

- 281) On 3 March 2014, the applicant sent to the respondent its payment claim. The amount claimed was set out in a spreadsheet that described the work performed on the basis of the schedule of rates that forms a part of the Contract and the applicant included other items referred to as '*variations/further costs*'. The applicant also attached notices that it had previously sent to the superintendent in support of its payment claims.
- 282) Relevant to Item 33 Cost claim 5 set out in the payment claim were the following notices previously sent to the respondent:
- a) On 27 February 2014, the applicant sent a notice to the respondent entitled; '*Notice of Delay/Suspension Costs No. 5: Consequential delay of remobilising to site following end of Suspension*.'
 - i) The notice indicated a delay period of 15 days that the applicant claims to have suffered during the period 1 September 2012 to 15 September 2012 because the respondent's direction to suspend the Works during the period 21 July 2011 to 23 May 2012 caused a further delay during the period 1 September 2012 to 15 September 2012.
 - ii) The notice claimed extra costs arising from the respondent's delay in the amount of \$287,756.70 incl. GST in the payment claim.
 - b) The above notice dated 27 February 2014 was based on the applicant's the claim for extension of time entitled; '*Notice of Claim for an extension of time for Practical Completion of the Works (in accordance with clause 35.4)*', which was sent to the respondent and dated 20 February 2014 (**EOT Claim**).
 - i) The EOT claim referred to 12 previous notices of delay that were sent to the respondent during the period 22 December 2010 to 19 February 2014, provided a program showing the effects of those delays and claimed an extension of time to 6 February 2014 accordingly.
- 283) The respondent determined that the applicant is entitled to \$NIL for Item 34 Cost claim 5, which it certified accordingly in its payment certificate entitled; '*Superintendent's assessment of Progress Claim 37 dated 3 March 2014 & Notice of Dispute*' dated 17 March 2014 in response to the payment claim (Payment Certificate).

The respondent's reasons for withholding payment

- 284) In the Payment Certificate, the superintendent provided its reasons for withholding payment. The Payment Certificate referred to a letter entitled;

'Response to the Contractor's Notice of Claim for Extension of Time to the Date for Practical Completion dated 20 February 2014' dated 17 March 2014 (Letter 3) that was attached to the Payment Certificate.

a) At paragraph 6.5 of Letter 3, the superintendent states;

'The Superintendent's previous reasons for rejecting the Contractor's claims, which are also relied upon in this assessment, are as follows:

(a) any delay by the Contractor relating to the delay access was required, by clause 35.4 to be notified to the Superintendent no later than 20 June 2012 and the Superintendent found the Contractor's claim was out of time pursuant to sub-clause 35.4 (Reason 1)' [Emphasis added]

(b) ...the Contractor's slow progress were such that any delay by the Principal in providing access to the [site] had no delaying effect on the progress of the Contract Works (Reason 2);

(c) the design changes to the [omitted] (Stage 1) [works] did not result in any delay to the Works achieving Practical Completion by the Date for Practical Completion or at all and notes that the Contractor had sufficient works to carry out in undertaking the ground works and construction of the concrete panels for [works description omitted], which was not affected by the design changes; and (Reason 3)

(d) any delay, and to the extent of the delay, occasioned by this event arose no later than 21 June 2012 when the Contractor was fully apprised of the design changes and, as such, any claim for extension of time based on this event is out of time pursuant to sub-clause 35.4. (Reason 1)

b) In Letter 3, the respondent relied on the time bar set out in clause 35.4 and the assertion that the respondent's instruction did not cause any delay to the works achieving completion by the Date for Practical.

c) At paragraph 6.8 of Letter 3, the respondent asserted;

'...the Contractor's own acts, omissions and delays and failings in the performance of the Works has been the cause of the Contractor failure to progress the Works in a timely manner and to achieve practical completion.' (Reason 4)

d) The Payment Certificate referred to a further letter dated 17 March 2014 (Letter 10) entitled; *'Response to Notice of Delay/Suspension Costs No. 5 dated 27 February 2014'* that was attached to the Payment Certificate.

e) Letter 10 provided additional reasons for withholding money as follows.

'The superintendent rejects the whole of the claim the subject of the

Contractors Notice of Delay/Suspension Costs No. 3 dated 27 February 2014 (Claim). The reasons for rejection of the Claim are set out below.

First, the Contractor has not complied with the requirements of clause 48 of the General Conditions of Contract... (Reason 5)

Second, to the extent that the Contractor relies on clause 35.4...the Contractor has no entitlement because no extension of time has been granted in respect of the subject of the Contractor's claim and the Contractor is not entitled to an extension of time in the amount claimed or at all...

Third, to the extent that the Contractor relies on clause 34.5 of the General Conditions of Contract:

(a) the entitlement (if any) under clause 34.5 is dependant upon a suspension being ordered by the Superintendent. No suspension was ordered or granted in respect of the period the subject of the Contractor's claim, with the result that the Contractor has no basis of claim or entitlement under clause 34.4 (Reason 6); and

(b) the costs that are claimed by the Contractor:

(i) are not extra costs of completing the Works that have been incurred by the Contractor which are attributable to the alleged delay in access (Reason 7); and

(ii) are not extra Costs to the Contractor at all. (Reason 8)

Fourth, in respect of the individual heads of quantum claimed, the Superintendent rejects the quantum assessment [and sets out further reasons]'. (Reason 9)

Background

285) On 27 July 2011, the Superintendent issued a notice of suspension pursuant to clause 34.2(a) of the General Conditions that stated;

'In accordance with clause 34.2(a) of the General Conditions of Contract, work on site for Stage 1 is suspended due to an omission of the Principal.

The suspension of the work for Stage 1 [omitted] is required until a lease agreement is negotiated between [the respondent] and the land owners. This suspension will apply until further advised by the Superintendent.'

286) On 23 May 2012, the superintendent's representative sent an email to the applicant that stated:

'Good news, we have the OK to access the [works site] at last. As discussed earlier we will be changing the scope as below:

[6 design changes were identified]

I will issue some revised drawings and raise the appropriate variation by the end of the week.

In the mean time it would be possible to commence on the manufacture of the concrete panels for the primary pond and commence on the associated earthworks.

287) At clause 7.2.1 of the EOT Claim, the applicant stated:

'The implications of having to self-perform the earthworks as described above necessarily meant having to mobilise to Borroloola at short notice, all of the necessary earthworks plant required.'

288) At clause 7.2.3 of the EOT Claim, the applicant stated:

'All of the required earthworks plant was not able to be secured and mobilised to site until 15 September 2012.'

The applicant's right to claim an extension of time

289) On 23 May 2012, the respondent notified the applicant that the suspension to the Stage 1 Works had been lifted in the following terms:

'Good news, we have the OK to access the treatment [works site] at last. As discussed earlier we will be changing the scope as below:

[6 design changes were identified]

I will issue some revised drawings and raise the appropriate variation by the end of the week. [Emphasis added]

290) Clause 35.4 sets out the applicant's entitlements to extension of time as follows:

'...Where the Contractor is delayed in the execution of the Works by any cause arising out of any breach of the provisions of the Contract or out of any other act or omission on the part of the Principal, the Superintendent or the employees, professional consultants or agents of the Principal or by any other cause (except a cause arising out of any breach of the provisions of the Contract or any other act or omission on his own part or on the part of his employees, agents or sub-contractors or their employees or agents) which he considers to be such as to justify an extension of the time fixed by the Contract for Practical Completion of the Works, the Contractor shall, if he desires to claim an extension of time for Practical Completion of the Works, give to the Superintendent not later than twenty eight days after the cause of delay arose notice in writing of his claim for an extension of time for Practical Completion of the Works, together with a statement of the facts on which he bases his claim.

- 291) The delay and extension of time claimed arose from the respondent's suspension of the Stage 1 Works, which was instructed by the superintendent on 27 July 2011 and the subsequent change of design to the Stage 1 Works that the respondent provided on 21 June 2012.
- 292) In addition to instructing the suspension on 27 July 2011, clause 34.2(a) required the superintendent to specify the period of suspension. Specifically, clause 34.2(a) states:

'...the Superintendent shall order the Contractor to suspend the progress of the whole or any part of the work under the Contract specified in the order for such time or times as the Superintendent may think fit.'

[Emphasis added]

- 293) The respondent failed to give the applicant notice of the period of suspension in that notice of suspension. That was a breach of clause 34.2(a) of the General Conditions, which the respondent rectified by providing its notice to lift the suspension on 23 May 2012.
- 294) Clause 34.5 makes it clear that the applicant is entitled to claim an extension of time for all delays '*...arising out of any breach of the provisions of the Contract*' that affects the Date for Practical Completion.
- 295) The applicant could not have anticipated at which time the respondent would lift the suspension that it had ordered on 27 July 2011 because the superintendent failed to provide such notice.
- 296) Similarly, the applicant could not have anticipated when the respondent would provide the amended design to carry out the Stage 1 Works. The respondent does admit, however, the following at paragraph 5.5(d) of Letter 3:

'any delay, and the extent of the delay, occasioned by the design change arose no later than 21 June 2012 when the Contractor was fully apprised of the delay and, as such, any claim for extension of time based on this event is out of time pursuant to sub-clause 35.4.'

- 297) The first time that the applicant could commence procuring an alternative subcontractor was 21 June 2012.
- 298) Given that the applicant's subcontractor was unable or unwilling to mobilise to site within a reasonable period after 21 June 2012 it is not surprising that it would have suffered a further delay until the alternative subcontractor mobilised to site.
- 299) On the basis of the applicants notice that it gave to the superintendent that *'there is to be a minimum of 3 weeks until he [the earthworks subcontractor] is available to mobilise to site once clearances are obtained.'*

The applicant should have provided the superintendent a notice of delay relating

to not being able to procure an earthworks subcontractor by about 12 August 2012 and made a claim for an extension of time under clause 34.5 by 9 August 2012.

- 300) The applicant has not provided me any evidence that it made a claim or submitted a notice of intention to claim for extension of time pursuant to clause 34.5 of the General Conditions for any delay arising from the suspension of the Stage 1 Works and the further delay until the respondent provided the amended Stage 1 Works design on 21 June 2012. It appears that the applicant first made a claim for extension for time for the delay on 30 September 2012.
- 301) I refer to my analysis of the applicant's rights to claim an extension of time at above paragraphs 98) to 104). By the operation of clauses 34.5 and 48 of the General Conditions, the applicant is not entitled to claim an extension of time for the period 1 September 2012 to 15 September 2012 set out in its notice dated 20 February 2014.

The respondent's obligation to grant an extension of time

- 302) The conclusion set out in above paragraph 301), however, does not mean that the superintendent had no obligations to extend the Date for Practical Completion if the respondent was liable for a delay nor does it mean that the applicant was not entitled to payment of its costs incurred due to such delay.
- 303) I refer to the analysis of the respondent's obligation to grant an extension of time at above paragraphs 105) to 114) as it is relevant to this point.

Determination

- 304) In the circumstances that the superintendent failed to comply with its obligations under clause 34.2(a) of the General Conditions and given that the applicant failed to claim an extension of time pursuant to clause 35.4, the superintendent should have assessed the delay arising from the suspension and within a reasonable period exercised its power under and granted an appropriate extension of time under clause 35.4 of the General Conditions.
- 305) I determined above that the applicant was entitled to an extension of time for the delay during the period 21 June 2012 to 30 August 2012 in the circumstances of;
- a) the suspension of the Stage 1 Works from 21 April 2011 to 23 May 2012 and the superintendent's breach by failing to give the notification required under clause 34.2(a);
 - b) the further delay from 24 May 2012 to 21 June 2012 due to the respondent's change of design that was issued on 21 June 2012;
 - c) the superintendent's failure to instruct as to the periods of suspension or to give adequate notice that the suspension would cease at a certain

time;

- d) the earthworks subcontractor effectively rescinding its subcontract and the time to arrange for an alternative subcontractor and the time to arrange for equipment to self-perform the earthworks once it the applicant realised that it could not procure an earthworks subcontractor within a reasonable time.

- 306) The applicant, however, was required to commence mobilising its earthworks subcontractor to site once it received the respondent's amended design on 21 June 2012.
- 307) The applicant has not provided me any evidence as to when it became aware that its subcontractor could not remobilise to site within a reasonable time.
- 308) The applicant had 70 days to commence remobilising an earthworks subcontractor from 21 June 2012 to 30 August 2012. The applicant should have notified the superintendent any further delays had arisen due to its inability to procure an alternative subcontractor due to the suspension and change of design and claimed an extension of time pursuant to clause 34.5. It appears that the applicant first made a claim for extension for time for the delay on 30 September 2012.
- 309) In these circumstances, the superintendent had no further obligation to grant an extension of time because the further delay claimed by the applicant did not arise from the superintendent's or respondent's breach.
- 310) I determine that applicant is not entitled an extension of time for any delay it may have suffered during the period 1 September 2012 to 15 September 2012 and **the Date for Practical Completion was 5 April 2013.**
- 311) Similarly, the applicant is not entitled to costs arising from the delay it suffered during the period 1 September 2012 to 15 September 2012.

Item 35 – Cost claim 6 – Consequential delay relating to Inclement Weather Days

- 312) On 3 March 2014, the applicant sent to the respondent its payment claim. The amount claimed was set out in a spreadsheet that described the work performed on the basis of the schedule of rates that forms a part of the Contract and it included other items referred to as '*variations/further costs*'. The applicant also attached notices that it had previously sent to the superintendent in support of its payment claims.
- 313) Relevant to Item 35 Cost claim 6 set out in the payment claim were the following notices previously sent to the respondent:
 - a) On 27 February 2014, the applicant sent a notice to the respondent entitled; '*Notice of Delay/Suspension Costs No. 6: Consequential 5 Days of*

Inclement Weather.

- i) The notice indicated a delay period of 5 days that the applicant claims to have suffered on 30 September 2012, 1 October 2012, 9 November 2012, 9 December and 17 December 2012 because the superintendent's direction to suspend the Works during the period 21 July 2011 to 23 May 2012 and the subsequent design change that was instructed on 21 June 2012 caused the further delays on 30 September 2012, 1 October 2012, 9 November 2012, 9 December and 17 December 2012.
 - ii) The notice claimed extra costs arising from the respondent's delay in the amount of \$144,475.10 incl. GST in the payment claim.
- b) The above notice dated 27 February 2014 was based on the applicant's the claim for extension of time entitled; 'Notice of Claim for an extension of time for Practical Completion of the Works (in accordance with clause 35.4)', which was sent to the respondent and dated 20 February 2014 **(EOT Claim)**.
- i) The EOT claim referred to 12 previous notices of delay that were sent to the respondent during the period 22 December 2010 to 19 February 2014, provided a program showing the effects of those delays and claimed an extension of time to 6 February 2014 accordingly.

- 314) The respondent determined that the applicant is entitled to \$NIL for Item 35 Cost claim 6, which it certified accordingly in its payment certificate entitled; 'Superintendent's assessment of Progress Claim 37 dated 3 March 2014 & Notice of Dispute' dated 17 March 2014 in response to the payment claim (Payment Certificate).

The respondent's reasons for withholding payment

- 315) In the Payment Certificate, the superintendent provided its reasons for withholding payment. The Payment Certificate referred to a letter entitled; 'Response to the Contractor's Notice of Claim for Extension of Time to the Date for Practical Completion dated 20 February 2014' dated 17 March 2014 (Letter 3) that was attached to the Payment Certificate.

- a) At paragraph 7.5 of Letter 3, the superintendent states;

'The Superintendent's previous reasons for rejecting the Contractor's claims, which are also relied upon in this assessment, are as follows:

- (a) *any claim by the Contractor for extension of time relating to the delay in access was required by clause 35.4, to be notified to the Superintendent no later than 20 June 2012 and the Superintendent found the Contractor's claim was out of time pursuant to sub-clause*

35.4 (Reason 1) [Emphasis added]

- (b) *...the Contractor's slow progress in completing the works were such that any delay by the Principal in providing access to the [site] had no delaying effect on the progress of the Contract Works (Reason 2);*
- (c) *the design changes to the [omitted] (Stage 1) [works] did not result in any delay to the Works achieving Practical Completion by the Date for Practical Completion or at all and notes that the Contractor had sufficient works to carry out in undertaking the ground works and construction of the concrete panels for [the works], which was not affected by the design changes; and (Reason 3)*
- (d) *any delay, and to the extent of the delay, occasioned by this event arose no later than 21 June 2012 when the Contractor was fully apprised of the design changes and, as such, any claim for extension of time based on this event is out of time pursuant to sub-clause 35.4. (Reason 1)*

- b) In Letter 3, the respondent relied on the time bar set out in clause 35.4 and the assertion that the respondent's instruction did not cause any delay to the works achieving completion by the Date for Practical.
- c) At paragraph 7.8 of Letter 3, the respondent asserted;
'...the Contractor's own acts, omissions and delays and failings in the performance of the Works has been the cause of the Contractor failure to progress the Works in a timely manner and to achieve practical completion.' (Reason 4)
- d) The Payment Certificate referred to a further letter dated 17 March 2014 (Letter 11) entitled; '*Response to Notice of Delay/Suspension Costs No. 6 dated 27 February 2014*' that was attached to the Payment Certificate.

316) Letter 11 provided additional reasons for withholding money as follows.

'The superintendent rejects the whole of the claim the subject of the Contractors Notice of Delay/Suspension Costs No. 3 dated 27 February 2014 (Claim). The reasons for rejection of the Claim are set out below.

First, the Contractor has not complied with the requirements of clause 48 of the General Conditions of Contract...(Reason 5)

Second, to the extent that the Contractor relies on clause 35.4...the Contractor has no entitlement because no extension of time has been granted in respect of the subject of the Contractor's claim and the Contractor is not entitled to an extension of time in the amount claimed or at all...(Reason 6)

Third, to the extent that the Contractor relies on clause 34.5 of the General Conditions of Contract:

- (a) the entitlement (if any) under clause 34.5 is dependent upon a suspension being ordered by the Superintendent. No suspension was ordered or granted in respect of the period the subject of the Contractor's claim, with the result that the Contractor has no basis of claim or entitlement under clause 34.4; and*
- (b) the costs that are claimed by the Contractor:*
 - (i) are not extra costs of completing the Works that have been incurred by the Contractor which are attributable to the alleged delay in access (Reason 7); and*
 - (ii) are not extra Costs to the Contractor at all. (Reason 8)*

Fourth, in respect of the individual heads of quantum claimed, the Superintendent rejects the quantum assessment [and sets out further reasons]'. (Reason 9)

Background

- 317) On 27 July 2011, the Superintendent issued a notice of suspension pursuant to clause 34.2(a) of the General Conditions that stated;

'In accordance with clause 34.2(a) of the General Conditions of Contract, work on site for Stage 1 is suspended due to an omission of the Principal.

The suspension of the work for Stage 1 [description omitted] is required until a lease agreement is negotiated between [the respondent] and the land owners. This suspension will apply until further advised by the Superintendent.'

- 318) On 23 May 2012, the superintendent's representative sent an email to the applicant that stated:

'Good news, we have the OK to access the [site] at last. As discussed earlier we will be changing the scope as below:

[6 design changes were identified]

I will issue some revised drawings and raise the appropriate variation by the end of the week.

In the mean time it would be possible to commence on the manufacture of the concrete panels for the [works] and commence on the associated earthworks.'

- 319) At clause 8.2.1 of the EOT Claim, the applicant stated:

'Inclement weather events occurring on 30/9/2012, 1/10/2012, 9/11/2012 and 17/12/2012 (5 calendar days) which stopped the contractor from working on the contract works'

320) At clause 8.2.2 of the EOT Claim, the applicant stated:

'But for the Principal caused delays which have extended the Date for Practical Completion of the Works, the Contractor would not have been exposed to the inclement weather risk events which occurred on the dates in question. This inclement weather delay has been incurred as a consequence of one or more of the prior delays being:

8.2.2.1 the delay in the commencement and execution of the critical Stage 1 Works...'

8.2.2.2 ...

8.2.2.3 the delay caused by the critical Stage 1 Works; and

8.2.2.4 the consequential delays the result of the suspension...'

The applicant's right to claim an extension of time

321) On 23 May 2012, the respondent notified the applicant that the suspension to the Stage 1 Works had been lifted in the following terms:

'Good news, we have the OK to access the [site] at last. As discussed earlier we will be changing the scope as below:

[6 design changes were identified]

I will issue some revised drawings and raise the appropriate variation by the end of the week.' [Emphasis added]

322) Clause 35.4 sets out the applicant's entitlements to extension of time as follows:

'...Where the Contractor is delayed in the execution of the Works by any cause arising out of any breach of the provisions of the Contract or out of any other act or omission on the part of the Principal, the Superintendent or the employees, professional consultants or agents of the Principal or by any other cause (except a cause arising out of any breach of the provisions of the Contract or any other act or omission on his own part or on the part of his employees, agents or sub-contractors or their employees or agents) which he considers to be such as to justify an extension of the time fixed by the Contract for Practical Completion of the Works, the Contractor shall, if he desires to claim an extension of time for Practical Completion of the Works, give to the Superintendent not later than twenty eight days after the cause of delay arose notice in writing of his claim for an extension of time for Practical Completion of the Works, together with a

statement of the facts on which he bases his claim.

- 323) The delay arose from the superintendent's instruction to suspend the Stage 1 Works on 27 July 2011.
- 324) In addition to instructing the suspension on 27 July 2011, clause 34.2(a) required the superintendent to specify the period of suspension. Specifically, clause 34.2(a) states:
- '...the Superintendent shall order the Contractor to suspend the progress of the whole or any part of the work under the Contract specified in the order for such time or times as the Superintendent may think fit.'*
[Emphasis added]
- 325) The respondent failed to give the applicant notice of the period of suspension, which was a breach of clause 34.2(a) of the Contract. The superintendent rectified the breach by providing its notice to lift the suspension on 23 May 2012.
- 326) The applicant claimed for an extension of time from 21 April 2011 to 23 May 2012, which I accepted above.
- 327) A further delay commenced when the superintendent notified the design change to the Stage 1 Works by way of its email dated 23 May 2012.
- 328) In its letter dated 24 October 2013, the superintendent stated:
- 'By letter dated 21 June 2012, the Superintendent informed the Contractor of the final design changes and provided copies of the relevant drawings.'*
- 329) Accordingly, the delay caused by the respondent's change of design to the Stage 1 Works ceased on 21 June 2012.
- 330) The applicant claimed for an extension of time from 24 May 2012 to 21 June 2012, which I accepted above.
- 331) Clause 34.5 makes it clear that the applicant is entitled to claim an extension of time for all delays '*...arising out of any breach of the provisions of the Contract*' that affects the Date for Practical Completion.
- 332) The applicant could not have anticipated at which time the respondent would lift the suspension that it had ordered on 27 July 2011 or the subsequent change of design. Therefore, the time required to procure an alternative earthworks subcontractor was a delay arising from the superintendent's breach.
- 333) The applicant claimed for an extension of time for the delays suffered during the period 22 June 2012 up to 30 August 2012 to the Stage 1 Works, which I accepted above.
- 334) The applicant further claimed an extension of time for delays that it suffered

during the period 1 September 2012 to 15 September 2012 because it said it was further delayed by the superintendent's breach. I rejected that claim because the further delay did not arise from the superintendent's breach.

- 335) The applicant further claimed an extension of time for delays that it suffered during the period 1 September 2012 to 15 September 2012 because it said it was further delayed by the superintendent's breach. I rejected that claim because the further delay did not arise from the superintendent's breach.
- 336) The applicant further claimed an extension of time for delays on 30 September 2012, 1 October 2012, 9 November 2012, 9 December and 17 December 2012 because the superintendent's direction to suspend the Works during the period 21 July 2011 to 23 May 2012 and the subsequent design change that was instructed on 21 June 2012 caused the further delays on 30 September 2012, 1 October 2012, 9 November 2012, 9 December and 17 December 2012.
- 337) As of the time that the applicant suffered delays due to inclement weather, it had up to 5 April 2013 to achieve Practical Completion. But for the respondent's above mentioned delays, the applicant would not have suffered the delays claimed.
- 338) Accordingly, the delays arose from the superintendent's and respondent's acts or omissions.
- 339) The applicant, however, failed to claim an extension of time within the time prescribed in clause 34.5 and it was further barred from making that claim by the operation of clause 48 of the Contract, both of which I have considered above.
- 340) I refer to my analysis of the applicant's rights to claim an extension of time at above paragraphs 98) to 104). By the operation of clauses 34.5 and 48 of the General Conditions, the applicant is not entitled to claim an extension of time for 30 September 2012, 1 October 2012, 9 November 2012, 9 December and 17 December 2012 set out in its notice dated 20 February 2014.

The respondent's obligation to grant an extension of time

- 341) I refer to the analysis of the respondent's obligation to grant an extension of time at above paragraphs 105) to 114) as it is relevant to this point.
- 342) In these circumstances, the superintendent should have granted an extension of time because the further delay claimed by the applicant arose from the superintendent's or respondent's breach.

Determination

- 343) I have dealt with the respondent's Reasons 1 to 6 above and rejected them for the reasons stated above.

- 344) I will deal with the respondent's Reasons 7 to 9 below.
- 345) Based on the above claims, the superintendent should have been extended the Date for Practical to 5 April 2013.
- 346) In relation to this claim, I determine that the applicant was entitled to claim an extension of time for the delays it suffered on 30 September 2012, 1 October 2012, 9 November 2012, 9 December and 17 December 2012. Accordingly, **the Date for Practical Completion should have been extended to 10 April 2013.**
- 347) For the same reasons stated above, the applicant is entitled to costs arising from the delays it suffered on 30 September 2012, 1 October 2012, 9 November 2012, 9 December and 17 December 2012.

Item 36 – Cost claim 7 – Consequential Delay: 2012 Christmas Period

- 348) On 3 March 2014, the applicant sent to the respondent its payment claim. The amount claimed was set out in a spreadsheet that described the work performed on the basis of the schedule of rates that forms a part of the Contract and it included other items referred to as ‘*variations/further costs*’. The applicant also attached notices that it had previously sent to the superintendent in support of its payment claims.
- 349) Relevant to Item 36 Cost claim 7 set out in the payment claim were the following notices previously sent to the respondent:
- a) On 27 February 2014, the applicant sent a notice to the respondent entitled; ‘*Notice of Delay/Suspension Costs No. 7: Consequential Delay: 2012 Christmas Period.*’
 - i) The notice indicated a delay period of 20 days that the applicant claims to have suffered during the period 19 December 2012 to 7 January 2013 because the respondent’s direction to suspend the Works during the period 21 July 2011 to 23 May 2012 caused a further delay during the period 19 December 2012 to 7 January 2013.
 - ii) The notice claimed extra costs arising from the respondent’s delay in the amount of \$372,257.60 incl. GST in the payment claim.
 - b) The above notice dated 27 February 2014 was based on the applicant’s the claim for extension of time entitled; ‘*Notice of Claim for an extension of time for Practical Completion of the Works (in accordance with clause 35.4)*’, which was sent to the respondent and dated 20 February 2014 (**EOT Claim**).
 - i) The EOT claim referred to 12 previous notices of delay that were sent to the respondent during the period 22 December 2010 to 19 February 2014, provided a program showing the effects of those delays and claimed an extension of time to 6 February 2014 accordingly.
- 350) The respondent determined that the applicant is entitled to \$NIL for Item 35 Cost claim 6, which it certified accordingly in its payment certificate entitled; ‘*Superintendent’s assessment of Progress Claim 37 dated 3 March 2014 & Notice of Dispute*’ dated 17 March 2014 in response to the payment claim (**Payment Certificate**).

The respondent’s reasons for withholding payment

- 351) In the Payment Certificate, the superintendent provided its reasons for withholding payment. The Payment Certificate referred to a letter entitled; ‘*Response to the Contractor’s Notice of Claim for Extension of Time to the Date*

for Practical Completion dated 20 February 2014' dated 17 March 2014 (Letter 3) that was attached to the Payment Certificate.

a) At paragraph 8.5 of Letter 3, the superintendent states;

'The Superintendent's previous reasons for rejecting the Contractor's claims, which are also relied upon in this assessment, are as follows:

(a) *any claim by the Contractor for extension of time relating to the delay in access was required, by sub-clause 35.4 to be notified to the Superintendent no later than 20 June 2012 and the Superintendent found the Contractor's claim was out of time pursuant to sub-clause 35.4 (Reason 1)' [Emphasis added]*

(b) *...the Contractor's slow progress were such that any delay by the Principal in providing access to the [site] had no delaying effect on the progress of the Contract Works (Reason 2);*

(c) *the design changes to the [omitted] (Stage 1) [works] did not result in any delay to the Works achieving Practical Completion by the Date for Practical Completion or at all and notes that the Contractor had sufficient works to carry out in undertaking the ground works and construction of the concrete panels for [the works], which was not affected by the design changes; and (Reason 3)*

(d) *any delay, and to the extent of the delay, occasioned by this event arose no later than 21 June 2012 when the Contractor was fully apprised of the design changes and, as such, any claim for extension of time based on this event is out of time pursuant to sub-clause 35.4.*

b) In Letter 3, the respondent relied on the time bar set out in clause 35.4 and the assertion that the respondent's instruction did not cause any delay to the works achieving completion by the Date for Practical.

c) At paragraph 8.9 of Letter 3, the respondent asserted; *'...the Contractor's own acts, omissions and delays and failings in the performance of the Works has been the cause of the Contractor failure to progress the Works in a timely manner and to achieve practical completion.'* (Reason 5)

d) The Payment Certificate referred to a further letter dated 17 March 2014 (Letter 12) entitled; *'Response to Notice of Delay/Suspension Costs No. 7 dated 27 February 2014'* that was attached to the Payment Certificate.

352) Letter 12 provided additional reasons for withholding money as follows.

'The superintendent rejects the whole of the claim the subject of the Contractors Notice of Delay/Suspension Costs No. 3 dated 27 February 2014 (Claim). The reasons for rejection of the Claim are set out below.

First, the Contractor has not complied with the requirements of clause 48 of the General Conditions of Contract...(Reason 6)

Second, to the extent that the Contractor relies on clause 35.4...the Contractor has no entitlement because no extension of time has been granted in respect of the subject of the Contractor's claim and the Contractor is not entitled to an extension of time in the amount claimed or at all...(Reason 1)

Third, to the extent that the Contractor relies on clause 34.5 of the General Conditions of Contract:

(a) the entitlement (if any) under clause 34.5 is dependant upon a suspension being ordered by the Superintendent. No suspension was ordered or granted in respect of the period the subject of the Contractor's claim, with the result that the Contractor has no basis of claim or entitlement under clause 34.4; and

(b) the costs that are claimed by the Contractor:

(i) are not extra costs of completing the Works that have been incurred by the Contractor which are attributable to the alleged delay in access; and

(ii) are not extra Costs to the Contractor at all.(Reason 8)

Fourth, in respect of the individual heads of quantum claimed, the Superintendent rejects the quantum assessment [and sets out further reasons]'. (Reason 9)

Background

353) On 27 July 2011, the Superintendent issued a notice of suspension pursuant to clause 34.2(a) of the General Conditions that stated;

'In accordance with clause 34.2(a) of the General Conditions of Contract, work on site for Stage 1 is suspended due to an omission of the Principal.

The suspension of the work for Stage 1 [works description omitted] is required until a lease agreement is negotiated between [the respondent] and the land owners. This suspension will apply until further advised by the Superintendent.'

354) On 23 May 2012, the superintendent's representative sent an email to the applicant that stated:

'Good news, we have the OK to access the [site] at last. As discussed earlier we will be changing the scope as below:

[6 design changes were identified]

I will issue some revised drawings and raise the appropriate variation by the end of the week.

In the mean time it would be possible to commence on the manufacture of the concrete panels for the [main works] and commence on the associated earthworks.'

355) At clause 9.2.1 of the EOT Claim, the applicant stated:

'as a result of the above described Principal caused delays:

9.2.1.1 the delay in the commencement and execution of the critical Stage 1 Works...'

9.2.1.2 ...

9.2.1.3 the delay caused by the critical Stage 1 Works; and

9.2.1.4 the consequential delays the result of the suspension...

9.2.1.5 earlier non-neutral inclement weather (5 days) incurred as a consequence of preceding delays, listed above

The Works have been significantly prolonged and have encountered the Christmas Period, when the site shuts down for the Christmas break.'

The applicant's right to claim an extension of time

356) On 23 May 2012, the respondent notified the applicant that the suspension to the Stage 1 Works had been lifted in the following terms:

'Good news, we have the OK to access the [site] at last. As discussed earlier we will be changing the scope as below:

[6 design changes were identified]

I will issue some revised drawings and raise the appropriate variation by the end of the week.' [Emphasis added]

357) Clause 35.4 sets out the applicant's entitlements to extension of time as follows:

'...Where the Contractor is delayed in the execution of the Works by any cause arising out of any breach of the provisions of the Contract or out of any other act or omission on the part of the Principal, the Superintendent or the employees, professional consultants or agents of the Principal or by any other cause (except a cause arising out of any breach of the provisions of the Contract or any other act or omission on his own part or on the part of his employees, agents or sub-contractors or their employees or agents) which he considers to be such as to justify an extension of the time fixed

by the Contract for Practical Completion of the Works, the Contractor shall, if he desires to claim an extension of time for Practical Completion of the Works, give to the Superintendent not later than twenty eight days after the cause of delay arose notice in writing of his claim for an extension of time for Practical Completion of the Works, together with a statement of the facts on which he bases his claim.

- 358) The delay arose from the superintendent's instruction to suspend the Stage 1 Works on 27 July 2011.
- 359) In addition to instructing the suspension on 27 July 2011, clause 34.2(a) required the superintendent to specify the period of suspension. Specifically, clause 34.2(a) states:

'...the Superintendent shall order the Contractor to suspend the progress of the whole or any part of the work under the Contract specified in the order for such time or times as the Superintendent may think fit.'
[Emphasis added]

- 360) The respondent failed to give the applicant notice of the period of suspension, which was a breach of clause 34.2(a) of the Contract. The superintendent rectified the breach by providing its notice to lift the suspension on 23 May 2012.
- 361) The applicant claimed for an extension of time from 21 April 2011 to 23 May 2012, which I accepted above.
- 362) A further delay commenced when the superintendent notified the design change to the Stage 1 Works by way of its email dated 23 May 2012.
- 363) In its letter dated 24 October 2013, the superintendent stated:
- 'By letter dated 21 June 2012, the Superintendent informed the Contractor of the final design changes and provided copies of the relevant drawings.'*
- 364) Accordingly, the delay caused by the respondent's change of design to the Stage 1 Works ceased on 21 June 2012.
- 365) The applicant claimed for an extension of time from 24 May 2012 to 21 June 2012, which I accepted above.
- 366) Clause 34.5 makes it clear that the applicant is entitled to claim an extension of time for all delays '*...arising out of any breach of the provisions of the Contract*' that affects the Date for Practical Completion.
- 367) The applicant could not have anticipated at which time the respondent would lift the suspension that it had ordered on 27 July 2011 or the subsequent change of design. Therefore, the time required to procure an alternative earthworks subcontractor was a delay arising from the superintendent's breach.

- 368) The applicant claimed for an extension of time for the delays suffered during the period 22 June 2012 up to 30 August 2012 to the Stage 1 Works, which I accepted above.
- 369) The applicant further claimed an extension of time for delays that it suffered during the period 1 September 2012 to 15 September 2012 because it said it was further delayed by the superintendent's breach. I rejected that claim because the further delay did not arise from the superintendent's breach.
- 370) The applicant further claimed an extension of time for delays that it suffered during the period 1 September 2012 to 15 September 2012 because it said it was further delayed by the superintendent's breach. I rejected that claim because the further delay did not arise from the superintendent's breach.
- 371) The applicant further claimed an extension of time for delays on 30 September 2012, 1 October 2012, 9 November 2012, 9 December 2012 and 17 December 2012 because the superintendent's direction to suspend the Works during the period 21 July 2011 to 23 May 2012 and the subsequent design change that was instructed on 21 June 2012 caused the further delays on 30 September 2012, 1 October 2012, 9 November 2012, 9 December 2012 and 17 December 2012. I accepted that claim because the further delays arose from the superintendent's breach.
- 372) The applicant further claimed an extension of time for delays that it suffered during the period 19 December 2012 to 7 January 2013 because it said it was further delayed by the superintendent's breach.
- 373) I do not see anything in the Contract that entitles the applicant to claim an extension of time for delays arising from the Christmas shutdown period.
- 374) I have also not been provided any claims of extension of time for the Stage 2A works that could have affected the Date for Practical Completion.

The respondent's obligation to grant an extension of time

- 375) I refer to the analysis of the respondent's obligation to grant an extension of time at above paragraphs 105) to 114) as it is relevant to this point.
- 376) In these circumstances, the superintendent had no further obligation to grant an extension of time because the further delay claimed by the applicant did not arise from the superintendent's or respondent's breach.

Determination

- 377) Based on the above claims, my preliminary assessment of the applicant's extension of time indicate that the Date for Practical should have been extended to 20 September 2012.
- 378) There are a number of additional claims that I must determine below and these

may affect my final determination of the Date for Practical Completion.

- 379) In this context, I do not see that the applicant was entitled to claim an extension of time for the delays it suffered during the period 19 December 2012 to 7 January 2013.
- 380) Similarly, the applicant is entitled to costs arising from the delays it suffered on 30 September 2012, 1 October 2012, 9 November 2012, 9 December 2012 and 17 December 2012.
- 381) I refer to my analysis of the applicant's rights to claim an extension of time at above paragraphs 98) to 104). By the operation of clauses 34.5 and 48 of the General Conditions, the applicant is not entitled to claim an extension of time for the period 19 December 2012 to 7 January 2013 set out in its notice dated 20 February 2014.

Item 37 – Cost claim 8 – Consequential Delay: 2013 Wet Season Delays

- 382) On 3 March 2014, the applicant sent to the respondent its payment claim. The amount claimed was set out in a spreadsheet that described the work performed on the basis of the schedule of rates that forms a part of the Contract and it included other items referred to as '*variations/further costs*'. The applicant also attached notices that it had previously sent to the superintendent in support of its payment claims.
- 383) Relevant to Item 37 Cost claim 8 set out in the payment claim were the following notices previously sent to the respondent:
- a) On 27 February 2014, the applicant sent a notice to the respondent entitled; '*Notice of Delay/Suspension Costs No. 8: Consequential Delay: Wet Season Delays*'.
 - i) The notice indicated a delay period of 80.5 days that the applicant claims to have suffered during the period 11 February 2013 to 30 April 2013 because the respondent's direction to suspend the Works during the period 21 July 2011 to 23 May 2012 caused a further delay during the period 11 February 2013 to 30 April 2013.
 - ii) The notice claimed extra costs arising from the respondent's delay in the amount of \$1,362,124.00 incl. GST in the payment claim.
 - b) The above notice dated 27 February 2014 was based on the applicant's the claim for extension of time entitled; '*Notice of Claim for an extension of time for Practical Completion of the Works (in accordance with clause 35.4)*', which was sent to the respondent and dated 20 February 2014 (**EOT Claim**).
 - i) The EOT claim referred to 12 previous notices of delay that were sent to the respondent during the period 22 December 2010 to 19 February 2014, provided a program showing the effects of those delays and claimed an extension of time to 6 February 2014 accordingly.
- 384) The respondent determined that the applicant is entitled to \$NIL for Item 37 Cost claim 8, which it certified accordingly in its payment certificate entitled; '*Superintendent's assessment of Progress Claim 37 dated 3 March 2014 & Notice of Dispute*' dated 17 March 2014 in response to the payment claim (**Payment Certificate**).

The respondent's reasons for withholding payment

- 385) In the Payment Certificate, the superintendent provided its reasons for withholding payment. The Payment Certificate referred to a letter entitled; '*Response to the Contractor's Notice of Claim for Extension of Time to the Date*'

for Practical Completion dated 20 February 2014' dated 17 March 2014 (Letter 3) that was attached to the Payment Certificate.

a) At paragraph 9.5 of Letter 3, the superintendent states;

'The Superintendent's previous reasons for rejecting the Contractor's claims, which are also relied upon in this assessment, are as follows:

(a) any delay by the Contractor relating to the delay access was required, by clause 35.4 to be notified to the Superintendent no later than 20 June 2012 and the Superintendent found the Contractor's claim was out of time pursuant to sub-clause 35.4 (Reason 1)' [Emphasis added]

(b) ...the Contractor's slow progress were such that any delay by the Principal in providing access to the [site] had no delaying effect on the progress of the Contract Works (Reason 2);

(c) the design changes to the [site] (Stage 1) did not result in any delay to the Works achieving Practical Completion by the Date for Practical Completion or at all and notes that the Contractor had sufficient works to carry out in undertaking the ground works and construction of the concrete panels for [the works], which was not affected by the design changes; and (Reason 3)

(d) any delay, and to the extent of the delay, occasioned by this event arose no later than 21 June 2012 when the Contractor was fully apprised of the design changes and, as such, any claim for extension of time based on this event is out of time pursuant to sub-clause 35.4.

b) In Letter 3, the respondent relied on the time bar set out in clause 35.4 and the assertion that the respondent's instruction did not cause any delay to the works achieving completion by the Date for Practical.

c) At paragraph 9.7 of Letter 3, the respondent asserted; *'...the Contractor's own acts, omissions and delays and failings in the performance of the Works has been the cause of the Contractor failure to progress the Works in a timely manner and to achieve practical completion.'* **(Reason 4)**

386) The Payment Certificate referred to a further letter dated 17 March 2014 (Letter 13) entitled; *'Response to Notice of Delay/Suspension Costs No. 8 dated 27 February 2014'* that was attached to the Payment Certificate.

387) Letter 13 provided additional reasons for withholding money as follows.

'The superintendent rejects the whole of the claim the subject of the Contractors Notice of Delay/Suspension Costs No. 3 dated 27 February 2014 (Claim). The reasons for rejection of the Claim are set out below.

First, the Contractor has not complied with the requirements of clause 48

of the General Conditions of Contract... (Reason 5)

Second, to the extent that the Contractor relies on clause 35.4...the Contractor has no entitlement because no extension of time has been granted in respect of the subject of the Contractor's claim and the Contractor is not entitled to an extension of time in the amount claimed or at all... (Reason 1)

Third, to the extent that the Contractor relies on clause 34.5 of the General Conditions of Contract:

- (a) the entitlement (if any) under clause 34.5 is dependent upon a suspension being ordered by the Superintendent. No suspension was ordered or granted in respect of the period the subject of the Contractor's claim, with the result that the Contractor has no basis of claim or entitlement under clause 34.4; and*
- (b) the costs that are claimed by the Contractor:*
 - (i) are not extra costs of completing the Works that have been incurred by the Contractor which are attributable to the alleged delay in access (Reason 6); and*
 - (ii) are not extra Costs to the Contractor at all. (Reason 7)*

Fourth, in respect of the individual heads of quantum claimed, the Superintendent rejects the quantum assessment [and sets out further reasons]'. (Reason 8)

Background

388) On 27 July 2011, the Superintendent issued a notice of suspension pursuant to clause 34.2(a) of the General Conditions that stated;

'In accordance with clause 34.2(a) of the General Conditions of Contract, work on site for Stage 1 is suspended due to an omission of the Principal.

The suspension of the work for Stage 1 [works description omitted] is required until a lease agreement is negotiated between [the respondent] and the land owners. This suspension will apply until further advised by the Superintendent.'

389) On 23 May 2012, the superintendent's representative sent an email to the applicant that stated:

'Good news, we have the OK to access the [site] at last. As discussed earlier we will be changing the scope as below:

[6 design changes were identified]

I will issue some revised drawings and raise the appropriate variation by the end of the week.

In the mean time it would be possible to commence on the manufacture of the concrete panels for the primary pond and commence on the associated earthworks.'

390) At clause 10.2.1 of the EOT Claim, the applicant stated:

'Inclement weather event (wet season) occurring from 11 February 2013 to 30 April 2013 (80.5 calendar days) which prevented the contractor from executing any of the works'

391) At clause 10.2.2 of the EOT Claim, the applicant stated:

'As a result of the above described Principal caused delays:

10.2.2.1 the delay in the commencement and execution of the critical Stage 1 Works...'

10.2.2.2 ...

10.2.2.3 the delay caused by the redesign of the critical Stage 1 Works; and

10.2.2.4 the consequential delays the result of the suspension...

10.2.2.5 earlier non-neutral inclement weather (5 days) incurred as a consequence of preceding delays, listed above; and

10.2.2.6 the Christmas Period Shutdown incurred as a result of the preceding delays listed above,

The Contractor would not have been exposed to the Works being conducted into this Wet Season. The inclement weather was encountered solely because of the preceding delays to the Works identified above, pushing the Works into the 2012/2013 Wet Season.'

10.2.3 Inclement Weather during the period from 11 February 2012 to 30 April 2013 affecting the critical Stage 1 [site] Works resulted in a cessation of the [omitted] area between 11 February 2013 and 30 April 2013, as the black soil conditions became unworkable with the Wet Season.'

The applicant's right to claim an extension of time

392) On 23 May 2012, the respondent notified the applicant that the suspension to the Stage 1 Works had been lifted in the following terms:

'Good news, we have the OK to access the [site] at last. As discussed earlier we will be changing the scope as below:

[6 design changes were identified]

I will issue some revised drawings and raise the appropriate variation by the end of the week.' [Emphasis added]

393) Clause 35.4 sets out the applicant's entitlements to extension of time as follows:

'...Where the Contractor is delayed in the execution of the Works by any cause arising out of any breach of the provisions of the Contract or out of any other act or omission on the part of the Principal, the Superintendent or the employees, professional consultants or agents of the Principal or by any other cause (except a cause arising out of any breach of the provisions of the Contract or any other act or omission on his own part or on the part of his employees, agents or sub-contractors or their employees or agents) which he considers to be such as to justify an extension of the time fixed by the Contract for Practical Completion of the Works, the Contractor shall, if he desires to claim an extension of time for Practical Completion of the Works, give to the Superintendent not later than twenty eight days after the cause of delay arose notice in writing of his claim for an extension of time for Practical Completion of the Works, together with a statement of the facts on which he bases his claim.

394) The delay arose from the superintendent's instruction to suspend the Stage 1 Works on 27 July 2011.

395) In addition to instructing the suspension on 27 July 2011, clause 34.2(a) required the superintendent to specify the period of suspension. Specifically, clause 34.2(a) states:

'...the Superintendent shall order the Contractor to suspend the progress of the whole or any part of the work under the Contract specified in the order for such time or times as the Superintendent may think fit.'

[Emphasis added]

396) The respondent failed to give the applicant notice of the period of suspension, which was a breach of clause 34.2(a) of the Contract. The superintendent rectified the breach by providing its notice to lift the suspension on 23 May 2012.

397) The applicant claimed for an extension of time from 21 April 2011 to 23 May 2012, which I accepted above.

398) A further delay commenced when the superintendent notified the design change to the Stage 1 Works by way of its email dated 23 May 2012.

399) In its letter dated 24 October 2013, the superintendent stated:

'By letter dated 21 June 2012, the Superintendent informed the Contractor of the final design changes and provided copies of the relevant drawings.'

- 400) Accordingly, the delay caused by the respondent's change of design to the Stage 1 Works ceased on 21 June 2012.
- 401) The applicant claimed for an extension of time from 24 May 2012 to 21 June 2012, which I accepted above.
- 402) Clause 34.5 makes it clear that the applicant is entitled to claim an extension of time for all delays '*...arising out of any breach of the provisions of the Contract*' that affects the Date for Practical Completion.
- 403) The applicant could not have anticipated at which time the respondent would lift the suspension that it had ordered on 27 July 2011 or the subsequent change of design. Therefore, the time required to procure an alternative earthworks subcontractor was a delay arising from the superintendent's breach.
- 404) The applicant claimed for an extension of time for the delays suffered during the period 22 June 2012 up to 30 August 2012 to the Stage 1 Works, which I accepted above.
- 405) The applicant further claimed an extension of time for delays that it suffered during the period 1 September 2012 to 15 September 2012 because it said it was further delayed by the superintendent's breach. I rejected that claim because the further delay did not arise from the superintendent's breach.
- 406) The applicant further claimed an extension of time for delays that it suffered during the period 1 September 2012 to 15 September 2012 because it said it was further delayed by the superintendent's breach. I rejected that claim because the further delay did not arise from the superintendent's breach.
- 407) The applicant further claimed an extension of time for delays on 30 September 2012, 1 October 2012, 9 November 2012, 9 December 2012 and 17 December 2012 because the superintendent's direction to suspend the Works during the period 21 July 2011 to 23 May 2012 and the subsequent design change that was instructed on 21 June 2012 caused the further delays on 30 September 2012, 1 October 2012, 9 November 2012, 9 December 2012 and 17 December 2012. I accepted that claim because the further delay arose from the superintendent's breach.
- 408) The applicant further claimed an extension of time for delays that it suffered during the period 19 December 2012 to 7 January 2013 because it said it was further delayed by the superintendent's breach. I rejected that claim because the further delay did not arise from the superintendent's breach.
- 409) The applicant further claimed an extension of time for delays that it suffered during the period 11 February 2013 to 30 April 2013 because it said it was further delayed by the superintendent's breach.

- 410) As of 11 February 2013, the applicant was entitled to achieve Practical Completion by 10 April 2013. But for the superintendent's and respondent's acts and omissions, **the applicant would not have suffered the delay due to wet season.**
- 411) Accordingly, the wet season delay arose from the superintendent's and respondent's acts and omissions.
- 412) The applicant claimed an extension of time for the inclement weather on 10 May 2013.
- 413) The applicant should have claimed an extension of time within 28 days of the occurrence of the delaying event pursuant to clause 34.5 and was barred by the operation of clause 48 of the Contract.
- 414) I refer to my analysis of the applicant's rights to claim an extension of time at above paragraphs 98) to 104). By the operation of clauses 34.5 and 48 of the General Conditions, the applicant is not entitled to claim an extension of time for the period 11 February to 30 April 2013 set out in its notice dated 20 February 2014.

The respondent's obligation to grant an extension of time

- 415) I refer to the analysis of the respondent's obligation to grant an extension of time at above paragraphs 105) to 114) as it is relevant to this point.
- 416) In these circumstances, the superintendent should have granted an extension of time because the further delay claimed by the applicant arose from the superintendent's or respondent's act or omission.

Determination

- 417) I have dealt with the respondent's Reasons 1 to 5 above and rejected them for the reasons stated above.
- 418) I will deal with the respondent's Reasons 6 to 8 below.
- 419) Based on the above claims, **the Date for Practical should have been extended to 28 June 2013.**
- 420) In relation to this claim, the applicant was entitled to claim an extension of time for the delays it suffered during the period 11 February 2013 to 30 April 2013.
- 421) Similarly, the applicant is entitled to costs arising from the delays it suffered during the period 11 February 2013 to 30 April 2013 that arose from the superintendents and respondent's acts or omissions.

Item 38 – Cost claim 9 – Rectification Works to [works description omitted]

- 422) On 3 March 2014, the applicant sent to the respondent its payment claim. The amount claimed was set out in a spreadsheet that described the work performed on the basis of the schedule of rates that forms a part of the Contract and it included other items referred to as '*variations/further costs*'. The applicant also attached notices that it had previously sent to the superintendent in support of its payment claims.
- 423) Relevant to Item 38 Cost claim 9, set out in the payment claim were the following notices previously sent to the respondent:
- a) On 27 February 2014, the applicant sent a notice to the respondent entitled; '*Notice of Delay/Suspension Costs No. 9: Rectification Works to [project works]*'.
 - i) The notice indicated a delay period of 167 days that the applicant claims to have suffered during the period 2 July 2013 to 15 December 2013 because the respondent directed the applicant use type 4 bedding material in the construction of the [works] instead of the type 2 bedding material specified in the Contract.
 - ii) The notice claimed extra costs arising from the respondent's delay in the amount of \$3,450,949.70 incl. GST in the payment claim.
 - b) The above notice dated 27 February 2014 was based on the applicant's the claim for extension of time entitled; '*Notice of Claim for an extension of time for Practical Completion of the Works (in accordance with clause 35.4)*', which was sent to the respondent and dated 20 February 2014 (EOT Claim).
 - i) The EOT claim referred to 12 previous notices of delay that were sent to the respondent during the period 22 December 2010 to 19 February 2014, provided a program showing the effects of those delays and claimed an extension of time to 6 February 2014 accordingly.
- 424) The respondent determined that the applicant is entitled to \$NIL for Item 38 Cost claim 9, which it certified accordingly in its payment certificate entitled; '*Superintendent's assessment of Progress Claim 37 dated 3 March 2014 & Notice of Dispute*' dated 17 March 2014 in response to the payment claim (Payment Certificate).

The respondent's reasons for withholding payment

- 425) In the Payment Certificate, the superintendent provided its reasons for withholding payment. The Payment Certificate referred to a letter entitled; '*Response to the Contractor's Notice of Claim for Extension of Time to the Date*

for Practical Completion dated 20 February 2014' dated 17 March 2014 (Letter 3) that was attached to the Payment Certificate.

a) At paragraph 10.7 of Letter 3, the superintendent states;

'The Superintendent's previous reasons for rejecting the Contractor's claims, which are also relied upon in this assessment, are as follows:

(a) The Superintendent found that any rectification works required to be undertaken by the Contractor on the [works] were as a direct result of the errors and/or omissions of the Contractor. In particular the Superintendent found that the rectification works were required as a result of the Contractor's (Reason 1);

(i) inappropriate use of the shoring system in the trenches;

(ii) failure to dewater in accordance with its Contractual obligations; and

(iii) Poor quality control and workmanship.

(b) Also, any delay, and the extent of the delay, occasioned by these events arose in 2011 or 2012 when the Contractor was fully apprised of the need to rectify certain works and, as such, any claim for extension of time based on this event is out of time in accordance with sub-clause 35.4 (Reason 2).

b) In Letter 3, the respondent relied on the time bar set out in clause 35.4 and the assertion that the respondent's instruction did not cause any delay to the works achieving completion by the Date for Practical.

c) At paragraph 10.9 of Letter 3, the respondent asserted; *'...the Contractor's own acts, omissions and delays and failings in the performance of the Works has been the cause of the Contractor failure to progress the Works in a timely manner and to achieve practical completion.'* (Reason 1)

d) The Payment Certificate referred to a further letter dated 17 March 2014 (Letter 14) entitled; *'Response to Notice of Delay Costs No. 9 dated 27 February 2014'* that was attached to the Payment Certificate.

e) Letter 14 provided additional reasons for withholding money as follows.

'The superintendent rejects the whole of the claim the subject of the Contractors Notice of Delay/Suspension Costs No. 3 dated 27 February 2014 (Claim). The reasons for rejection of the Claim are set out below.

First, the Contractor has not complied with the requirements of clause 48 of the General Conditions of Contract...(Reason 3)

Second, to the extent that the Contractor relies on clause 35.4...the Contractor has no entitlement because no extension of time has been granted in respect of the subject of the Contractor's claim and the Contractor is not entitled to an extension of time in the amount claimed or at all...(Reason 4)

Third, in respect of the individual heads of quantum claimed, the Superintendent rejects the quantum assessment [and sets out further reasons]'. (Reason 5)

Background

426) At clause 11.2.3 of the EOT Claim, the applicant stated:

'The Principal's bedding design was based on type 4 bedding material for the [works]. The Contract did however identify the possible need to use type 2 pipe bedding material in the event of ground water conditions. Significant groundwater conditions were encountered. The Superintendent directed that type 2 bedding material would not be used by the Contractor, contrary to the prevailing site conditions which required type 2 bedding material to properly bed [works].

427) On 15 July 2011, [CM] of the applicant requested [KM]'s (the superintendent's representative) direction regarding [particular works] as follows:

'... 1. refer Drawing #B10-5198 and B10-5200 [works] layout plan- line 1A and 1B. A test pit on [particular works] has revealed [sic] a heavy ingress of ground water.

Please confirm that under these conditions, [the applicant] is to continue as per design with the specified type 4 embedment material around the [particular works].'

A copy of the direction was sent to [PL] (the superintendent's representative).

428) On 15 July 2011, [KM] (the superintendent's representative) directed the applicant as follows:

'Type 2 requires gravel which is not available in [the project location].

The spec advises to use type 4 and this will work provided the trench is dewatered correctly and there is good compaction achieved.

Please continue as per the specification.'

A copy of the direction was sent to [PL] (the superintendent's representative).

429) On 16 November 2011, [DS] (the superintendent's representative site representative) directed the applicant as follows:

{CM}

There are a couple of issues I have with the construction of the [particular works].

The ground water appears to be causing untold problems which are detrimental to the construction of the [works]. This ground water must be controlled before laying the pipes.

The other problem is the material between the geo and the trench cannot be compacted sufficiently before backfill. It appears, when the trench is backfilled the pipe surround can move sideways. The problem is multiplied when the sand is saturated, it becomes fluid.

A copy of the direction was sent to [PL] (the superintendent's representative).

- 430) [IS], [AS], [MW] and [LL] of the applicant have provided sworn statements deposing that the applicant encountered extensive ground water during the construction of the [particular works] portion of the Stage 2A Works. Each of the deponents further opine that the defects that had to be rectified during the period 2 July 2013 to 15 December 2013 were caused by the use of type 4 material, which was directed by the superintendent and required under the Contract.
- 431) By way of Exhibit 6 to the sworn statement of [IS], the applicant has provided a marked up plan of the particular works] that shows that about 80% of the [particular works] was affected by ground water and another 15% was affected by sporadic ground water.
- 432) By way of the sworn statement of [KM], the respondent has provided a detailed account of the defects. He has also identified certain areas that were subject to ground water [details omitted]
- 433) On 31 August 2011, [DS] of the respondent sent an email to [KM] that stated;
- 'The problem is the ingress of ground water, by tomorrow the excavation will be flooded...'*
- 434) On 2 November 2011, [DS] of the respondent sent an email to [KM] that stated;
- '...[location] is deep, lots of ground water and the material is the worst you can find.'*
- 435) On 6 November 2011, [DS] of the respondent sent an email to [KM] that stated;
- '...[location] is flooded...'*
- 436) Notwithstanding the email dialogue between the applicant and the respondent referred to at above paragraphs 427) to 429), the applicant has not otherwise provided any evidence that it notified the superintendent of groundwater that it

claims to have encountered.

- 437) Similarly, the applicant has not provided me an accurate account of the ground water encountered by its representatives. It has only provided me its representatives reports.
- 438) The respondent provided a geotechnical report to the applicant at the time of tender referenced; '*TR 01/09 [project] Stage 2 and 3 – Geotechnical Investigation*' which stated:

'EMBEDMENT/ BEDDING MATERIALS

...

- *Type2 bedding material (crushed aggregate) and geotextile should be used under roads and if the material surrounding the bedding material contains voids or if soft ground conditions are encountered during construction or the ground is subject to groundwater flow.*

The suggested bedding materials along the pipe alignment / test pit locations are given in Table 9.

6.3 GROUNDWATER

Groundwater was encountered in test pit location TP 35 (2.4m depth). Field work was carried out during May'09 at the start of dry season. During the wet season groundwater levels are expected to rise in other locations and might reach the surface or close to the surface. Elevated groundwater levels would likely affect construction work if this was carried out during the wet season or shortly thereafter.

- 439) Upon review of the 16 detailed accounts of the defects provided by [KM], it appears that 8 accounts had reported instances of ground water and were the type of failure that could result if the bedding material failed to provide continuous support to the [works].
- 440) The [particular] Works were commenced in May 2011 and continued to through 2012. During that period it appears that the applicant provided notice to the superintendent in July 2011 of the groundwater problems at which time it raised concerns with using the type 4 bedding material because of the concern that the type 4 material was not fit for purpose.

The applicant's right to claim an extension of time

- 441) The claimed delay arose from the respondent's purported defective design, relating to the use of Type 4 bedding material.
- 442) The Geotechnical report sets out the findings of TP35, which identified the existence of ground water on the future line 1B, recommended the use of Type

2 material;

'...under roads and if the material surrounding the bedding material contains voids or if soft ground conditions are encountered during construction or the ground is subject to groundwater flow.'

443) The applicant has provided a design advice written by Ryan Krake of Sinclair Knight Merz and dated 12 August 2013 that states:

'This is specifically in relation to pipe laying activities infiltrated by ground water...

'...Type 4 embedment in trenches infiltrated by ground water is not an appropriate design in this instance as maintaining required quality control (compaction/relative density) in these conditions are not practical, leading to long term performance issues. Even if trenches can remain dry for construction through dewatering, once embedment is in place, drying and saturation will occur, potentially dislodging/suspending the sand and creating pipe uplift.'

444) The applicant appears to have notified of the existence of ground water upon commencing the Stage 2A Works and suggested the design be changed from a Type 4 to Type 2 bedding material.

445) The respondent directed the applicant to;

'The spec advises to use type 4 and this will work provided the trench is dewatered correctly and there is good compaction achieved.

Please continue as per the specification.'

446) The above direction was reiterated several times by the superintendent to the applicant during the course of the works.

447) Clause 34.5 makes it clear that the applicant is entitled to claim an extension of time for all delays *'...arising out of any breach of the provisions of the Contract'* that affects the Date for Practical Completion.

448) The mere presence of ground water, however, was not a breach of Contract nor was any delay arising from the ground water a delay for which the applicant was entitled to claim an extension of time.

449) It appears that in 2013, certain defects (that are identified at paragraph 38 in the sworn statement of [KM]) to the [particular works] became known to the respondent and the applicant carried out rectification of the defects during the period 2 July 2013 to 15 December 2013.

450) There is no dispute that defects were rectified during the period 2 July 2013 to 15 December 2013 and that the affected pipe was re-laid on Type 4 bedding

material, which the respondent advises has to date not failed.

- 451) The purported breach of Contract would have occurred at the time the applicant uncovered the [particular works] to carry out defect rectification and discovered that the [works constructed] had moved because of the failure of the respondent's design, specifically the failure of the Type 4 material that encountered ground water.
- 452) Clause 35.4 sets out the applicant's entitlements to extension of time as follows:

'...Where the Contractor is delayed in the execution of the Works by any cause arising out of any breach of the provisions of the Contract or out of any other act or omission on the part of the Principal, the Superintendent or the employees, professional consultants or agents of the Principal or by any other cause (except a cause arising out of any breach of the provisions of the Contract or any other act or omission on his own part or on the part of his employees, agents or sub-contractors or their employees or agents) which he considers to be such as to justify an extension of the time fixed by the Contract for Practical Completion of the Works, the Contractor shall, if he desires to claim an extension of time for Practical Completion of the Works, give to the Superintendent not later than twenty eight days after the cause of delay arose notice in writing of his claim for an extension of time for Practical Completion of the Works, together with a statement of the facts on which he bases his claim.

- 453) The applicant has not provided me any evidence as to when it became aware that the [constructed works] had moved because of a failure of the Type 4 material faced with ground water nor that it made a claim for extension of time pursuant to clause 35.4.
- 454) I refer to my analysis of the applicant's rights to claim an extension of time at above paragraphs 98) to 104). By the operation of clauses 34.5 and 48 of the General Conditions, the applicant is not entitled to claim an extension of time for the period 2 July 2013 to 15 December 2013 set out in its notice dated 20 February 2014.

The respondent's obligation to grant an extension of time

- 455) The conclusion set out in above paragraph 454), however, does not mean that the superintendent had no obligations to extend the date for Practical Completion if the respondent was liable for a delay nor does it mean that the applicant was not entitled to payment of its costs incurred due to such delay.
- 456) Based on the reported presence of some ground water and the advice of the respondent's geotechnical consultant and those of [name omitted] Sinclair Knight Merz, I am persuaded that the respondent's design and particularly the fitness for purpose of the Type 4 bedding material used in the construction of the parts of the [works] that failed was inappropriate.

- 457) The superintendent should have carried out a detailed investigation of the numerous ground water reports and engaged a professional design engineer to reconsider its design relating to the use of Type 4 bedding materials in certain places.
- 458) I refer to the analysis of the respondent's obligation to grant an extension of time at above paragraphs 105) to 114) as it is relevant to this point.
- 459) In the circumstances that the superintendent failed to comply with its obligations under clause 34.2(a) of the General Conditions and given that the applicant failed to claim an extension of time pursuant to clause 35.4, the superintendent should have assessed the delay arising from the suspension and within a reasonable period exercised its power under and granted an appropriate extension of time under clause 35.4 of the General Conditions.

Determination of the respondent's Reason 1 for withholding payment

- 460) The applicant claims that the failures the subject of the rectification works failed because of groundwater and inappropriate bedding.
- 461) For the avoidance of doubt, I repeat the definition of 'groundwater' provided in paragraph 10 of the sworn statement of [DG] (a hydrogeologist) and [and employee] of the respondent;

'...groundwater is understood to be as:

- (a) water in rock below ground surface level; or*
- (b) where soil or rock below ground surface level is saturated with water (that is where the soil or rock cannot hold any more water).'*

I understand this to mean naturally occurring subterranean water but does not include surface water unless it collects and stands for such a period that the soil or rock cannot hold any more water.

- 462) In support of that claim, I was referred to the respondent's geotechnical report and to the advice provided by a consulting engineer from SKM. Specifically the Geotechnical report identifies an instance of ground water and recommends that Type 2 material be used if ground water is encountered. The SKM advice similarly recommends that Type 2 material be used if ground water is present.
- 463) The respondent relies on Reason 1 for withholding payment. Specifically it asserts that:
- a) the applicant's construction methodology in relation to shoring was inappropriate;
 - b) the applicant failed to de-water in accordance with the contract;
 - c) Poor quality control and workmanship;

caused the failures that the applicant had to rectify that are the subject of this claim.

- 464) There is nothing in the Contract that sets out how shoring was to be used. Similarly nor have any of the superintendent's representative reported that they suspended the work because it was defective due to inappropriate use of shoring.
- 465) [KM] provided a list of specific defects at paragraph 38 of his sworn statement and at paragraph 23 opined that;

'...the methodology originally adopted by [the applicant] for the installation and removal of the trench shoring was the major cause of failures in the [works] and not ground water or inappropriate bedding type.'

- 466) At paragraph 34, [KM] stated;

'There were numerous defects identified in both [works] that had nothing to do with bedding material, or are in anyway associated with ground water conditions...

[specific defect details omitted]

- 467) At paragraph 34, [KM] stated;

'More importantly, the type of defects that you would expect to find in the circumstances claimed by [the applicant] (excessive groundwater, unsuitable material and inappropriate bedding) would be pipe deformation and gradient issues'

468) At paragraph 34, [KM] identified a list of [work type 1] failures. That list included 7 pipe deformation and gradient failures, which were the type of failures that he would have expected to have arisen from excessive groundwater, unsuitable material and inappropriate bedding. I also note that he identified ground water 4 times in that list.

469) At paragraph 38, [KM] made the following statements about various defects;

'The removal of the shoring boxes in this location appears to have had no impact on the integrity of the pipe bedding....despite the site being totally flooded on numerous occasions...'

'...in this section, [the applicant's] crews were instructed by [IS] to weld 300 mm steel plate extensions to the bottom of the shoring boxes. This had the effect of reducing the void between the shoring box and the trench wall, so when the shoring box was removed it had less impact on the integrity of the pipe bedding. This method seems to have worked as there were no pipe deformation or pipe gradient defects recorded in this section.'

'In this section [the applicant] suspended the shoring boxes above the pipe bedding....When the shoring box was removed it had little if any impact on the integrity of the pipe bedding.'

'Shoring boxes were supported from the base of the trench in this section and I believe this was the cause of the failure.'

'This work site expanded during the rectification works as the bedding of the existing pipework was undermined and then slid into the excavation when it was opened up to undertake the repairs.'

470) As set out above and in reports that [DS] (superintendent's site representative) sent to [KM], ground water is reported at least 5 times.

471) It is clear from the sworn statement of [KM] that there were 16 defects identified and only one was attributable to inappropriate use of shoring. 7 defects were the type of defect that would be caused by groundwater. There were 5 other instances of groundwater reported by [DS] and another instance of groundwater reported by [CM] of the applicant.

472) It is also clear from the statement of [KM] that 9 defects related to poor workmanship and lack of quality control.

473) In the list of defects to [work type 1] main that is set out in the sworn statement of [KM], he has not attributed any of the defects to the applicant's failure to carry out de-watering in accordance with the Contract. I further note that there was only one instance where it was said that;

'...This surface runoff combined with the water draining along the [omitted] excavations of [street names omitted] added up to a significant water

problem. Indeed [the applicant] installed a sump pump and dewatered the [site] to construct [some of the works].'

It was suggested that that defect arose from the applicant's carelessness.

- 474) Notwithstanding the applicant's employees sworn statement and the geotechnical report, the statement of [KM] and the reports of [DS] attached to [KM]'s statement, persuade me that there was groundwater present in the areas the [omitted] rectification works that caused some defects due to the inadequacy of the bedding material.
- 475) I am also persuaded that the applicant's less than efficient dewatering processes adopted and the applicant's use of the shoring boxes did not significantly cause the defects identified by [KM].
- 476) I have not been given a more detailed account by either party that would allow me to determine whether the respondent's reasons applied to each defect.
- 477) On the balance of probabilities, I am persuaded that some parts of the works that were rectified should have been bedded on Type 2 material and it seems that the inappropriate use of shoring, and dewatering processes, only caused minor failure.
- 478) On the basis of the specific defects identified by the respondent and the witnesses' sworn statements, I determine that the applicant is entitled to 50% of the extension of time claimed arising from the respondent's failure to adequately deal with the groundwater identified and

Determination of the respondent's Reason 2 for withholding payment

- 479) The applicant asserts that the rectification works the subject of the payment claim were necessary because of the inadequacy of the Type 4 bedding material in areas that contained groundwater. For the reasons stated above, I accept that argument applies only to a part of the rectification work carried out.
- 480) The respondent was responsible for the design of the works including the area the subject of the rectification work and as such there must have been an implied warranty that the design was adequate and fit for purpose provided to the applicant under the contract.
- 481) If there was no such warranty and in the event of failure due to inadequacy of design, the respondent would be entitled to instruct the applicant to rectify all defects that arose from time to time and the applicant would have no claim against the respondent, which would not fair or equitable.
- 482) The High Court has repeatedly applied the legal principle, *established in BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, that a term will only be implied into a contract if it is absolutely necessary to ensure business efficacy, fairness and obviousness. Furthermore, the implied term must be able to be

expressed clearly and it must not contradict any of the terms in the contract.

483) I determine that the respondent was responsible for the design and that it provided the applicant a warranty as to the adequacy and the fitness for purpose of the design.

484) In its letter dated 30 September 2012, the applicant stated:

'Extensive amounts of ground water has been encountered in most of the [works] excavations associated with the Stage 2A works, contrary to tender information. This has made the excavation and installation of [works] much more difficult and adversely affected progress of these works. The extensive presence of such groundwater was not reasonably expected nor anticipated by [the applicant], from the geotechnical information provided by the Principal, at the time of tender. In light of substantial ground water infiltration into [works excavations] [the applicant] requested a pipe bedding re-design and suggested a pipe bedding system which accommodates wet trenches such as crushed aggregate bedding. This was rejected by the Superintendent. Indeed the Superintendent made no decision in respect of the changed ground conditions or in relation to the Principal's original bedding design. In an effort to mitigate costs, [the applicant] has with the approval of the Superintendent, sought to obtain river screenings and installed this under the original pipe bedding for the [works] in many locations. This has resulted in additional costs and delays to Stage 2A works.'

485) The respondent asserts that any delay relating to the presence of ground water and pipe bedding design arose in 2011 or 2012 when the Contractor was fully apprised of the need to rectify certain works, and this claim for extension of time is out of time in accordance with sub-clause 35.4.

486) At paragraph 22 of the sworn statement of [KM], he states:

'I recall [the applicant] requesting a change from Type 4 bedding specified in the Contract to Type 2 due to groundwater being encountered. I replied that Type 4 bedding would work perfectly well if the trench was dewatered properly.'

487) The superintendent was given numerous notices of the presence of groundwater during the period July 2011 to November 2011 by its own staff and the applicant's staff.

488) There is no doubt that the clause 12.4.5 of the specification that formed a part of the Contract required the applicant to keep trenches dry during installation. The Contract, however, does not make any provision as to the steps that should be taken if groundwater is encountered.

489) The respondent breached its warranty at the time it failed to take action when it became aware that there was extant groundwater in the Stage 2A works area

and further breached its obligations when it instructed the applicant to carry out work that was necessary because of the inadequacy of its design and or lack of fitness for purpose.

- 490) For the reasons stated above, I determine that the applicant did notify the respondent of the presence of groundwater, which was a delaying event, and notified its intention to claim an extension of time pursuant to clauses 34.5 and 48. Specifically, clause 34.5 states:

Where the Contractor is delayed in the execution of the Works by any cause arising out of any breach of the provisions of the Contract or out of any other act or omission on the part of the Principal, the Superintendent or the employees, professional consultants or agents of the Principal or by any other cause (except a cause arising out of any breach of the provisions of the Contract or any other act or omission on his own part or on the part of his employees, agents or sub-contractors or their employees or agents) which he considers to be such as to justify an extension of the time fixed by the Contract for Practical Completion of the Works, the Contractor shall, if he desires to claim an extension of time for Practical Completion of the Works, give to the Superintendent not later than twenty eight days after the cause of delay arose notice in writing of his claim for an extension of time for Practical Completion of the Works, together with a statement of the facts on which he bases his claim.

- 491) Clause 48 further states:

The Principal shall not be liable upon any claim by the Contractor in respect of any matter arising out of the Contract unless the claim together with full particulars thereof, is lodged in writing with the Principal not later than twenty-eight days after the date of the occurrence of the events or circumstances on which the claim is based or written notice of intention to make the claim specifying the nature of the claim is lodged with the Principal within that time and the claim, together with full particulars thereof, is lodged in writing with the Principal before the issue of the Final Certificate.

- 492) For the above stated reasons, I am satisfied that the applicant notified its intention to claim an extension of time under clause 48 and, therefore, the applicant's EOT claim is not out of time pursuant to clause 34.5 by the operation of clause 48. Accordingly, I do not accept the respondent's Reason 2.

Determination of the respondent's Reason 3 for withholding payment

- 493) I have dealt with Reason 3 above. Accordingly, I reject the respondent's reasons for withholding payment pursuant to Reason 3.

Determination of the respondent's Reason 4 for withholding payment

- 494) I have dealt with Reason 4 above. Accordingly, I reject the respondent's reasons

for withholding payment pursuant to Reason 3.

Determination of the respondent's Reason 5 for withholding payment

- 495) The applicant is not entitled to the entire extension of time that it claimed for the above reasons. I will determine the extension of time to which it is entitled below. Accordingly, I will consider the respondent's Reason 5 below in order to determine the costs arising from this delay to which the applicant is entitled.

Determination of extension of time

- 496) On 23 May 2012, the respondent notified the applicant that the suspension to the Stage 1 Works had been lifted in the following terms:

'Good news, we have the OK to access the treatment [site] at last. As discussed earlier we will be changing the scope as below:

[6 design changes were identified]

I will issue some revised drawings and raise the appropriate variation by the end of the week. [Emphasis added]

- 497) Clause 35.4 sets out the applicant's entitlements to extension of time as follows:

'...Where the Contractor is delayed in the execution of the Works by any cause arising out of any breach of the provisions of the Contract or out of any other act or omission on the part of the Principal, the Superintendent or the employees, professional consultants or agents of the Principal or by any other cause (except a cause arising out of any breach of the provisions of the Contract or any other act or omission on his own part or on the part of his employees, agents or sub-contractors or their employees or agents) which he considers to be such as to justify an extension of the time fixed by the Contract for Practical Completion of the Works, the Contractor shall, if he desires to claim an extension of time for Practical Completion of the Works, give to the Superintendent not later than twenty eight days after the cause of delay arose notice in writing of his claim for an extension of time for Practical Completion of the Works, together with a statement of the facts on which he bases his claim.

- 498) The delay arose from the superintendent's instruction to suspend the Stage 1 Works on 27 July 2011.

- 499) In addition to instructing the suspension on 27 July 2011, clause 34.2(a) required the superintendent to specify the period of suspension. Specifically, clause 34.2(a) states:

'...the Superintendent shall order the Contractor to suspend the progress of the whole or any part of the work under the Contract specified in the order for such time or times as the Superintendent may think fit.

[Emphasis added]

- 500) The respondent failed to give the applicant notice of the period of suspension, which was a breach of clause 34.2(a) of the Contract. The superintendent rectified the breach by providing its notice to lift the suspension on 23 May 2012.
- 501) The applicant claimed for an extension of time from 21 April 2011 to 23 May 2012, which I accepted above.
- 502) A further delay commenced when the superintendent notified the design change to the Stage 1 Works by way of its email dated 23 May 2012.
- 503) In its letter dated 24 October 2013, the superintendent stated:
- 'By letter dated 21 June 2012, the Superintendent informed the Contractor of the final design changes and provided copies of the relevant drawings.'*
- 504) Accordingly, the delay caused by the respondent's change of design to the Stage 1 Works ceased on 21 June 2012.
- 505) The applicant claimed for an extension of time from 24 May 2012 to 21 June 2012, which I accepted above.
- 506) Clause 34.5 makes it clear that the applicant is entitled to claim an extension of time for all delays '*...arising out of any breach of the provisions of the Contract*' that affects the Date for Practical Completion.
- 507) The applicant could not have anticipated at which time the respondent would lift the suspension that it had ordered on 27 July 2011 or the subsequent change of design. Therefore, the time required to procure an alternative earthworks subcontractor was a delay arising from the superintendent's breach.
- 508) The applicant claimed for an extension of time for the delays suffered during the period 22 June 2012 up to 30 August 2012 to the Stage 1 Works, which I accepted above.
- 509) The applicant further claimed an extension of time for delays that it suffered during the period 1 September 2012 to 15 September 2012 because it said it was further delayed by the superintendent's breach. I rejected that claim because the further delay did not arise from the superintendent's breach.
- 510) The applicant further claimed an extension of time for delays that it suffered during the period 1 September 2012 to 15 September 2012 because it said it was further delayed by the superintendent's breach. I rejected that claim because the further delay did not arise from the superintendent's breach.
- 511) The applicant further claimed an extension of time for delays on 30 September 2012, 1 October 2012, 9 November 2012, 9 December 2012 and 17 December

2012 because the superintendent's direction to suspend the Works during the period 21 July 2011 to 23 May 2012 and the subsequent design change that was instructed on 21 June 2012 caused the further delays on 30 September 2012, 1 October 2012, 9 November 2012, 9 December 2012 and 17 December 2012. I accepted that claim because the further delays arose from the superintendent's breach.

- 512) The applicant further claimed an extension of time for delays that it suffered during the period 19 December 2012 to 7 January 2013 because it said it was further delayed by the superintendent's breach. I rejected that claim because the further delay did not arise from the superintendent's breach.
- 513) The applicant further claimed an extension of time for delays that it suffered during the period 11 February 2013 to 30 April 2013 because it said it was further delayed by the superintendent's breach. I rejected that claim because the further delay did not arise from the superintendent's breach.
- 514) The applicant further claimed an extension of time from 2 July 2013 to 15 December 2013 due to delays arising from groundwater and inappropriate bedding design.
- 515) The applicant has further claimed an extension of time I have also not been provided any claims of extension of time for the Stage 2A works that could have affected the Date for Practical Completion.

The respondent's obligation to grant an extension of time

- 516) I refer to the analysis of the respondent's obligation to grant an extension of time at above paragraphs 105) to 114) as it is relevant to this point.
- 517) In these circumstances, the superintendent had an obligation to grant an extension of time because the further delay claimed by the applicant arose from the respondent's breach.
- 518) As I have determined that the applicant was entitled to claim an extension of time, I will not consider this point any further.

Determination

- 519) Based on the above claims and my determination that the applicant is entitled to 84 of the 167 days extension of time claimed. **The Date for Practical should have been extended to 20 September 2013.**
- 520) In this context, I do not see that the applicant was entitled to claim an extension of time for the delays it suffered due to its failure to construct parts of the Works in accordance with the Contract or to the associated costs during the period 2 July 2013 to 15 December 2013. It was, however, entitled to an extension of time that arose from the superintendent's and respondent's acts or omissions.

- 521) For the same reasons, the applicant was entitled to costs that arose from the superintendent's and respondent's acts or omissions.

Item 39 – Cost claim 10 – Consequential Delay: 2013 Wet Season Delays

- 522) On 3 March 2014, the applicant sent to the respondent its payment claim. The amount claimed was set out in a spreadsheet that described the work performed on the basis of the schedule of rates that forms a part of the Contract and it included other items referred to as '*variations/further costs*'. The applicant also attached notices that it had previously sent to the superintendent in support of its payment claims.
- 523) Relevant to Item 39 Cost claim 10 set out in the payment claim were the following notices previously sent to the respondent:
- a) On 27 February 2014, the applicant sent a notice to the respondent entitled; '*Notice of Delay/Suspension Costs No. 10: Consequential Delay: Wet Season Delays*'.
 - i) The notice indicated a delay period of 21 days that the applicant claims to have suffered during the period 16 December 2013 to 5 January 2014 because the respondent's direction to suspend the Works during the period 21 July 2011 to 23 May 2012 and other delays for which the respondent was liable caused a further delay during the period 16 December 2013 to 5 January 2014.
 - ii) The notice claimed extra costs arising from the respondent's delay in the amount of \$345,664.00 incl. GST in the payment claim.
 - b) The above notice dated 27 February 2014 was based on the applicant's the claim for extension of time entitled; '*Notice of Claim for an extension of time for Practical Completion of the Works (in accordance with clause 35.4)*', which was sent to the respondent and dated 20 February 2014 (EOT Claim).
 - i) The EOT claim referred to 12 previous notices of delay that were sent to the respondent during the period 22 December 2010 to 19 February 2014, provided a program showing the effects of those delays and claimed an extension of time to 6 February 2014 accordingly.
- 524) The respondent determined that the applicant is entitled to \$NIL for Item 39 Cost claim 10, which it certified accordingly in its payment certificate entitled; '*Superintendent's assessment of Progress Claim 37 dated 3 March 2014 & Notice of Dispute*' dated 17 March 2014 in response to the payment claim (Payment Certificate).

The respondent's reasons for withholding payment

- c) In the Payment Certificate, the superintendent provided its reasons for withholding payment. The Payment Certificate referred to a letter

entitled; 'Response to the Contractor's Notice of Claim for Extension of Time to the Date for Practical Completion dated 20 February 2014' dated 17 March 2014 (Letter 3) that was attached to the Payment Certificate.

d) At paragraph 11.5 of Letter 3, the superintendent states;

'The Superintendent's previous reasons for rejecting the Contractor's claims, which are also relied upon in this assessment, are as follows:

(a) any claim by the Contractor for extension of time relating to the delay in access was required, by clause 35.4 to be notified to the Superintendent no later than 20 June 2012 and the Superintendent found the Contractor's claim was out of time pursuant to sub-clause 35.4 (Reason 1)' [Emphasis added]

(b) ...the Contractor's slow progress in completing the Works were such that any delay by the Principal in providing access to the [site] had no delaying effect on the progress of the Contract Works (Reason 2);

(c) the design changes to the [omitted] (Stage 1) [works] did not result in any delay to the Works achieving Practical Completion by the Date for Practical Completion or at all and notes that the Contractor had sufficient works to carry out in undertaking the ground works and construction of the concrete panels for [the works], which was not affected by the design changes; and (Reason 3)

(d) any delay, and to the extent of the delay, occasioned by this event arose no later than 21 June 2012 when the Contractor was fully apprised of the design changes and, as such, any claim for extension of time based on this event is out of time pursuant to sub-clause 35.4.

e) In Letter 3, the respondent relied on the time bar set out in clause 35.4 and the assertion that the respondent's instruction did not cause any delay to the works achieving completion by the Date for Practical.

f) At paragraph 11.8 of Letter 3, the respondent asserted;

'...the Contractor's own acts, omissions and delays and failings in the performance of the Works has been the cause of the Contractor failure to progress the Works in a timely manner and to achieve practical completion.' (Reason 4)

525) The Payment Certificate referred to a further letter dated 17 March 2014 (Letter 15) entitled; *'Response to Notice of Delay Costs No. 10 dated 27 February 2014'* that was attached to the Payment Certificate.

526) Letter 15 provided additional reasons for withholding money as follows.

'The superintendent rejects the whole of the claim the subject of the

*Contractors Notice of Delay Costs No. 10 dated 27 February 2014 (Claim).
The reasons for rejection of the Claim are set as follows.*

First, the Contractor has not complied with the requirements of clause 48 of the General Conditions of Contract...(Reason 5)

Second, to the extent that the Contractor relies on clause 35.4...the Contractor has no entitlement because no extension of time has been granted in respect of the matters the subject of the Contractor's claim and the Contractor is not entitled to an extension of time in the amount claimed or at all...(Reason 6)

Third, in respect of the individual heads of quantum claimed, the Superintendent rejects the quantum assessment [and sets out further reasons]'. (Reason 7)

Background

- 527) On 27 July 2011, the Superintendent issued a notice of suspension pursuant to clause 34.2(a) of the General Conditions that stated;

'In accordance with clause 34.2(a) of the General Conditions of Contract, work on site for Stage 1 is suspended due to an omission of the Principal.

The suspension of the work for Stage 1 [site/project description omitted] is required until a lease agreement is negotiated between [the respondent] and the land owners. This suspension will apply until further advised by the Superintendent.'

- 528) On 23 May 2012, the superintendent's representative sent an email to the applicant that stated:

'Good news, we have the OK to access the [site] at last. As discussed earlier we will be changing the scope as below:

[6 design changes were identified]

I will issue some revised drawings and raise the appropriate variation by the end of the week.

In the mean time it would be possible to commence on the manufacture of the concrete panels for the [works] and commence on the associated earthworks.'

- 529) At clause 12.2.1 of the EOT Claim, the applicant stated:

'As a result of the above described Principal caused delays:

12.2.1.1 the delay in the commencement and execution of the critical Stage 1 Works...'

12.2.1.2 ...

12.2.1.3 *the delay caused by the critical Stage 1 Works; and*

12.2.1.4 *the consequential delays the result of the suspension...*

12.2.1.5 *earlier non-neutral inclement weather (5 days) incurred as a consequence of preceding delays, listed above; and*

12.2.1.6 *the consequential delay associated with 2012 Christmas period;*

12.2.1.7 *the Wet Season delay caused to the [omitted] area; and*

12.2.1.8 *the delay in the Rectification Works to [particular works] caused by the Superintendent's direction to use inappropriate bedding material for the ground water conditions encountered,*

the Works have been significantly prolonged and have encountered the 2013 Christmas period, when the site shuts down for the Christmas break.'

530) At clause 12.2.2 of the EOT Claim, the applicant stated:

'The cumulative effect of the above listed preceding delays was that the Contractor's works was pushed into the 2013 Christmas period, which was never intended or allowed by the Contractor...'

The applicant's right to claim an extension of time

531) The applicant argues that the cumulative effect of all the abovementioned delays caused the applicant to remain on site to complete the Works up to 16 December 2013, at which point it elected to suspend the Works through the 2013 Christmas period. It argues that the work was suspended because that was *'common practice in the construction industry'*.

532) I do not see anything in the Contract that states that the Christmas period is a delay for which the applicant is entitled to claim an extension of time.

533) It was open for the applicant to request the superintendent to permit a suspension of the works under clause 42.3 of the Contract for the duration of the 2013 Christmas period.

534) The applicant has not provided me any evidence that it requested a suspension.

535) It appears that the applicant first made a claim for an extension for time for the 2013 Christmas period on 20 February 2013, which was 66 days after the commencement of the Christmas period delay and the time that the applicant suspended the Works.

536) I refer to my analysis of the applicant's rights to claim an extension of time at

above paragraphs 98) to 104). By the operation of clauses 34.5 and 48 of the General Conditions, the applicant is not entitled to claim an extension of time for the period 27 July 2011 to 23 May 2012 set out in its notice dated 20 February 2014.

- 537) As the applicant is not entitled to this extension of time, it follows that it is not entitled to payment of the costs claimed associated with this claim.

Item 40 – Cost claim 11 – Consequential Delay: Survey of Rectification Work and 2014 Wet Season

- 538) On 3 March 2014, the applicant sent to the respondent its payment claim. The amount claimed was set out in a spreadsheet that described the work performed on the basis of the schedule of rates that forms a part of the Contract and it included other items referred to as '*variations/further costs*'. The applicant also attached notices that it had previously sent to the superintendent in support of its payment claims.
- 539) Relevant to Item 40 Cost claim 11 set out in the payment claim were the following notices previously sent to the respondent:
- a) On 27 February 2014, the applicant sent a notice to the respondent entitled; '*Notice of Delay Costs No. 11: Consequential Delay: Survey of Rectification Work and 2014 Wet Season*'.
 - i) The notice indicated a delay period of 17 days that the applicant claims to have suffered during the period 6 January 2014 to 29 January 2014 because the respondent failed to give timely approval of the rectification work following a CCTV survey of those works.
 - ii) The notice claimed extra costs arising from the respondent's delay in the amount of \$302,549.90 incl. GST in the payment claim.
 - b) The above notice dated 27 February 2014 was based on the applicant's the claim for extension of time entitled; '*Notice of Claim for an extension of time for Practical Completion of the Works (in accordance with clause 35.4)*', which was sent to the respondent and dated 20 February 2014 (EOT Claim).
 - i) The EOT claim referred to 12 previous notices of delay that were sent to the respondent during the period 22 December 2010 to 19 February 2014, provided a program showing the effects of those delays and claimed an extension of time to 6 February 2014 accordingly.
- 540) The respondent determined that the applicant is entitled to \$NIL for Item 40 Cost claim 11, which it certified accordingly in its payment certificate entitled; '*Superintendent's assessment of Progress Claim 37 dated 3 March 2014 & Notice of Dispute*' dated 17 March 2014 in response to the payment claim (Payment Certificate).

The respondent's reasons for withholding payment

541) In the Payment Certificate, the superintendent provided its reasons for withholding payment. The Payment Certificate referred to a letter entitled: 'Response to the Contractor's Notice of Claim for Extension of Time to the Date for Practical Completion dated 20 February 2014' dated 17 March 2014 (Letter 3) that was attached to the Payment Certificate.

a) At paragraph 12.9 of Letter 3, the superintendent states;

'The Superintendent's previous reasons for rejecting the Contractor's claims are as follows:

(a) the Superintendent found that the works described by the Contractor, and upon which the extension of time claim was based, are included in the Scope of Works for the Contract at Clause 18 – [works] Construction (Reason 1)' [Emphasis added]

(b) The Superintendent agreed that sub-clause 18.13.2 did not include excavation, backfilling, compaction and reinstatement works associated with [plumbing works]; however, sub-clause 18.13.3 of the Contract specifically did include these works (Reason 2).

(c) Sub-clause 18.13.3, "Decommissioning [existing infrastructure] and [commissioning of new works]", states:

Include price for [omitted] decommissioning activities, [and construction and commissioning works].

Include costs to verify location of all septic tanks and sanitary drainage.

[emphasis added]

(d) the Superintendent rejected the Contractor's assertion that sub-clause 18.13.3 did not include excavation, backfilling and compaction associated with [certain plumbing works], [details of reasoning omitted]. (Reason 3).

...

b) In Letter 3, the respondent relied on its interpretation of the work that the applicant was to perform pursuant to sub-clause 18.13.3 and rejected the applicant's claim accordingly payment claim accordingly.

Background

542) At clause 13.2 of the EOT Claim, the applicant stated:

'13.2.2 Surface Reinstatement works ([omitted] Area) is a critical activity that could not be commenced until completion of the preceding critical activity of Rectification Works ([area details omitted]). The scope of the Contractor's works in respect of the works includes a 'hold point' inspection of the works being directed by the Superintendent, by way of the Contractor providing a CCTV survey of the [works] to the Superintendent for approval.

13.2.3 The CCTV survey was provided to the Superintendent on 15 December 2013. The Contractor is still awaiting Superintendent's approval of the surveyed [works].

13.2.4 The Superintendent communicated no decision whatsoever in relation to the approval until a site meeting on 30 January 2014. At that meeting the Superintendent advised, contrary to what had been agreed between the Superintendent and the Contractor prior to the Contractor embarking on the CCTV survey, that the Superintendent is now intended to carry out its own survey of the [works]...

...

13.2.7 This further delay has had the consequential effect of pushing the surface reinstatement works into the 2014 wet season effectively stopping any further work until after the wet season.

543) Clause 18.3 of the specification that forms a part of the Contract states:

'Notice of Stages of Work – Witness Point – Hold Point

Witness Point: Give not less than 24 hours notice to the Superintendent before commencing any of the above stages of the work under the Contract covered by this Section of the Specification.

[work details omitted]

Hold Point: Obtain the Superintendent's approval before commencing any of the above stages of work under the Contract.

544) At paragraph 12.6 of Letter 3, the superintendent states:

'The Superintendent does not accept that the scope of work with regard to "[work details omitted]" has increased as claimed by the Contractor.'

545) At paragraph 12.4 of Letter 3, the superintendent states:

'Any delay resulting from rectification works is a delay wholly occasioned

by the Contractor and not one for which an EOT should be granted.

- 546) The applicant's claim for an extension of time arises from the superintendent's delay in providing its approval or rejection of the inspection of [works] that was carried out by the use of CCTV.
- 547) There is nothing in the Contract that states the time within which the superintendent must provide its approval or rejection of any test of work that is subject to a hold point as defined in the specification.
- 548) For the reasons stated above it is necessary to rely on an implied term, which is that the superintendent should have given its approval or rejection of the CCTV inspection of the [works] within a reasonable time. I determine that a reasonable time in these circumstances is 7 days.
- 549) This contract does not envisage any shutdown period of the Christmas period.
- 550) Accordingly, the superintendent should have accepted or rejected the CCTV inspection of the [works] by 22 December 2013.
- 551) Nowhere in the Payment Certificate has the respondent provided its reasons for not providing its approval or rejection of the CCTV inspection of the [works] in a timely manner.

The applicant's right to claim an extension of time

- 552) The applicant argues that it suffered delays due to the superintendent's failure to provide an approval or rejection of the CCTV inspection of the [works] in a timely manner. I determined above that the superintendent should have provided its acceptance or rejection of the CCTV inspection by 22 December 2013.
- 553) The applicant has not provided me any evidence that it requested an extension of time within 28 days of the breach, which was the superintendent's failure to provide an approval or rejection.
- 554) It appears that the applicant first made a claim for an extension for time for the delay arising from the superintendent's failure on 20 February 2014.
- 555) I refer to my analysis of the applicant's rights to claim an extension of time at above paragraphs 98) to 104). By the operation of clauses 34.5 and 48 of the General Conditions, the applicant is not entitled to claim an extension of time for the period 6 January 2014 to 29 January 2014 set out in its notice dated 20 February 2014.

The respondent's obligation to grant an extension of time

- 556) I refer to the analysis of the respondent's obligation to grant an extension of time at above paragraphs 105) to 114) as it is relevant to this point.
- 557) The CCTV survey was provided to the Superintendent on 15 December 2013.
- 558) The superintendent caused a delay to the works by failing to provide timely approval or rejection of the CCTV inspection of the [works] by 22 December 2013.
- 559) In these circumstances, the superintendent had an obligation to grant an extension of time because the further delay claimed by the applicant arose from the respondent's breach.

Determination of the respondent's Reasons 1, 2 & 3 for withholding payment

- 560) This claim relates to the superintendents failure to provide an approval or rejection of the CCTV results in a timely manner. It has nothing to do with the scope of works. Accordingly, Reasons 1, 2 and 3 are irrelevant for the purposes of determining this claim.
- 561) The respondent's Reasons 1, 2 and 3 do not respond to the applicant's claim that the superintendent did not provide its approval or rejection of the CCTV inspection of the [works] in a timely manner. Accordingly, I reject the respondent's reasons for withholding payment.
- 562) As the respondent has not provide any rejection of the applicant's extension of time or costs claims, I determine that the applicant is entitled to the claimed extension of time and associated costs.

Determination of extension of time

- 563) On 23 May 2012, the respondent notified the applicant that the suspension to the Stage 1 Works had been lifted in the following terms:

'Good news, we have the OK to access the [site] at last. As discussed earlier we will be changing the scope as below:

[6 design changes were identified]

I will issue some revised drawings and raise the appropriate variation by the end of the week. [Emphasis added]

- 564) Clause 35.4 sets out the applicant's entitlements to extension of time as follows:

'...Where the Contractor is delayed in the execution of the Works by any cause arising out of any breach of the provisions of the Contract or out of any other act or omission on the part of the Principal, the Superintendent or the employees, professional consultants or agents of the Principal or by

any other cause (except a cause arising out of any breach of the provisions of the Contract or any other act or omission on his own part or on the part of his employees, agents or sub-contractors or their employees or agents) which he considers to be such as to justify an extension of the time fixed by the Contract for Practical Completion of the Works, the Contractor shall, if he desires to claim an extension of time for Practical Completion of the Works, give to the Superintendent not later than twenty eight days after the cause of delay arose notice in writing of his claim for an extension of time for Practical Completion of the Works, together with a statement of the facts on which he bases his claim.

- 565) The delay arose from the superintendent's instruction to suspend the Stage 1 Works on 27 July 2011.
- 566) In addition to instructing the suspension on 27 July 2011, clause 34.2(a) required the superintendent to specify the period of suspension. Specifically, clause 34.2(a) states:

'...the Superintendent shall order the Contractor to suspend the progress of the whole or any part of the work under the Contract specified in the order for such time or times as the Superintendent may think fit.

[Emphasis added]

- 567) The respondent failed to give the applicant notice of the period of suspension, which was a breach of clause 34.2(a) of the Contract. The superintendent rectified the breach by providing its notice to lift the suspension on 23 May 2012.
- 568) The applicant claimed for an extension of time from 21 April 2011 to 23 May 2012, which I accepted above.
- 569) A further delay commenced when the superintendent notified the design change to the Stage 1 Works by way of its email dated 23 May 2012.
- 570) In its letter dated 24 October 2013, the superintendent stated:

'By letter dated 21 June 2012, the Superintendent informed the Contractor of the final design changes and provided copies of the relevant drawings.'

- 571) Accordingly, the delay caused by the respondent's change of design to the Stage 1 Works ceased on 21 June 2012.
- 572) The applicant claimed for an extension of time from 24 May 2012 to 21 June 2012, which I accepted above.
- 573) Clause 34.5 makes it clear that the applicant is entitled to claim an extension of time for all delays '*...arising out of any breach of the provisions of the Contract*' that affects the Date for Practical Completion.

- 574) The applicant could not have anticipated at which time the respondent would lift the suspension that it had ordered on 27 July 2011 or the subsequent change of design. Therefore, the time required to procure an alternative earthworks subcontractor was a delay arising from the superintendent's breach.
- 575) The applicant claimed for an extension of time for the delays suffered during the period 22 June 2012 up to 30 August 2012 to the Stage 1 Works, which I accepted above.
- 576) The applicant further claimed an extension of time for delays that it suffered during the period 1 September 2012 to 15 September 2012 because it said it was further delayed by the superintendent's breach. I rejected that claim because the further delay did not arise from the superintendent's breach.
- 577) The applicant further claimed an extension of time for delays that it suffered during the period 1 September 2012 to 15 September 2012 because it said it was further delayed by the superintendent's breach. I rejected that claim because the further delay did not arise from the superintendent's breach.
- 578) The applicant further claimed an extension of time for delays on 30 September 2012, 1 October 2012, 9 November 2012, 9 December 2012 and 17 December 2012 because the superintendent's direction to suspend the Works during the period 21 July 2011 to 23 May 2012 and the subsequent design change that was instructed on 21 June 2012 caused the further delays on 30 September 2012, 1 October 2012, 9 November 2012, 9 December 2012 and 17 December 2012. I accepted that claim because the further delays arose from the superintendent's breach.
- 579) The applicant further claimed an extension of time for delays that it suffered during the period 19 December 2012 to 7 January 2013 because it said it was further delayed by the superintendent's breach. I rejected that claim because the further delay did not arise from the superintendent's breach.
- 580) The applicant further claimed an extension of time for delays that it suffered during the period 11 February 2013 to 30 April 2013 because it said it was further delayed by the superintendent's breach. I rejected that claim because the further delay did not arise from the superintendent's or respondent's breach.
- 581) The applicant further claimed an extension of time from 2 July 2013 to 15 December 2013 due to delays arising from groundwater and inappropriate bedding design. I determined that the applicant was only entitled to 84 days of the 167 days extension of time claimed.
- 582) The applicant further claimed an extension of time for the Christmas shutdown period from 16 December 2013 to 5 January 2013. I rejected that claim because the applicant has no entitlement under the Contract to suspend the works over any Christmas period and claim an extension of time.

- 583) The applicant claimed an extension of time from 6 January 2014 to 29 January 2014 for the reason that the superintendent caused a delay to the works by failing to provide timely approval or rejection of the CCTV inspection of the [works]. I accepted that claim for the above stated reasons.
- 584) I have also not been provided any claims of extension of time for the Stage 2A works that could have affected the Date for Practical Completion.

The respondent's obligation to grant an extension of time

- 585) I refer to the analysis of the respondent's obligation to grant an extension of time at above paragraphs 105) to 114) as it is relevant to this point.
- 586) In these circumstances, the superintendent had an obligation to grant an extension of time because the further delay claimed by the applicant arose from the respondent's breach.
- 587) As I have determined that the applicant was entitled to claim an extension of time, I will not consider this point any further.

Determination

- 588) Based on the above claims and my determination that the applicant is entitled to 39 days extension of time, **the superintendent should have extended the Date for Practical Completion to 29 October 2013.**
- 589) For the same reasons, the applicant was entitled to costs that arose from the superintendent's and respondent's acts or omissions.

Items 27, 28, 29 – Removal of “Unsuitable Material” and Replace with River Run to Subgrade of Trenches to [works]

- 590) On 3 March 2014, the applicant sent to the respondent its payment claim. The amount claimed was set out in a spreadsheet that described the work performed on the basis of the schedule of rates that forms a part of the Contract and it included other items referred to as ‘*variations/further costs*’. The applicant also attached notices that it had previously sent to the superintendent in support of its payment claims.
- 591) Relevant to the claims for Items 27, 28, 29 set out in the payment claim were the following notices previously sent to the respondent:
- a) On 28 February 2014, the applicant sent a notice of claim to the respondent entitled; ‘*Removal of “Unsuitable Material” and replace with River Run to Subgrade of Trenches to [works]”*’.
- i) The notice of claim indicated the work was to excavate and replace with river run gravel trenches in which the [works were] constructed (Unsuitable Material Work)
- ii) The notice of claim was for claimed extra costs arising from the Unsuitable Material Work in the amount of \$710,054.40 incl. GST. I note that the total amount of Items 27, 28 & 29 set out in the payment claim was \$710,055.00 incl. GST.
- 592) The respondent determined that the applicant is entitled to \$NIL for Item 39 Cost claim 10, which it certified accordingly in its payment certificate entitled; ‘Superintendent’s assessment of Progress Claim 37 dated 3 March 2014 & Notice of Dispute’ dated 17 March 2014 in response to the payment claim (Payment Certificate).

The respondent’s reasons for withholding payment

- a) In the Payment Certificate, the superintendent provided its reasons for withholding payment. The Payment Certificate referred to a letter entitled; ‘Response in relation to claim for costs of removal of ‘unsuitable material’ and replace with river run to subgrade of trenches to [works]’ (Letter 5) that was attached to the Payment Certificate.
- b) In Letter 5, the respondent stated:

The Superintendent rejects the claim in its entirety for the following reasons:

First, the Contractor has not complied with the requirements of clause 48 (Reason 1) of the General Conditions of Contract with the result that the Principal is not liable upon the claim. The Contractor became aware of this issue in 2011. As a result, the Superintendent notes that the Contractor’s

claim in relation to this issue, either by the Claim or by the earlier Notice of Intention to Claim Additional Costs dated 10 May 2013, is out of time pursuant to Clause 48 of the General Condition of Contract.

Secondly, the Contractor has not provided evidence that unsuitable material existed. (Reason 2)

Thirdly, if unsuitable material existed:

(a) *the Contractor failed to comply with the requirements of sub-clause 12.4.7 of the Contractor's Scope of Works "Unsuitable Trench Foundation - Hold Point".(Reason 3)*

(b) *The Contractor's Scope of Works, at sub-clause 12.4.5 "Diverting Water and Dewatering", states that it is the Contractor's responsibility to:*

Keep trenches free of water at all times, Keep excavations dry by diverting water or dewatering, and Carry out all works and provide all equipment necessary to achieve this.

The Superintendent finds that any unsuitable material (if it existed) was caused by the Contractor's failure to comply with its obligations under sub-clause 12.4.5 to dewater trenches and keep excavations dry and, as such, the Superintendent does not accept the Contractor's reasons support a claim for additional costs. (Reason 4)

(c) *The Superintendent finds that a further cause of any unsuitable material (if it existed) was that the Contractor failed to properly control the level of excavation and this resulted in over-excavation which may have also resulted in unsuitable material. (Reason 5)*

Fourthly, the Contractor's argument at paragraph 4.5 of the Claim that the work be considered as a variation is rejected on the basis that the process prescribed under clause 40.1 of the General Conditions was not followed and, specifically, no order for a variation was made by the Superintendent. (Reason 6)

Fifthly, the Superintendent does not accept the quantification of the Contractor's claim. The Contractor has failed to provide the Superintendent with:

(a) *accurate survey information showing the base level of the trenches prior to placement of the material; (Reason 7)*

(b) *accurate survey information showing the lengths of each section*

of trench where the material was used; and (Reason 8)

- (c) details of the actual resources and equipment used in each instance where it is claimed that unsuitable material was encountered; and (Reason 9)*
- (d) proper substantiation of the disruption cost claimed. (Reason 10)*

Background

593) During the course of constructing [particular works], the Contractor claims to have encountered "unsuitable material" below the trench floor in some of the excavations and the "unsuitable material" was generally associated with deep excavations and in areas where groundwater flow was encountered.

594) In the notice of claim, the applicant stated:

- 3.4. *The Contractor had to remove unsuitable material and replace it with suitable material to achieve the specified task of constructing the [works].*
- 3.5. *The Superintendent was on notice of the unsuitability of material and that the Contractor was required to undertake greater quantities of excavation and re- excavation to remove unsuitable material than estimated in the Principal's tender information, and had to source and supply appropriate bedding material, namely River run to be able to bed the [certain infrastructure] for [the works]. The Superintendent did not Issue any direction or do anything to Inform [the applicant] that its execution of this activity was inappropriate or that there was any alternative, given the inadequate character of the existing material encountered in the base of the excavated trenches.*
- 3.7 *The excavation specification at section 1.4.7 [12.4.7] calls for Type 2 embedment material, as the replacement material where unsuitable is encountered.*
- 4.2 *The Contractor is entitled to be paid under the Schedule of Rates for the volume of material excavated for the [works]. The fact that the volume increased from the [quantity] estimated by the Principal at time of tender, including because there was the need for over excavation to undertake the removal and replacement of unsuitable material, is not a variation, it is simply for the Contractor to identify the additional quantity. [The applicant] will make the claim for additional quantities of excavation executed in the normal course of its payment claims. The extent of unsuitable material as may be encountered is why the Principal presumably determined upon a schedule for rates contract in the first instance.*

4.5 ... The Superintendent expressly accepted the variation methodology that [the applicant] used to address the unsuitable material and including the use of the River run material In lieu of Importing Type 2 material from Katherine.

The applicant's right to claim payment for the removal of unsuitable material and replacing it with river run material

595) The respondent points out that the applicant first notified the respondent of its intention to claim on 10 May 2013 and that the applicant became aware of the "unsuitable material" in 2011.

596) The applicant has not provided me any evidence that indicates that it submitted a claim in accordance with clause 34.5 or clause 48 of the Contract.

597) Accordingly, I accept the respondent's Reason 1 for rejecting the claim.

598) The respondent further asserts that the applicant did not provide to the respondent evidence of the unsuitable material and the applicant has not provided me any evidence that it discussed the unsuitable material issue with the superintendent and agreed any construction methodology.

599) At paragraph 67 of the sworn statement of [KM], he states;

'...I do not recall observing [the applicant] ever returning to carry excavation of unsuitable material'.

600) Accordingly, I accept the respondent's Reason 2 for rejecting the claim.

601) The respondent asserts that the applicant failed to comply with the requirements of clause 12.4.7 of the specification that forms a part of the contract.

602) Clause 12.4.7 states;

Where, in the opinion of the Superintendent, the material in the bottom of the trench does not form a suitable foundation for the [works], remove additional material as directed.

When the additional excavation has been inspected and passed, fill to the required level with approved Type 2 embedment material compacted with a minimum of four passes of a vibrating compactor to at least 70% density index.

If the trench foundation is unsuitable solely because of excess water, pump it clear and allow to dry before placement of bedding material.

Hold Point: If a trench foundation is prepared and approved and the pipes are not immediately laid, then when the pipe laying proceeds reinstate the trench base to a condition suitable for bedding construction providing all

plant, labour and materials at no cost, and obtain approval prior to [undertaking works].

- 603) Clause 12.4.7 makes it clear that the superintendent must decide whether to replace unsuitable material. If the superintendent directed such work, that would have then entitled the applicant to claim payment for carrying out a variation.
- 604) The applicant was not entitled to elect to replace any material regardless that it may have in good faith considered that material unsuitable without the express direction of the superintendent.
- 605) Accordingly, I accept the respondent's Reason 3 for rejecting the claim.
- 606) The respondent asserts that the applicant did not follow the processes set out in clause 40.1 of the Contract. Clause 40.1 states;

If, at any time during the progress of the work under the Contract, the Superintendent determines that the form, quality or quantity of the work under the Contract should be varied, the Superintendent may order the Contractor to do all or any one or more of the following things -

(a) increase, decrease or omit any part of the work under the Contract;

(b) change the character or quality of any material or work;

(c) change the levels, lines, positions or dimensions of any part of the work under the Contract;

(d) execute additional work.

No variation shall be made by the Contractor without an order by the Superintendent.

- 607) Clause 40.1 clearly requires the superintendent to instruct any variation that is to be carried out. The applicant has no entitlement to claim payment for work that it may have carried out that was not work under the Contract or work to be performed under an instruction given by the superintendent.
- 608) Accordingly, I accept the respondent's Reason 6 for rejecting the claim.

Determination

- 609) I do not accept any of the applicant's arguments in relation to the unsuitable material as it has not provided me any evidence that the superintendent instructed the variation in any way. Similarly, there is nothing in the Contract that entitles the applicant to unilaterally carry out such work and accrue an automatic entitlement to payment.
- 610) Accordingly, I determine that the applicant is not entitled to claim payment for the removal of unsuitable material.
- 611) For the above stated reasons, the applicant was not entitled to over excavate to remove material that it considered unsuitable regardless that it may have acted in good faith.
- 612) The applicant was required to construct the [works] in accordance with the specification and drawings provided by the respondent under the Contract. It was then required to measure the depths actually excavated in accordance with the specification and the drawings and claim payment in accordance with the schedule of rates. Accordingly, the applicant is not entitled to payment for any excavation it may have carried out that was additional to that stated in the specifications and drawings.
- 613) The applicant would only have become entitled to payment for excavating more material than that stated in the specification and the drawings if the superintendent had instructed it to do so pursuant to clause 40.1.

Item 26 – Minor Variation Item from April 2013

- 614) The applicant provided no explanation of Item 26 claim for variation –'minor variation item from April 2013' in the amount of \$6,477.38 in its payment claim nor did it provide any submission relating to Item 26 in its application for adjudication.
- 615) In the Payment Certificate, the respondent determined that the applicant is entitled to \$NIL and the respondent further pointed out that the superintendent had, by way of a letter dated 14 April 2013, previously determined that the applicant is entitled to \$NIL in relation to the same claim.
- 616) Accordingly, I am persuaded by the respondent's reasons set out in the Payment Certificate and the reasons provided in the superintendent's letter dated 14 April 2013 and I determine that the applicant is not entitled to any further payment in relation to Item 26.

Determination of the Date for Practical Completion

617) For the reasons stated above, the Date for Practical Completion should have been adjusted to 29 October 2014.

618) In the respondent's submissions, the respondent provided me a letter that the superintendent sent to the applicant on 16 May 2014 that stated:

'The Superintendent grants an extension of time for Practical Completion of the Works of 106 days, for the period between 30 January 2014 until today [16 May 2014] on the basis of the effect of the wet season.

For the reasons stated in previous correspondence the Superintendent does not accept that the works have been pushed into the 2014 wet season as a result of any acts omissions of either the Principal or the Superintendent. For the reasons addressed in this letter the Superintendent does not accept there has been any delay caused by the [omitted] testing of [work details omitted] and, as such, the Extension of Time is granted without costs.

In the circumstances, the Superintendent calculates that the Extended Date for Practical Completion to now be 9 March 2012.'

619) I will accordingly apply the superintendent's further grant of extension of time of 106 days (without costs) to calculate the liquidated damages that the respondent is entitled to deduct.

620) **I, therefore, determine that the adjusted Date for Practical Completion is 12 February 2014.**

Determination of the applicant's delay costs claims and other claims

- 621) The respondent asserts that the applicant's delay costs are not the extra over costs to which it was entitled under clause 34.5 of the Contract.
- 622) I agree that the applicant was only entitled to the cost arising from the delays for which the respondent was liable.
- 623) I will consider the applicant's cost build up and each of the respondent's reasons for asserting that the applicant has claimed more than that to which it was entitled by the operation of clause 34.5.

Additional cost of site tools, plant and equipment resources

- 624) The respondent argues that the applicant's management and supervisory personnel performed work during the claimed period of delay. The costs claimed are costs that the applicant would have incurred in any event and are not extra costs attributable to the respondent caused delays.
- 625) It is clear that the delayed works required some management and supervisory resources. If the respondent had given the applicant notice as to the duration of the delay, the respondent may have been able to deploy some of its resources to other projects or made them redundant to mitigate its costs. The respondent never gave the applicant prior notice of the duration of the delays. However, I do not accept that the applicant suffered no additional costs management and supervisory resources.
- 626) The respondent asserts that the amount claimed was based on the entirety of the Contractor's costs for site management over the life of the project and is not an assessment of extra costs incurred in the relevant period as required under clauses 34.5 or 35.4. I acknowledge that point. The applicant has not helped itself by submitting all costs associated with the Works. I will determine below the costs incurred by the applicant arising from the superintendent's and respondent's acts and omissions.
- 627) The respondent asserts that the applicant has not provided sufficient substantiation of the claimed amounts. I do not accept that argument. There is ample information to determine the costs incurred by the applicant arising from the superintendent's and respondent's acts and omissions.

Additional cost of site tools, plant and equipment resources

- 628) The respondent asserts that the applicant's resources did not remain on site any longer regardless of the delay in access because the Contractor performed other work during the delay period for which the claimed resources were utilised. The cost of the claimed resources are costs which the Contractor would have incurred in any event and are not extra costs that are attributable to the delay in access. I do not accept that argument, because equipment was required to complete the Stage 1 Works that were delayed and that equipment remained on

site longer than it would have but for the delay.

- 629) The respondent implies that the "*internal charge rates*" claimed are not costs for the purposes of calculating the additional costs arising from the delays for which the respondent is liable. The respondent has not, however, provided me any examples of which or to what extent the internal charge rates are excessive.
- 630) The respondent asserts that the claim is based on an average weekly cost and not therefore a statement of the extra cost incurred during the delay as required under clause 34.5 or alternatively clause 35.4 of the General Conditions. I do not accept that a pro-rata weekly rate cannot be applied for the purposes of calculating the applicant's costs given the type of items claimed and the duration of the delay.

Off-site overheads - Head office costs

- 631) The respondent asserts that the applicant's claim is not "extra" costs incurred due to the delay, but is all off-site overheads. The applicant has not helped itself by submitting all costs associated with the Works. I will determine below the costs incurred by the applicant arising from the superintendent's and respondent's acts and omissions as I am required to do under the CCA.
- 632) The respondent asserts that applicant is not entitled off-site overheads because the costs claimed are not 'extra costs' but the '*same costs (or at least a proportion thereof) that it would have incurred regardless of the delay*'. I have responded to the respondent's concern in the above paragraph.
- 633) The respondent asserts that there is no evidence establishing that the claimed costs are attributable to the delay in access, nor is it apparent how the claimed costs could ever been attributable to the alleged delay. I will determine below the costs incurred by the applicant arising from the superintendent's and respondent's acts and omissions as I am required to do under the CCA.
- 634) The respondent argues that in respect of the Contractor's reliance on clause 34.5, the claimed costs cannot be a cost of completing the Work which is attributable to the delay. I agree with that argument.

Fly-In/Fly-Out Costs

- 635) The respondent argues that the applicant performed other work during the delay period for which the claimed resources were utilised. As a consequence, the alleged FIFO costs that are claimed are costs that the Contractor would have incurred in any event and are not extra costs that are attributable to the alleged delay in access or indeed extra costs at all. I have responded to this type of concern above.
- 636) The respondent asserts that the Contractor has not provided sufficient substantiation of the claimed amounts to allow the Superintendent to be satisfied that they reflect costs that have been incurred. I consider there is

ample substantiation and will determine below the costs incurred by the applicant arising from the superintendent's and respondent's acts and omissions as I am required to do under the CCA.

Extra Costs of Indigenous Training

- 637) The respondent asserts that costs claimed are not extra costs of completing the Works that are attributable to the delay. I will determine below the costs incurred by the applicant arising from the superintendent's and respondent's acts and omissions as I am required to do under the CCA.

Additional extra cost of messing and accommodation

- 638) The respondent asserts that the applicant performed other work during the delay period for which the claimed resources were utilised. The costs claimed are costs that the applicant would have incurred in any event and are not extra costs that are attributable to the alleged delay in access.

Finance extra costs

- 639) The respondent argues that finance costs are not an extra cost incurred by the applicant. I do not accept this argument because the respondent derived a benefit from the money that it would otherwise have paid to the applicant during the course of the Contract and, conversely, the applicant incurred the cost of financing the work to the extent that the respondent failed to pay amounts that were due under the Contract.

Determination of the costs incurred by the applicant arising from delays for which the respondent is liable

- 640) The applicant has not helped itself because it failed to provide an account of costs arising from delays for which the respondent is liable. The applicant has claimed all costs associated with the Works during the periods of delay.
- 641) I have reviewed all of the costs claimed and they do not appear to me to be unreasonable. I cannot, however, distinguish which costs relate to the Stage 1 Works and which relate to the Stage 2A works.
- 642) The respondent has not provided any submission about which particular total project costs claimed it considers unreasonable.
- 643) For Cost Claims 1 to 5, 8 and 10, it is undeniable that some overheads were required to carry out the Stage 1A costs;
- a) I have determined that the proportion of the Stage 1A contract value of the total contract value of the Works (but excluding preliminaries) and applied that number (14.98%) to the delay costs claimed to calculate the daily delay costs to which the applicant is entitled.

- b) I then applied the daily delay cost that was determined as described in the above sub-paragraph to the number of days for which I determined above the applicant is entitled;
- c) I have determined that the applicant is entitled to;
 - i) \$232,099.68 incl. GST for Item 30 Cost Claim 1.
 - ii) \$789,135.00 incl. GST for Item 31 Cost Claim 2.
 - iii) \$83,355.65 incl. GST for Item 32 Cost Claim 3.
 - iv) \$201,203.50 incl. GST for Item 33 Cost Claim 4.
 - v) \$0.00 for Item 34 Cost Claim 5.
 - vi) \$21,646.64 incl. GST for Item 35 Cost Claim 6.
 - vii) \$0.00 for Item 36 Cost Claim 7.
 - viii) \$220,312.62 incl. GST for Item 37 Cost Claim 8.
 - ix) \$0.00 for Item 39 Cost Claim 10.

644) For Cost Claim 9, it appears that for 84 days, all the overheads were applied to the rectification of the part of the Works that had failed due to design issues for which the respondent is liable. Accordingly, In relation to the days for which I determined the respondent was liable, the respondent is entitled to all of the costs claimed.

- a) I applied the daily delay cost to the above sub-paragraph to the number of days for which I determined above the applicant is entitled;
- b) I have determined that the applicant is entitled to;
 - i) \$1,735,776.00 incl. GST for Item 38 Cost Claim 9.

645) For Cost Claim 11, I determined that the superintendent should have granted the applicant an extension of time of 39 days. The applicant claimed costs incurred for 17 days. Accordingly, for the purposes of this determination, I determined the applicant is entitled to the costs it claimed.

- a) I applied the daily delay cost to the above sub-paragraph to the number of days for which I determined above the applicant is entitled;
- b) I have determined that the applicant is entitled to;
 - i) \$302,549.00 incl. GST for Item 40 Cost Claim 11.

646) In relation to Items 27, 28, 29 – Removal of “*Unsuitable Material*” and [works details omitted], I determined that the applicant is entitled to \$0.00.

- 647) The applicant advised at paragraph 2.2 of its submissions that all other amounts referred to in the payment claim that remained unpaid did not require adjudication.
- 648) In summary, **the applicant is entitled to payment of \$3, 586,078.89 incl. GST** less liquidated damages that the respondent is entitled to apply.

Determination of the liquidated damages that the respondent is entitled to apply

- 649) For reasons stated above at paragraph 620), **I determined that the Date for Practical Completion is 12 February 2014.**
- 650) The respondent has applied liquidated damages in the amount of \$3,594,192 up to 30 January 2014.
- 651) As the Date for Practical Completion **as at 30 January 2014 should have been 12 February 2014, the respondent was not entitled to apply any liquidated damages.**

THE DETAILS OF THE DETERMINATION

- 652) Pursuant to s 34(1)(a) of the CCA, I have made this determination on the basis of the application and its attachments and the response and its attachments.
- 653) In accordance with the applicant's request that only a certain part of the payment dispute be determined⁴, I have only determined Items 27 to 40 of the payment claim.
- 654) To the extent that a payment dispute may have arisen in relation to other items where the respondent's certified amount was less than that claimed by the applicant, I have taken the applicant's request to mean that it accepted the determination made by the respondent, which is set out in the payment certificate issued under the Contract and dated 17 March 2014.
- 655) Pursuant to s 33(1)(b), I have determined that:
- a) the applicant is entitled to payment of \$3,586,078.89 incl. GST;
 - b) the respondent must pay to the applicant the sum of \$3,586,078.89 incl. GST within 7 days of the issue of this determination;
 - c) the calculation of the amount that the respondent must pay the applicant is set out in **Appendix 1** of this determination.
 - d) in accordance with clause 35(1)(b) of the CCA, I determine that interest is payable on the amount the respondent must pay to the applicant at the rate of 8.5% per annum from 2 April 2014.
- 656) Pursuant to section 36(1) of the CCA, each party shall bear its own costs in relation to this adjudication.
- 657) Pursuant to section 46(5) of the CCA, the costs of the adjudication shall be shared equally by both parties.
- 658) The costs of the adjudication amount to 285.8 hours @ \$305.00 plus GST, which is; \$95,885.90 incl. GST.
- 659) I will issue separate Tax Invoices to each party accordingly.

CONFIDENTIAL INFORMATION

- 660) The parties have not indicated which parts of the information provided to me with their submissions are to be treated as confidential.
- 661) If either party considers any part of their submissions confidential or any part of this determination as confidential, I request that they notify me accordingly within 2 working days of receipt of this determination.

⁴ The applicant has made the parts of the payment dispute that are the subject of the application clear at paragraphs 2.2 of its application submissions.



Signed:

John Tuhtan⁵

Date: 15 August 2014

Accidental slips, material miscalculation and material mistake in the description of a thing were corrected on 28 August 2014 and 1 September 2014.

⁵ Registered Adjudicator Number 35