Adjudication Decision: 58.17.03

Construction Contracts (Security of Payments) Act

Adjudicator : Chris Lenz (58)

Applicant - Claimant

Name **[Redacted]**
ACN
Address

Respondent

Name **[Redacted]**
ACN
Address

Work

Nature of work : **[Redacted]**
Applicant's trade : Engineering, Installation & Maintenance
Location of construction site : **[Redacted]**

Payment claim

Date : 21 July 2017
Due date for payment claim : 4 September 2017
Amount of payment dispute : $666,504.05 (excl GST)

Application detail

Application service date : 23 October 2017
Appointment date : 17 October 2017
Response date : 6 November 2017

Adjudicator's determination

Amount to be paid : **$447,525.34 incl GST**
Due date for payment **: 4 September 2017**
Amount of interest : **$21,628.35**
Claimant's adjudication costs :50%
Respondent's adjudication costs :50%

Determination date **:12 December 2017 (2 week's extension granted)**

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A. DECISION

I have decided under the *Construction Contracts (Security of Payments) Act* ("the Act"), and in respect of the claimant's adjudication application:

- the amount to be paid by the respondent,
- the date upon which the amount is to be paid,
- the amount of interest until this determination, and
- the parties are liable to pay the costs of the adjudication in the proportions,

as shown on the first page of this decision.

B. REASONS

II. Background

1. [*the applicant*] (referred to in this adjudication as the "claimant") was engaged [*by the respondent*] (referred to in this adjudication as the "respondent"), for a [*project*] requiring [*works*] at the [*project site*] (the "work").
2. The work involved [*work details redacted*].
3. There was a written contract C1362-06-CON-005 executed by the parties on 2 March 2017.
4. Payment claim no 5 dated 21 July 2017 for $825,103.71 (excl GST) consisting of a claim under the contract, together with 11 claims for variations, was delivered to the respondent.
5. Payment schedule number C90376, dated 26 July 2017, identified a scheduled amount of $405,002.62 (excl GST) (the "scheduled amount") was payable.
6. The claimant alleged that the respondent has failed/refused to pay the scheduled amount on 4 September 2017.
7. The claimant lodged its adjudication application with RICS (numbered 58.17.03) on 23 October 2017.
8. The respondent lodged its adjudication response on 6 November 2017.
9. On 23 October 2017, the day it lodged its application 58.17.03, the applicant filed another application with RICS (application 58.17.04) for payment claim 6 claiming $819,488.74 (excl GST).
10. In accordance with s34(3)(b) of the Act, the parties consented to me adjudicating both payment disputes together. They had earlier consented to me adjudicating their [*redacted*] disputes [*at another site*] 58.17.01 and 58.17.02 together. These earlier disputes were completed on 29 November 2017 and 30 November 2017 respectively.
11. I requested the Registrar's consent to extend the time to decide both payment claims 5 and 6, and he granted an extension until 13 December 2017 for the determinations.
12. s34(4) of the Act allowed me to consider information or documents received in the other adjudication 58.17.04 in adjudicating each dispute, and I have done so.
13. These earlier disputes (58.17.01 and 58.17.02) covered very similar issues to those in this adjudication 58.17.03 and adjudication 58.17.04, which follows this determination.
14. In this adjudication, as with 58.17.01, the respondent argued that the claimant had waived its rights to recover any part of the credit note that it issued.
15. However, in this adjudication, the respondent did not argue that there was no payment dispute in relation to payment claim 5, which meant that I therefore had no jurisdiction. This was a significant issue to resolve in my 58.17.01 determination.
16. The issues that emerged from an initial review of both parties' material, were as follows:
    (i) whether the claimant had waived its rights to any amount contained within the credit note;
    (ii) whether the claimant's design obligations precluded it from being entitled to some of the variation claims;
    (iii) whether the claimant was entitled to extensions of time ("EOT's");
    (iv) whether the respondent was entitled to set off liquidated damages;
    (v) whether the respondent was entitled to set off the costs of having taken the works out of the hands of the claim

(vi) whether the respondent could claim set off for any amounts that I may have found due under the [other] project, which I also adjudicated.

III. Material provided in the adjudication

Application

17. I received two lever arch folders documents from RICS from the claimant dated 23 October 2017.
18. In the application, the claimant outlined the basis of the payment dispute, and provided 16 annexures supporting its submissions that it had provided in the application.

Response

19. The response comprised two lever arch folders.

IV. Threshold matters

Construction contract and construction work

20. Section 33 of the Act provides that an application must be dismissed if it is not a construction contract. Therefore, it must be a construction contract to be within jurisdiction, so I need to carry out an investigation about this issue.
21. Thereafter, s33(1)(a)(ii) of the Act requires that the application be prepared and served in accordance with s28 of the Act.
22. The claimant provided the contract behind tab 3 of its application, and the respondent, at paragraph 3.1 agreed that this was the contract between the parties.
23. It contained an amended AS4000–1997, which was essentially similar to the contract for the [*other site*].
24. At paragraph 13 of the application submissions, the claimant submitted that the contract:
    (i) was a *construction contract* within the meaning of s5 of the Act, and
    (ii) the work it performed or undertook to perform was *construction work* within s6 of the Act;
    (iii) the goods and services it supplied were *goods and services relating to construction work* within the meaning of s7 of the Act.
25. In the response submissions, the respondent conceded:
    (i) at paragraph 2.6, that the contract was a *construction contract* within s5 of the Act;
    (ii) at paragraph 2.7, that the work was *construction work* within the meaning of s6 of the Act.
26. Accordingly, there is no contest between the parties about this aspect, and I am satisfied that it is a *construction contract* within the meaning of the Act.

Did the application comply with s28 of the Act?

27. s28 of the Act provides several statutory requirements to found jurisdiction in this adjudication. These include:
    (i) a written application [s28(1)(a)];
    (ii) served on the other party[s28(1)(b)];
    (iii) and served on the prescribed appointer [s28(1)(c)(ii)];
    (iv) provide any deposit or security that the adjudicator requires.
28. At paragraph 2.2 of the response submissions, the respondent conceded that the application had been served on it, and made no submissions that the application was not served in accordance with the requirements of the Act.
29. Given that there is no dispute between the parties, I find therefore that these requirements had been complied with.
30. Furthermore, given that I was appointed by RICS, a prescribed appointer, which sent me the application documents, I find that:
    (i) there was a written application to RICS; and
    (ii) that Regulation 6 of the *Construction Contracts (Security of Payment) Regulations* (the "Regulations") which provides that:

(a) the name and contact details of the prescribed appointer;
(b) the applicant's name and contact details;
(c) the name and contact details of the other party to the contract,

was complied with because all these details were on the RICS form.

31. I did not require a deposit, and therefore s28(1)(c)(iv) did not apply.
32. Accordingly, I am satisfied that the application required it to be adjudicated in accordance with my obligations as an adjudicator under the Act, if it involves a *payment dispute*.

V. Is it a payment dispute?

33. At paragraph D of its submissions, in paragraphs 22 and 23, the claimant submitted:
(i) the payment claim had been rejected or wholly or partly disputed in accordance with s8(a)(i) of the Act; and
(ii) the amount claimed in the payment claim and the amount certified the payment schedule had not been paid in full.
34. I am satisfied from the material that:
(iii) A payment claim was made on 21 July 2017 for $825,103.71 (exc GST);
(iv) A payment schedule certifying $405,002.62 (exc GST) was delivered to the claimant, which I accept was on 27 July 2017. I found this payment schedule behind tab 5 of the application, and this is not controverted by the respondent. Furthermore, at paragraph 2.3.3, the respondent stated that its progress certificate dated 27 July 2017 was issued on that date
(v) No payment was made by the respondent on 4 September 2017.
35. Those ingredients were sufficient for a *payment dispute* to have arisen under s8(a)(i) of the Act, because in the payment schedule regarding VO 01 and VO 02, it stated, "*Costs are not accepted by CEA,*" and regarding VO 26it stated "Not approved in this claim, still being assessed…"
36. In addition, the amount of $405,002.62 certified in the payment schedule was not paid on 4 September 2017, which falls within s8(a)(ii) of the Act, as a payment dispute.
37. I am therefore satisfied that there is a *payment dispute* which needs to be adjudicated.
38. I need to expand briefly on the *extent of the payment dispute*, that needs to be adjudicated. I appreciate that the respondent, in paragraph 11 of the response, urged me to consider its counterclaims/set offs, and submitted that I was obliged to do so, citing persuasive authorities.
39. I am adjudicating payment claims 5 and 6 simultaneously, which allows for consideration of the facts in both matters, at the same time.
40. However, as in my previous determination 58.17.01, in my opinion, in my view, there needs to be a distinction made between both matters, in order that the reasoning does not become muddled.
41. The reason why I mention this, so early on in this determination, is that the respondent has claimed identical set offs in both adjudications for liquidated damages and for the cost of the works taken out.
42. At paragraph 11.5 of the response submissions, the respondent submitted that I must consider its defensive claims for liquidated damages and for works taken out, in coming to a decision whether any party is liable to make a payment, and if so, in what amount.
43. It is important to state, that this adjudication is dealing with a payment dispute about payment claim 5. It is not a payment dispute about the respondent's set offs, which means I must only decide *if the claimant is entitled to any payment*.
44. Naturally, any set off amounts may reduce this quantum, but I must qualify the respondent's submission, *whether any party is liable to make a payment, and if so, in what amount*, to the respondent's liability to make a payment to the claimant.
45. It is outside my jurisdiction to find the claimant liable to pay anything to the respondent.
46. This then leads on to another important limitation that I make in this determination, which in my view is required by the objects of the Act.

47. The respondent claims a set off for the works taken out in this adjudication, and I am not prepared to do so in this payment claim for the following reasons:
    (i) In paragraph 7.1.3 of the response, the respondent identified that parts of the work were taken out of the claimant's hands on 4 August 2017 and 25 August 2017. This occurred after this payment claim of dated 21 July 2017, and the payment schedule of 27 July 2017;
    (ii) In paragraph 7.1.5 of the response, the respondent stated that the superintendent, on 6 November 2017, certified liquidated damages and his assessment of work taken out of the claimant's hands. I was unable to find such a certificate. There was a certificate on 6 October 2017 of the superintendent's assessment of work taken out of the claimant's hands, and this is the document that I assume the respondent was referring to;
    (iii) Until 6 October 2017, the respondent was not entitled to set off any amounts for work taken out, as they had not yet been quantified;
    (iv) In my view, from a practical point of view, and to promote the objects of the Act of rapid dispute resolution [s3(2)(b) of the Act], there needs to be a time-frame to put this payment dispute in context;
    (v) When the claimant lodged this claim and after it received the payment schedule, no work had been taken out. Furthermore, quantification of the work taken out only took place on 6 October 2017, which is a month after the respondent was liable to pay the scheduled amount;
    (vi) In the circumstances, and being mindful that the set off for work taken out is also being claimed in determination 58.17.04, I do not consider it appropriate to consider a set off claim, which only ripened on 6 October 2017, to be considered in this payment dispute payment. [I also provide further reasoning on this point under the heading of *SET OFF* below.]
48. I refer to my analysis of the payment dispute in determination 58.17.01, where I had to consider the date on which a payment dispute arose. I had referred to the case of *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd & Anor* [2012] NTSC 22, where His Honour, Barr J held that the due date for payment under the contract with the only date on which a payment dispute may arise.
49. In this context, therefore, the *payment dispute* arose on 4 September 2017, which is a month before the respondent quantified the amount of its works taken out set off claim.
50. In my view, an applicant to an adjudication being entitled by the Objects of the Act, to have a rapid determination of its payment dispute, and it should be limited to, within reason, the issues confronting the parties at the time of the *payment dispute*.
51. At paragraph 25.2 of the response submissions the respondent referred to *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2015] WASC237 ("*Samsung*"), which was a judgement of Mitchell J, in which His Honour explained the limits of an adjudicator's powers under s3(1)(2)(b) of the West Australian Act. [I understand from the respondent's paragraph 25.4 submission that this is the equivalent of s33(1)(b) of the Act].
52. His Honour, at paragraph [186] the judgement, cited an earlier case of *Alliance Contracting Pty Ltd v James* [2014] WASC where Beech J explained that:
    "In my view, the determination by an adjudicator of whether any party to a payment dispute is liable to make a payment involves, and is limited to, determining whether the recipient of the payment claim (the non-payment or rejection of which constitutes the payment dispute) is liable to make a payment in respect of that payment claim.... The function of the adjudicator is to determine the merits of the payment claim the disputing of which constitutes a payment dispute, and to determine whether any party to that payment is liable to make a payment in respect of that payment claim."
53. At paragraph [209] Mitchell J, explained that the adjudicator had to determine the *merits of a payment dispute*, and that it was a legal question whether a party is legally liable to pay claim made construction contract [paragraph 210].

54. At paragraph 25.3 of the response submissions, the respondent submitted that I must take into consideration all of the contractual elements and determine legal liability as between the parties. I am not convinced that I can go that far.
55. Both Judges referred to the limits of the adjudicator's power, and to my mind the power is limited to considering the issues in the *payment dispute*. I extract the words used by Beech J with emphasis that, *"... is limited to, determining whether the recipient of the payment claim (the non-payment or rejection of which constitutes the payment dispute) is liable to make a payment in respect of that payment claim."*
56. I have found that the payment dispute arose on **4 September 2017**, and as at that date there were no monies due and payable under the works taken out set off claim, because the certificate was not issued until 6 October 2017. In my view, my powers are limited to that payment dispute, and I do not agree that the two cases cited by the respondent allow me to conduct a far wider more far-reaching enquiry.
57. The words used by both Judges refer to the limitation of the adjudicator's powers, and in my view, that is a limitation clearly proscribing the adjudicator to the issues in that payment dispute. Such an approach in my view is consistent with the objects of the Act.
58. This means that the respondent's set off claims in this adjudication are limited to liquidated damages. In the next payment claim, which I infer is the last payment claim in the dispute, it will be necessary then to then reconsider the set off claim of work taken out, together with liquidated damages.
59. I considered it important to deal with the respondent's waiver objections, because they arguably essentially limit the amount to which the claimant is entitled, and such limitation should be dealt with before any calculations take place.

VI. Has there been a waiver by the claimant?

60. The payment schedule (dated 26 July 2017), and served on 27 July 2017 was as follows:

Item/s	Scheduled amount	Details (reasons for assessed amount or for withholding payment)
1	$405,002.62	progress claim revised as per attached
2	VO 01	Refer... Costs are not accepted by CEA
3	VO 02	Refer... Costs are not accepted by CEA
4-12	VO19 - 27	Not approved on this claim, still being assessed...
	$405,002.62	

61. I find no reference in the payment schedule to waiver by the claimant, nor could there have been, because the credit note was issued on 17 August 2017.
62. Nevertheless, the respondent, under the heading at paragraph 12, argued that the issue of the credit note was a waiver and release, such that the claimant could not recover any more than $405,002.62 for payment claim 5.
63. The claimant in its application did not address waiver, because it was not something that was raised in the payment schedule.
64. The respondent's submissions on this point are essentially identical to those in my earlier determination 58.17.01, in which it explained the law in relation to waiver with case authorities to support the submissions.
65. On this occasion, I did not seek the claimant's submissions about waiver, because it was not a jurisdictional point raised by the respondent.
66. In my earlier determination 58.17.01, I carried out significant analysis regarding the ingredients of the payment dispute and its timing, and concluded that waiver was a new reason raised by the respondent in the adjudication response that had not been raised in the schedule.

67. Nevertheless, I considered waiver in any event because, in that determination, it was a jurisdictional point raised by the respondent.
68. As I have said, waiver was not raised as a jurisdictional point in this adjudication, so there is no reason to conduct a similar detailed analysis; because, even if the respondent could establish that a waiver had occurred, about which I make no finding; s10(3) of the Act expressly states, "*Any purported waiver (whether in a construction contract or not and whether or not in writing) of an entitlement under this Act has no effect.*"
69. The respondent provided no submissions about the effect of section 10 of the Act.
70. I need to decide whether the waiver resulting from the issue of the credit note falls within s10(3) of the Act. I therefore construed the Act to discern what it seeks to achieve, using the *Interpretation Act* for assistance.
71. The well-known *purposive approach* is found in s62A of the *Interpretation Act* which provides:

> ***"62A Regard to be had to purpose or object of Act***
>
> *In interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object."*

72. The express reference to a "purported waiver, whether in a construction contract or not, and whether or not in writing", is extremely wide-ranging. I must consider the extent to which s10 of the Act applies in this adjudication.
73. Turning firstly to s3 of the Act which provides:

> ***"3 Object and its achievement***
>
> *(1) The object of this Act is to promote security of payments under construction contracts.*
>
> *(2) The object of this Act is to be achieved by:*
>
> *(a) facilitating timely payments between the parties to construction contracts; and*
>
> *(b) providing for the rapid resolution of payment disputes arising under construction contracts; and*
>
> *(c) providing mechanisms for the rapid recovery of payments under construction contracts."*

74. In considering the purpose of the Act, it appears to me that s10(3) must be allowed an interpretation which is as wide ranging and all encapsulating as the words within that section expresses.
75. By essentially capturing all possible ingredients of *purported* waiver, in writing or not, and rendering such waiver of no effect, provides for rapid resolution of this payment dispute, which is precisely what the Act sets out to achieve.
76. I therefore consider that any alleged waiver, suggested by the respondent, falls directly within s10(3) of the Act, such that it is of no effect.
77. That interpretation, to my mind, facilitates the purpose and objects of the Act, particularly the rapid resolution of payment disputes, and rapid recovery of payments.
78. **Accordingly, I reject the respondent's submissions on waiver that the claimant was prevented from recovering any more than $405,002.62.**

VII. The claimant's design obligations & Liquidated damages claimed by the respondent

79. The claimant, in its application, dealt with respondent's arguments about the claimant's design obligations and the respondent's right to liquidated damages, and it is useful to deal with these important issues now, in the order that they were addressed by the claimant.
80. This is not to say that the claimant's obligations to:
    (i) explain its claim;
    (ii) demonstrate entitlement;

(iii) substantiate its claim;
(iv) provide evidence of quantum,

are being ignored, because the claimant still bears the onus to demonstrate all these factors.

Claimant's design obligations

81. In paragraphs 27 through to 29 of the application, the claimant argued that it was engaged on a construct only basis, and its arguments were very similar to those advanced in my 58.17.01 determination.
82. At paragraphs 6.1 and 6.2 of the response, the respondent outlined the claimant's design obligations and the supply of design documents.
83. At the paragraph 13 heading in the response, it referred in more detail to the claimant's design responsibility, and its arguments were very similar to those advanced in my 58.17.01 determination.
84. One of the central arguments of the respondent was around the claimant's design obligations identified in clause 8.7 A, and its obligations to supply design documents under clause 8.7 B.
85. The respondent, at paragraph 13.9, submitted that the claimant's design obligations meant that, for a project of this complexity, it was not possible to identify [*work details redacted*], and that the claimant needed to assess these requirements on site, and where necessary, they were to be designed and fitted by the claimant.
86. At paragraph 13.10, for example, the respondent stated that for the claimant to argue that if a [*detail*] did not appear in a drawing, such that it then gave rise to a variation, not only flew in the face of reality of the sorts of projects, but also contrary to the express language of the contract.
87. Both parties' arguments were the same as those raised in my 58.17.01 determination, in which I analysed the contract closely to decide the extent, if any, of the claimant's design obligations.
88. This is a fresh adjudication, and I need to carry out this analysis again, based on the facts before me.
89. At paragraph 13.1 of the response, the respondent said that the claimant contracted on the basis that it accepted *an element of design responsibility*. Furthermore, at paragraph 13.2 it submitted that the terms of the contract in that regard were unambiguous, and it referred to paragraph 6 in which it had listed the two Special Conditions of Contract clauses, clause 8.7 A and 8.7 B.
90. At paragraph 13.5, the respondent submitted that the contract had to be read as it stands, and given its ordinary meaning, without attempting to divine the intention of the parties where not required to do so. I agree that this is the correct approach.
91. In considering the claimant's overall design obligations identified by clause 8.7 A and clause 8.7 B, I need to interpret the entire contract based on an assessment of what the parties objectively agreed. In the case of, *Codelfa*[1] at page 350, Mason J held:

> *"In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."*

92. It is therefore necessary to consider the evidence regarding the genesis of the transaction, its background and context, and the market in which the parties operated.

Genesis of transaction

93. At paragraph 14 of [K's] statutory declaration, he said that he was involved in the precontract negotiations up to the award stage.

[1] *Codelfa Constructions Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337

94. At paragraph 17.1, [K] said that the claimant was employed to be the [*redacted*] subcontractor for the project (my underlining), and that those works included [*redacted*] works associated with the [*redacted*] works on site.
95. [K] never once mentioned the claimant's design obligations, in his statutory declaration, and he was involved right up to contract award.
96. At paragraph 11 of [V']s statutory declaration, he said that he was involved from the outset and provided a review role during the assembly of the tender materials, mainly with respect to the commercial documents.
97. At paragraph 12, he said the contract scope and expectations were discussed at this meeting on 2 March 2017, and that he was involved in finalising some commercial aspects of the contract [paragraph 13].
98. [V] made no comment anywhere in his statutory declaration about the claimant's design obligations.
99. I note, therefore, that neither of the respondent's witnesses, who were closely connected with the tender negotiations, made any comment about the claimant's design obligations, and they were not identified in any of the tender materials identified by the respondent.
100. Given [K's] involvement, if there had been design obligations as identified by the contract, I would have expected him, and [V], the previous superintendent to refer to the facts of the supply of design documents by the claimant, for the respondent's superintendent's review. That is what clause 8.7A of the contract required, and there is no evidence of this ever occurring.
101. Both parties provided submissions about the genesis of the contract by reference to the tender negotiations, and the respondent provided the only sworn evidence about these precontract negotiations.

Background

102. As with the previous determination 58.17.01, it appears that the allegations of the design responsibilities emerged in correspondence between [W] and the claimant during the correspondence trail involving the variations.
103. Design reasons were not identified in the payment schedule for any of the variations claimed, but of course the payment schedule referred to other correspondence.
104. Under paragraph 54 above, I have already outlined the payment schedule 5 objections, and I was unable to glean any objection based on the claimant's design obligations, in that 2-page schedule.
105. At paragraph 34 of his statutory declaration, [V] stated that on 27 July 2017, he sent an email reply to the claimant attaching the payment schedule. For some strange reason he said it was *for [redacted] (and another project)*. I presume that he meant it was for [*this project*].
106. In that same paragraph he also said that the assessment for the payment schedule was carried out by [K], in coordination with [M].
107. As I said, [V] and [K] were involved in the negotiations, and neither made any reference in the payment schedule to any design obligations.
108. [W] in his statutory declaration said, at paragraph 23 of his statutory declaration, "*It is important also to realise that there is a necessary element of on-site discretion and design that comes with a complex installation of [redacted] has undertaken in this project*."
109. e added at paragraph 25 that, "*It is not usual practice, nor is it feasible, for every aspect of the installation to be the subject of specific instruction or specification."*
110. He further explained that is why the contract identified that the claimant would have a design obligation to address the sorts of issues.
111. When [W] assessed the first variation, he said at paragraph 47, that in a response by email dated 13 June 2017, that he reminded the claimant of its design responsibilities and cross-referenced tab 8.1 of N Volume 2 (which means the claimant's documents).

112. I looked for this document and found it behind tab 8.4, and note him stating the claimant's design obligations by reference to clause 8.7 A and clause 8.7 B, which was in response to the claimant's 27 April 2017 allegations that it was a fully designed project with no design responsibility apportioned to the claimant.
113. At that time, [W], was not the superintendent, as he only became the Superintendent on 28 August 2017 [paragraph 5 of his statutory declaration].
114. [W's] statements in June 2017 about the claimant's design obligations cannot assist, because the contract had been concluded on 2 March 2017.
115. He was not involved in what the parties objectively negotiated, as he had only commenced employment in March 2017 [paragraph 4 of his statutory declaration], and the contract was signed on 2 March 2017.
116. He cannot swear to the issue, that the design obligations were to identify these necessary *on-site discretion and design* activities.
117. It is difficult to attribute much weight to his evidence, as he is providing opinion evidence and swearing to the issue, rather than deposing to facts.
118. However, I need to consider whether he can give opinion evidence of the market in which the parties were operating, because he said that there was a necessary element of on-site discretion and design.

The market in which the parties were operating

119. If [W's] evidence is to be considered opinion evidence about the design obligations in the market, (with respect) I cannot attribute any weight to it, because I do not consider:
    (i) that he is sufficiently qualified as an expert to give evidence of the market place design obligations;
    (ii) that he can swear to the issue of the claimant's design obligations.
120. Accordingly, the respondent has not established through the market in which the parties were operating that the claimant had any design obligations.

Analysis

121. I accept that evidence of negotiations preceding a contract are generally not admissible in evidence to discern the objective intention of the parties.[2]
122. However, in accordance with my earlier reference to *Codelfa,* I considered that the evidence that I have looked at under the genesis of the transaction is admissible to assist in seeing how the parties entered into a contractual arrangement and to put matters in context.
123. In addition, *Codelfa*, is authority for several exceptions to the *Prenn* rule, and it held that prior negotiations are admissible to establish <u>the objective background facts</u>, *my underlining*, which are known to both parties, and the subject matter of the contract.[3]
124. As far as the tender negotiations are concerned, the request for quotation at Annexure 1 of the application was for the [*redacted*] Works and AS4000-1997 was attached to the request("RFQ").
125. I find that AS4000 1997 required, at paragraph 2.1, that the claimant to carry out and complete *WUC* in accordance with the contract and directions authorised by the contract. The *WUC* makes no mention of design.
126. The tender provided at Annexure 2 provided was in response to the request and referred to the specification, scope of works and drawings.
127. I find that the objective background facts (allowed by *Codelfa*) are that the contract price for the works was negotiated and based on a construct-only basis. Nevertheless, clause 8.7A and 8.7B form part of the contract, as they were Special Conditions which were added to the contract at some stage, to which I must have regard.
128. There was no reference to these special conditions in the RFQ.

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[2] *Prenn v Simmonds* [1971] 1 WLR 1381, 1384 cited in Christensen SA and WD Duncan: *The construction and performance of commercial contracts* (2014], The Federation Press, Leichardt New South Wales

[3] Cited in Christensen SA and WD Duncan, *supra,* paragraph 2.3.6.1 at page 32

129. As mentioned at paragraph 5 in the claimant's submissions, under paragraph 29 of the application, the claimant argued there is no evidence of being requested to be involved in design development, provide design documents prior to and during the performance of the *WUC*.
130. However, *Franklins*[4] is authority that evidence of post contract conduct is not admissible to aid in the construction of the contract, so I cannot have regard to these submissions to aid in the contract construction.
131. However thus far, my reference to the tender negotiations and history up until the signing of the contract, based largely on the respondent's own witnesses, was to obtain the objective facts that design was not part of the claimant's obligations at that time.
132. Unfortunately, the respondent did not point to any provisions, apart from clause 8.7A and 8.7B explaining the extent of the claimant's design obligations. At paragraph 13.5, it merely said that, there was an element of design responsibility that the claimant was to take on for which it was to receive remuneration.
133. Furthermore, at paragraph 13.7, that at a practical level, the claimant was undertaking an element of design. It is not clear at all to me what is meant by an *element of design responsibility*, because the contract should identify the existence of and the extent of design responsibility, and this is where I have some considerable difficulty, as I had in my earlier determination 58-17-01 about these submissions.
134. At paragraph 13.9 of the response, it suggested that that it was not possible to identify every element of support bracket, and that an assessment must be made to an extent on-site and if elements of support are required, then *they are to be designed and fitted by the contractor*.
135. This is the high-water mark of the respondent's submissions regarding design, or perhaps more accurately *an element of design*, but unfortunately it does not take the matter any further.
136. When reading the contract as a whole, it appears to merely be a construction contract, with drawings identifying the work to be carried out by the claimant under the WUC. I will need to consider the character of the contract in more detail, to which I now turn.
137. Clause 36.1 which deals with variations, identifies many activities which constitute a *variation* including increasing any part of work, changing its character or quality, changing its levels, lines, positions or dimensions, or carry out additional work.
138. Such an express clause appears to me to be in direct contradiction to the respondent's notion of *element of design* requiring the claimant, after assessing the elements of support, to design and fit them, presumably at no cost to the respondent.
139. Such a vague obligation, to my mind cannot cut across the express variation clause identified above.
140. However, these additional design clauses were added in the Special Conditions, and I must make sense of them, because they form part of the contract. I am required to give effect to all parts of the contract.
141. As I have already said, I cannot find in AS4000-1997, any reference to design in the WUC, which the claimant was responsible to complete. I now turn to clause 8.7 A.
142. Clause 8.7A provides as follows:
"The Contractor shall:
    (a) *ensure that a qualified, experienced and competent person at all times supervises and coordinates:*
        i. the design and specification of the WUC and the works; and
        ii. the carrying out of WUC;
    (b) *complete and supply to the superintendent the contractor's design documents in sufficient time to allow the superintendent to review and (if the*

[4] *Franklins Pty Ltd v Metcash Ltd* (2009) 76 NSWLR 603 cited Christensen SA and WD Duncan *supra*, paragraph 2.3.6.2, page 33

superintendent elects) comment on them before the WC to which they relate commences; and

(c) *ensure that it (and shall use its reasonable endeavours to ensure that an involved in the contract is design documents) certifies in writing (prior to, and as a prerequisite to achieving, practical completion) to the purchaser the contractor's design obligations carried out by its comply with the contract."*

143. In the context of a AS4000-1997, there are no other express references to design documents in the General conditions. In Part A, item 15 regarding the principal supplied documents, there is a list of a whole series of schedules and specifications.
144. With reference to general condition clause 8.3, which refers to contractor supplied documents, there is no evidence provided of the claimant ever providing these.
145. Turning to Schedule A – the Schedule of Prices [appendix 3.5 of the claimant's application] states that "This contract is for the supply of all labour, materials, and equipment necessary to [*redacted*] …"
146. Schedule B refers in similar terms to, "This contract is for the supply of all labour, materials and equipment necessary to [*redacted*] for the…as defined in the relevant scope of work documents, drawings and specifications."
147. There is no mention of design obligations in these documents.
148. The [*redacted*] Specification [appendix 3.7 of the application], at paragraph 1, sets out the requirements for [*various aspects of the works*] including the [*redacted*] of the [*redacted*] works…"
149. The general specification [appendix 3.8] does refer as follows:
    (i) at paragraph 3 to Design Requirements, but I find this is in the context of equipment where it states at clause 3.1 "Equipment shall be designed and selected to meet the requirements of the scope of work and any other relevant specifications, codes, standards and legislation, in particular relating to OHS. Particular consideration shall be given to the environment in which the equipment is required to operate."
    (ii) Paragraph 4 refers to general requirements where again there is reference to equipment as follows, "all equipment shall be established and proven design… Design and selection of all equipment shall make provision for safe and convenient operation, maintenance and handling. All equipment shall be designed to minimise hazards….
    (iii) Paragraph 4.6 there is reference to Alternative Design Options and Design Code Compliance, in which it stated that alternative design options would be considered by the respondent on a case by case basis provided that the proposed options meet the general design and performance philosophies and the technical requirements of the specification.
    (iv) Paragraph 6.4 was headed "Information to Be Submitted for Design Approval", and it referred to a tabulated summary of documentation required post contract award in Appendix A.
    (v) I have looked at Appendix A, and it appeared to me to be a generalised reference to plant and equipment, where the note number 1 which relates to the electronic format of documents with the tender, referred to "RFQ", which I note from the abbreviations at paragraph 2.2 means the Request for Quotation.
    (vi) The request for quotation [At appendix 1] did not require any documents to be provided by the claimant and the RFQ stated, "We request your proposal to undertake the [*redacted*] works for the above-mentioned project." There is no reference at all to any design documents.
150. The **[redacted] Installation Scope of Work** at appendix 3.9 of the application, was the last document in the series of contract documents in the bundle. I have searched for elements of design within it and found the following:

(i) *at paragraph 1.1* ***Scope*** *there is reference to, "The works are to be executed in accordance with project general specification… and generally [reacted] specification…, [redacted] scope of work… and to the approved construction plans and drawings….*

The contractor shall be cognisant with the installation drawings, site conditions and access constraints to ensure ease of installation with minimum disruption to other contractors"

151. In my view these words connote *installation only* in accordance with the drawings and specifications. I see no reference to a design obligation.
152. *At paragraph 1.3* ***Subsystems Breakdown*** *it stated, "The design has been divided into subsystems and the work package structure, including the ITP's, has inherited this structure. It then provides a table 1.3 – one with the Sub System Design Codes.*
153. Again, it appears from the meaning of this paragraph that the design has already been completed, and divided the work up into sub-systems, with designated design codes. This connotes the design has been complete by others, and cannot suggest that the claimant is to carry out some design.
154. At paragraph 1.4 **Construction Activity Types,** there is reference to all sorts of typical construction activities, none of which refers to design.
155. **At paragraph 1.5 Work Packages**, provides, "The design is also delivered using packaging based on the systems breakdown in the scope of works described in section 2 are presented using this structure."
156. **Paragraph 2 Work included**, "Work packages are to include the relevant construction plans…"
157. Neither of these last 2 paragraphs, in the important Scope of Work document assists in sheeting home a design responsibility to the claimant.
158. I am of the view that clause 8.7A does not identify the extent of the claimant's alleged design obligations, and the reference to the claimant providing an experienced person responsible for supervising and co-ordinating the design and specification of the WUC and the Works appears meaningless, if it is requiring the claimant to carry out design.
159. There is no evidence of any design requirements in the WUC, so I cannot realistically find that this aspect of the clause means anything, apart from, as suggested by the claimant at paragraph 11 of the application submissions on page 8, to turn the respondent's design into a constructed product.
160. The clause 8.7A also requires an experienced person to supervise the carrying out of the WUC, and I find that this clause can operate, without any strained interpretation of its meaning.
161. As to the requirement of providing the contractor's design documents, there is no evidence of any, and everything else in the contract points to it being a construct only contract.
162. There is no definition of the Contractor's design documents, so I am unable to find that clause 8.7A imposes any meaningful design obligation on the claimant.
163. Insofar as clause 8.7B is concerned, whilst it identifies an obligation on the claimant to supply the Contractor's Design Documents to the superintendent, there are no such design documents identified anywhere in the contract which I can find.
164. The respondent did not point to any specific documents in this context, such that its best submission is that the claimant was obligated to *an element of design* about which it gave no further meaningful information.
165. I cannot accept that such a vague notion was a contractual obligation, particularly in the face of the specific variation clause referred to above. Accordingly, I find against the respondent on its submissions that the claimant accepted an element of design obligation.
166. **I find therefore, that the claimant does not have design obligations under the contract.**
167. I now turn to the respondent's claim to set off liquidated damages.

Liquidated damages

168. At paragraph 32 of the application, the claimant commenced its submissions, inter-alia, about liquidated damages.
169. It expanded upon its objection to liquidated damages at paragraph 33.3 of the application, on the basis that it was factually and contractually and correct.
170. At paragraph 33.4, the claimant said that the respondent had failed or refused to acknowledge that the *WUC* had been delayed by qualifying causes of delay in respect of which EOT's should be granted.
171. It then embarked upon an objection under paragraph 33.5 about the respondent's flawed *contractual process* in attempting to set off the claimed value of liquidated damages by relying upon the case of *Main Roads Construction Pty Ltd v Samaray Enterprises Pty Ltd* [2005] VSC 388 ("*Samaray*").
172. I will turn to the issue of the allegedly flawed *contractual process* followed by the respondent, in my analysis regarding set-offs below. The reason for this approach is that the respondent has provided significant case authorities objecting to the claimant's assertion that *Samaray* is authority supporting the claimant's arguments.
173. For present purposes, I am focusing on the narrower issue of whether the respondent is entitled to levy liquidated damages, because of the claimant's submissions regarding the prevention principle.
174. If I find that the respondent is not entitled to levy liquidated damages, whether or not it has followed a flawed contractual approach in doing so, becomes a moot point.
175. In paragraphs 34 through to 66 of the application submissions, the claimant essentially argued:
    (i) EOT's were not granted due to delays for which the respondent was responsible;
    (ii) The claimant was entitled to EOT's for qualifying causes of delay;
    (iii) The claimant made and otherwise had claims for EOT's which were rejected by the superintendent;
    (iv) Reading clauses 20 and 34.5 of the contract together imposes an obligation on the respondent and the superintendent to allow the claimant it's reasonable EOT entitlements;
    (v) *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151 confirmed I was entitled to apply the prevention principle in this case;
    (vi) The *prevention principle* provided that the respondent could not insist on the performance of the contractual obligation if it caused the non-performance;
    (vii) The respondent could not insist upon the claimant's timely performance of the contract if the respondent caused the claimant delay, and therefore could not obtain the benefit of the liquidated damages clause;
    (viii) *Probuild* was also authority that there is an implied term of good faith governing discretionary EOT's, such that exist in this case;
    (ix) The respondent had breached clause 20 of the contract and the implied provision to act in good faith;
    (x) Consistent with *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSW CA 211, the court held that the discretionary EOT provisions ought to have been invoked honestly and fairly, having regard to the rationale behind the prevention principle;
    (xi) The respondent therefore could not apply liquidated damages where the claimant had not been granted EOT's because the respondent's failure to meet its obligations under the contract in respect of the:
        (a) Design;
        (b) Specification;
        (c) Management;
        (d) Programming; and
        (e) Coordination of the WUC.

176. In its submissions supporting its five EOT's, on pages 21 through to 28 of its application submissions, the claimant explained several factors supporting its claim for EOT's.
177. Whilst I accept that the claimant bears the onus of demonstrating its entitlement to claim, the issue with which I am currently grappling, is whether the respondent has the entitlement to levy liquidated damages in the face of the prevention principle that has been raised.
178. I considered that it is important to resolve that issue, before going into the merits of the claimant's EOT claims. If the respondent is not entitled to liquidated damages, there is no need to consider COD the claimant's EOT's.
179. At paragraph 8 of the response, under the heading "Valid application of liquidated damages," the respondent engaged with the claimant's section G submissions, but its focus was in demonstrating that *Samaray* was not authority that the claimant could not be liable for liquidated damages under the allegedly flawed *contractual process* followed by the respondent.
180. These submissions did not deal with the prevention principle.
181. I therefore turn to the respondent's paragraph 14 submissions contained within the heading "*Peninsula Balmain distinguishable*".
182. The respondent argued that *Peninsula Balmain* was distinguishable in this adjudication, because the claimant in this adjudication, knew since the time of tender, that the superintendent had a connection with the respondent, whereas this was unknown to the contractor in *Peninsula Balmain*.
183. It argued at paragraph 14.6, that there could be no suggestion that the claimant was misled or deceived by the respondent nominating its own employee as superintendent.
184. Clause 35.5 in *Peninsula Balmain* involved extensions of time for practical completion, and had the following words in the penultimate paragraph:

> *"Notwithstanding that the contractor is not entitled to an extension of time the superintendent made any time and from time to time before the issue of the final certificate by notice in writing to the contractor extend the time for practical completion for any reason."*

185. Hodgson JA gave the judgement in Peninsula Balmain, with whom the other two Justices agreed, and at paragraph 79 His Honour held, regarding the superintendent's power to extend time under clause 35.5:

> *"In my opinion, this power is one capable of being exercised in the interests both of the owner and the builder, and in my opinion the superintendent is obliged to act honestly and impartially in deciding whether to exercise this power."*

186. Just by way of comparison, the extension of time clause in this contract, clause 34.5 provides in the second paragraph:

> *"Notwithstanding that the contractor is not entitled to or has not claimed an EOT, the superintendent made any time and from time to time before issuing the final certificate direct an EOT."*

187. Referring to Peninsula Balmain, His Honour had already dealt with the issue of misleading and deceptive conduct regarding the failure by the principal to disclose that it had appointed the superintendent as its agent in relation to all matters regarding the design and construction of the project (the "project management agreement").
188. His Honour found that there had been no misleading or deceptive conduct regarding this nondisclosure, and at paragraph [60] held that there was no breach by the principal of clause 23 by reason of the undisclosed project management agreement.
189. Clause 23 provided:

> *"The principal shall ensure that it all times there is a superintendent and that in the exercise of the functions of the superintendent under the contract, the superintendent –*
>
> (a) *acts honestly and fairly;*

(b) *acts within the time prescribed under the contract or where no time is prescribed, within a reasonable time; and*
(c) *arrives at a reasonable measure or value of work, quantities or time."*

190. The wording of clause 23 is similar to clause 20 in this contract which provides in the first sentence:

> *"The principal shall ensure that at all times there is a superintendent, and that the superintendent fulfils all aspects of the role and functions reasonably and in good faith."*

191. In my view, there is sufficient similarity in the *Peninsula Balmain* wording to the contract in this case, such that, unless I can distinguish it, the principles of it may apply to this adjudication.
192. he respondent invites me to distinguish it, essentially on the basis that the issue of nondisclosure was material to the decision of Hodgson JA regarding clause 35.5, and the nondisclosure does not exist in this adjudication.
193. I am not convinced that the nondisclosure had any bearing on His Honour's finding that a superintendent is obliged to exercise the EOT power for the benefit of both parties.
194. As I have said above, His Honour had already dealt with misleading and deceptive conduct argument, and found that there had been no misleading or deceptive conduct regarding the nondisclosure of the project management agreement.
195. This nondisclosure, His Honour held, did not, of itself, make the principal in breach of clause 23, and His Honour made no reference to this somehow impacting on the superintendent's EOT power in clause 35.5.
196. I conclude that the misleading and deceptive conduct was directed at the principal in that case, and the principal's possible breach of clause 23 in having a superintendent act honestly and fairly etc.
197. It was not to my mind, directed at all at the superintendent's conduct and his obligations.
198. Accordingly, I am not convinced that the essential principle for which *Peninsula Balmain* stands, can be distinguished based on a nondisclosure of the superintendent's close relationship with the principal.
199. To my mind that issue was separately decided, and had no bearing on what Hodgson JA said at paragraph 79 about the Superintendent's duty to act on behalf of both parties.
200. Accordingly, I find that the principles of *Peninsula Balmain* apply in this adjudication, and they are that the superintendent:
    (i) must exercise the EOT power for the benefit of the claimant, as well as the respondent; and
    (ii) is obliged to act honestly and impartially in the exercise of that power.
201. I note that the respondent made no reference to *Probuild* in its response submissions to counter those of the claimant, which the claimant argued allows me to:
    (i) apply the prevention principle;
    (ii) recognise there is an implied term of good faith governing discretionary EOT's.
202. In fact, the respondent had nothing at all to say about the prevention principle and the implied term of good faith governing discretionary EOT's.
203. I find therefore that in this adjudication, I need to be convinced that:
    (i) The superintendent exercised the EOT power for the benefit of the claimant;
    (ii) Acted honestly and impartially in the exercise of that power;
    (iii) The respondent did not cause the claimant to be late through its actions or inactions.
204. *Probuild* cited the West Australian Full-Court decision of *Spiers Earthworks Pty Ltd v Landtec Projects Corporation Pty Ltd [No 2]* [2012] WASCA 53; (2012) 28 BCL 282, for the ingredients of the prevention principle.
205. At paragraph 115 of *Probuild* McColl JA held that:

> *"The prevention principle applies to delays in practical completion caused by variations resulting from the act or default of the principal."*

206. Her Honour cited paragraphs [48] of *Spiers* as support for her statement.
207. I considered that it was sufficiently important for me to read *Spiers* to decide whether its principles applied in this adjudication. Turning firstly to McClure P at [48] & [49] in *Spiers*, who held:

"[48] The prevention principle clearly applies to delays in practical completion caused by a breach of contract by the principal. In a construction law context, it also applies to other acts (or omissions) of the principal within the scope of the contract that prevent practical completion within the fixed period. Variations are an obvious example. **(my emphasis)**

[49] If as a result of the prevention principle the contractual date for practical completion has ceased to be the proper date for the completion of the works and there is no contractual mechanism for the substitution of a new date in the events which have occurred, then there is no date from which liquidated damages can run and the right to liquidated damages will be lost: Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd (1970) 1 BLR 111; MacMahon Construction Pty Ltd v Crestwood Estates [1971] WAR 162, 167 (Burt J). The nominated time fixed for practical completion is replaced by an obligation to complete within a reasonable time."

208. Turning back to the claimant's submissions, at paragraph 37, the claimant stated the prevention principle, that, "*...provides that a party cannot insist upon the performance of a contractual obligation if it caused the non-performance. In our circumstances, this would prevent [the respondent] from benefiting from its own breaches to [the claimant's] detriment, via the application of liquidated damages."*
209. At paragraph 38, the claimant continued that the respondent could not insist upon the claimant's timely performance of the contract if the respondent caused the delay and it could not benefit by applying liquidated damages.
210. Furthermore, at paragraph 39, it submitted that in the case of *Probuild* the court found that there was an implied term of good faith governing discretionary EOT's of the kind found in clause 34.5 of the contract.
211. It submitted, at paragraph 40, that the respondent had breached clause 20 of the contract and the implied provision requiring it to act in good faith by benefiting from the failure of the superintendent to afford the claimant its EOT entitlements.
212. *Probuild*, was a Design and Construct Subcontract AS4303 – 1995, which has similar wording to the AS4000-1995 contract in this adjudication, because it is part of the AS4000 suite of contracts.
213. It was a sub contract with express design obligations in-built into the structure of the contract. In the contract in this adjudication, the design obligations were added in part B as clauses 8.7 A and 8.7B.
214. In *Probuild*, DDI completed the sub contract works 144 days late, and had not claimed any EOT's. Probuild claimed $2.3 million liquidated damages as a set-off on the basis that no EOT's had been claimed by DDI. Probuild calculated liquidated damages from the program date for practical completion to the that date the Works were in fact practically complete.
215. The judgement of the Full Court was given by McColl JA, and the essential issue on appeal was whether the primary judge should have held that the adjudicator had not breached natural justice by applying the prevention principle to Probuild's liquidated damages claim.
216. At paragraph [30] Her Honour extracted the EOT clauses which provided:

*"**41.8 Extension of Time Sole Remedy***

(a) The right of the make a claim for an extension of time pursuant to this clause is the Subcontractor's sole remedy under the Subcontract in respect of any delay or delays. The Subcontractor is not entitled to any Subcontract Sum or any other monetary compensation or damages (including damages for breach of contract in respect of any such delay).

41.9 Extension of Time Otherwise

(a) Notwithstanding that the Subcontractor is not entitled to or has not claimed an extension of time, the Head Contractor may at any time and from time to time before the issue of the Final Certificate under the Subcontract by notice in writing to the Subcontractor extend the time for Practical Completion for any reason.

41.10 Time Not Set at Large

(a) A delay or failure by the Head Contractor to grant a reasonable, or any, extension of time shall not cause the Date for Practical Completion to be set at large."

217. Under this contract, clause 34.5 second paragraph provides:

"Notwithstanding that the Contractor is not entitled to or has not claimed an EOT, the Superintendent may at any time and from time to time before the issue the final certificate direct an EOT."

218. Apart from the superintendent being the person directing EOT's in this contract, compared to the head contractor in *Probuild*, the clauses are essentially similar.

219. Her Honour referred to *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211 ("*Peninsula Balmain*") at paragraph 124, which contained a similar clause before the Court in that case, which Her Honour identified as a "reserve power".

220. At paragraph 125 of *Probuild*, Her Honour canvassed Hodgson JA's findings in *Peninsula Balmain* that absent the reserve power, any failure to claim an EOT would have precluded the operation of the prevention principle. However, she added that Hodgson JA held that the reserve power was "*capable of being exercised in the interests of both the owner and the builder and… the Superintendent is obliged to act honestly and impartially in deciding whether to exercise it."*

221. At paragraph 127, Her Honour referred to the case of *620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 2)* [2006] VSC 491 in which Osborne J held that, "*the reserve power was to be exercised 'effectively where it [was] is just and equitable to do so,… [was] expressly directed to situations where 'the contractor is not entitled to or has not claimed an extension of time…', is expressed to arise on a separate and distinct basis from the provision for the extension of time pursuant to the primary mechanism [and] [t]he grounds for exercise of the reserve power [were] is expressed in the broadest possible terms."*

222. At paragraph 128, Her Honour held that, "*Probuild was obliged to exercise the reserve power to grant extensions conferred by clause 49 honestly and fairly having regard to the underlying rationale of the prevention principle to which I have earlier referred or, if necessary, because there is an implied duty of good faith in exercising the discretion clause 41.9 conferred."*

223. What was particularly important in *Probuild*, which is apposite to this adjudication, was Her Honour's reference to the fact that the primary judge identified that the adjudicator could not determine the date to which Probuild ought to have granted an EOT.

224. In *Probuild*, Her Honour noted, at paragraph 43, that Probuild's payment schedule focused on DDI's failure to complete the Works by the date for practical completion, and that it had suffered loss and damage as a consequence and elected to apply liquidated damages.

225. At paragraph 50, she referred to the adjudication response that DDI had delayed completion past the date for practical completion and that DDI had not claimed for and was not awarded any extension of time and was not entitled to do so and had no entitlement to extend the date for practical completion. It added that even if an EOT claim had been made (which Probuild denied) such claim would be time-barred.

226. Her Honour referred to the primary judge's analysis at [paragraph 33 of the primary judge's reasons] which held:

"Thus, Probuild maintained, as part of its argument, that DDI was not entitled to any extension of time, under clause 41.9 or otherwise. It did so seeking to discharge its onus of persuading the adjudicator of its right to a set off. In response DDI denied that claim

at least partly on the basis that Probuild's position was unreasonable, although no argument was developed explaining why unreasonableness on the part of Probuild might provide an answer to its assertion that DDI was not entitled to an extension of time under clause 41.9."

227. At paragraph 62 of the application, the claimant submitted that, "The fact that the subcontract allowed Probuild to grant a discretionary EOT ruled out Probuild's argument that DDI'S failure to claim EOT's meant that the prevention principle ought not be applied."
228. I am not in a position based on the material to which I must give weight, what amount of EOT's the claimant in this case is entitled to, as there is no programming analysis provided by the claimant.
229. I was unable to have regard to the [T] Report because I considered it inadmissible for the reasons identified in this decision, but even if I had considered it, it provided no analysis of what the superintendent could have granted, because the report focused on the claimant's failure to demonstrate delays on the critical path.
230. I have resolved this thorny issue, based on the *Probuild* principle that the respondent had the onus to demonstrate its entitlement to liquidated damages. Probuild's case focused on DDI's failure to claim for an EOT, and that any claim would be time-barred.
231. Once the adjudicator, the primary judge and the Court of Appeal considered that the existence of the reserve power meant that Probuild could not rely upon DDI's failures to claim an EOT, because of the underlying rationale of the prevention principle, Probuild was unable to discharge the onus it was entitled to liquidated damages.
232. At paragraph 63 of the application, the claimant referred to the case of *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211, and the claimant emphasised that the discretionary EOT provisions ought to have been invoked honestly and fairly.
233. It argued that the respondent's failure to meet its obligations under the contract meant that it could not apply liquidated damages.
234. At this stage I have not considered whether there had been any failures of the respondent's obligations in respect of design, specification, management, programming and coordination of the WUC.
235. My focus is entirely on the proposition that the respondent had the onus to demonstrate it was entitled to liquidated damages, and in its letter dated 18 September 2017 [tab12 of the documents attached to [W's] declaration] in which it certified monies due by the claimant to the respondent, it simply stated that, "The WUC did not reach Practical Completion by the Date for Practical Completion and have still not achieved Practical Completion."
236. The Superintendent then proceeded to assess liquidated damages up until 15 September 2017 in the sum of $313,465.51. This is what Probuild had done in its payment schedule, which it supported in its adjudication response, at which it also alleged that the claimant would be time-barred.
237. It is not necessary for me to decide how many days EOT's the claimant was entitled because that is not possible on the material. Nevertheless, in paragraph 68 of the application, the claimant referred to its EOT claims, and the entitlement to an EOT based on a Qualifying Cause of Delay, for *any act, default or omission of the Superintendent, the Principal or its consultants, agents or other contractors (not being employed by the contractor)* with the relevant paragraphs for each EOT as follows:
    (a) paragraph 3, page 21 regarding EOT 1;
    (b) paragraph 4, page 22 regarding EOT 2;
    (c) paragraph 2, page 24 regarding EOT 3;
    (d) paragraph 2, page 25 regarding EOT 4;
    (e) paragraph 2, page 27 regarding EOT 5.
238. The claimant in the tables associated with paragraph 68, explained the issue of variations being directed, delay in the respondent providing the claimant with a revised [*redacted*]

schedule, changes to design for works complete on [*redacted*] and modifications ordered in site instructions.

239. These submissions arguably fall within *qualifying causes of delay*, for which the claimant could be entitled to an EOT, as identified in *Spiers*.
240. In the adjudication response, in response to these EOT submissions, the respondent, at paragraph 21 referred to various paragraphs of the [W] declaration and the [T] Report.
241. Turning, by way of example to the [W] declaration regarding EOT's 1 and 2, at paragraphs 81 to 86 and 87 to 92 respectively, in both cases, [W]:
    1. time-barred the EOT claims [paragraph 82 and paragraph 88]; and
    2. rejected the EOT claims by reference to his letters dated 23 June 2017 [Tab 15 of the application and Tab 16 of the application].
242. In both cases the wording in the letters rejecting the claim (without any reference to time bars) was:

    "In accordance with clause 34.3 of the contract, the contractor has failed to

    1. Demonstrate, by way of a construction program, that the contractor is or will be delayed in reaching practical completion.

    Due to the invalidity of the EOT claim as described above, an EOT shall not be granted."
243. The focus by the superintendent in his letter assessing the EOT claims was not whether there was a qualifying cause for delay, but relied simply on a failure by the claimant to provide a construction program.
244. The respondent provided no direct submissions controverting the claimant's submissions about the qualifying causes of delay, and merely relied upon [W] and the [T] Report.
245. Just by reference to these two examples, the superintendent's conduct in disqualifying the EOT in the letter on the basis that it was the claimant's failure to provide a construction program that disqualified it from an EOT, to my mind was not acting reasonably and in good faith.
246. I find that the other EOT assessment letters for EOT's 3, 4 and 5 had identical wording.
247. In his assessment letters there is no evidence of him demonstrating his reasonable and good faith attempt to exercise his *reserve power* for the benefit of the claimant, as required by *Peninsular Balmain*.
248. The importance of the prevention principle, according to *Spiers* at [49], to which I have referred above, in which McClure P cites the well-known cases of *Peak* and *MacMahon*[5], is that the contractual date for completion of the works, in this case 16 June 2017, no longer applies.
249. That was the start date used by the superintendent for calculating liquidated damages, which meant that he gave no EOT's for any of the work under the contract at all.
250. Even if he was correct that every claimed EOT was incorrect, about which I have made no finding, I note from the variation schedule provided by the claimant in payment claim 5, [behind tab 5 of the application], that V06 through to VO18, excluding V08, were all approved.
251. Many of these variations were paid as dayworks, which I infer followed the Schedule C rates [on page 5 of 7 of the 3.5 tab in the application], which were used for the purposes of variations.
252. These amount to nearly $100,000 of work, and are approved variations, which must mean they fell within, *any act…of the Superintendent, the Principal…* [the opening words to qualifying cause of delay].
253. On balance, it seems surprising, that there was not an entitlement to even a 1-day EOT for this additional work. I do not make any finding about EOT's in this context, but it has put me on alert about the superintendent's failure to even once exercise his reserve power, which must be exercised in good faith

[5] *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd (1970) 1 BLR 111; MacMahon Construction Pty Ltd v Crestwood Estates [1971] WAR 162, 167 (Burt J)*

254. I now turn to his reference to time bars, which have emerged in the adjudication response for the first time, because they were not referred to in any of the EOT assessment letters.
255. The time bars were also contained in the submissions in paragraph 10 of the response, and I will deal with those along with the respondent's reliance on the [T] Report to support its rejection of the EOT's to which I now turn, before reaching a decision on the respondent's right to settle for liquidated damages.

Time bar and [T] Report

256. The time bar was raised by the respondent in paragraphs 10.1 through to 10.4 o f the response.
257. At paragraph 10.4, the respondent referred to the [W] declaration and the [T] Report to demonstrate that the claimant was barred from any entitlement to an EOT.
258. I do not accept that the [T] Report dealt with any alleged time bars. It simply concluded in each instance (apart from EOT 3) that the claimant had provided "*…insufficient evidence and information either at the time the delay occurred or in its EOT claim to allow for a meaningful assessment of its entitlement to or the magnitude of any potential delay contemplated by the EOT*".
259. In its assessment of EOT 3, the [T] Report stated that the cause of delay was the claimant's act to delay commencement of [*redacted*] rework, and so was not a qualified cause of delay.
260. Accordingly, I reject that the [T] Report supported any arguments regarding a time bar as suggested by the respondent.
261. I find that the respondent had not referred to time bars until its adjudication response. In my view to allow an objection based on time bars, when in earlier correspondence as early as 23 June 2017, there was no reference to time bars in the EOT assessments, would be to allow the respondent to "ambush" the claimant.
262. The claimant had no opportunity to deal with this objection in its adjudication application.
263. I appreciate the respondent's submissions in paragraphs 11.1 through to 11.6 that I am obliged to consider counterclaim/set offs, about which I make further comments below
264. However, a freshly raised time bar, to my mind does not fall within the umbrella of the counterclaim/set off arguments identified by the respondent.
265. To my mind that falls entirely outside the dispute regime that is required to be followed under the Act. The respondent could have raised time bars as far back as June 2017, when it rejected the EOT claims 1 and 2, and did not do so.
266. **Accordingly, I have ignored the respondent's time bar claims.**

Extensions of time and the [T] Report

267. The [T] Report analysed the 5 extensions of time claims made by the claimant, and as I have said above, concluded in each instance (apart from EOT 3) that the claimant had provided:

> *"…insufficient evidence and information either at the time the delay occurred or in its EOT claim to allow for a meaningful assessment of its entitlement to or the magnitude of any potential delay contemplated by the EOT".*

268. I have the same concerns with the [T] Report, that I had in determination 58.17.01.
269. The [T] Report provided opinion evidence by [H] about extensions of time, as well as his comments, for example regarding EOT1, on page 2:

> *"Given that the [redacted] classification and sizing only changed in some instances, it would have been reasonable for the contractor to proceed with the installation of unchanged [redacted] in the [redacted] in an effort to mitigate any potential delay caused by the revised drawings."*

270. The respondent submitted this *high-quality* evidence [paragraph 9.2 of the response submissions], and invited me to accord much greater weight to the [T] Report than the "scant material and submissions provided by the claimant".
271. I am therefore required to attributed weight to the [T] Report, and whilst I appreciate that section 34(1)(b) states that I am not bound by the rules of evidence, in my view that does not mean that I cannot have regard to the rules of evidence. This is particularly apposite in cases of opinion evidence.
272. Nowhere in the [T] Report was there any evidence of [H's] qualifications to provide expert evidence regarding programming, and [*redacted*] construction. He signed the report as an Associate Director, but nowhere did he provide his qualifications, or a CV, to enable me to evaluate whether he was properly qualified to proffer the opinions in the [T] Report.
273. As I found in my earlier determination, as far as possible, the documents provided by the parties should be the evidence used to resolve the dispute. The respondent's [T] Report must be evaluated on its merits, and I am obliged to investigate those merits.
274. The parties consented to me to adjudicate payment claims 5 and 6 simultaneously, and s34(4) of the Act allows me to consider information or documents in the other application, and, as I had done previously, I looked at the adjudication response in payment claim 6 to see if [H's] qualifications were contained within any [T] Report in that response.
275. Unfortunately for the respondent, the [T] Report is identical without any details of [H's] experience or qualifications.
276. In *Clark v Ryan* [1960] HCA 42, (1960) 103 CLR 486 which dealt with opinion evidence, the majority of Dixon CJ, Fullager J and Menzies J explained the admissibility of expert evidence. I have highlighted particularly pertinent passages.
277. Dixon CJ, held:

> *4. The rule of evidence relating to the admissibility of expert testimony as it affects the case cannot be put better than it was by J. W. Smith in the notes to Carter v. Boehm, 1 Smith L.C., 7th ed. (1876) p. 577. "On the one hand" that author wrote, "it appears to be admitted that the opinion of witnesses* ***possessing peculiar skill is admissible*** *whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it."*
>
> *5. In R. v. Parker [1912] VicLawRp 32; (1912) VLR 152 , one of the cases establishing the evidentiary use of finger prints to prove identity, Cussen J. in that connexion said that expert witnesses may give in evidence statements based on their own experience or study but that they cannot be permitted to attempt to point out to the jury matters which the jury could determine for themselves or to formulate their empirical knowledge as a universal law. To this should be added the observation made by Vaughan Williams J. during the argument of Reg. v. Silverlock (1894) 2 QB 766, viz. "****No one should be allowed to give evidence as an expert unless his profession or course of study gives him more opportunity of judging than other people****." (1894) 2 QB, at p 769 The words "profession or course of study" have of course a wide meaning and application; see per Lord Russell C.J. (1894) 2 QB at p 771.*

278. Menzies J held:

> *5. Opinion evidence to account for a happening that is described to a witness is* ***admissable only when the happening can be explained by reference to an organized branch of knowledge in which the witness is an expert.*** *As Lord Mansfield said in Folkes v. Chadd (1782) 3 Dougl 157 (99 ER 589) , (as quoted by Lord Merrival in United States Shipping Board v. The Ship St. Albans (1931) AC 632, at p 642 ,* ***"the opinion of scientific men upon proven facts may be given by men of science, within their own science"****.*

279. Fullager J agreed with both above Justice's decisions.
280. The respondent proffered the [T] Report to demonstrate the inadequacy of the claimant's EOT claims. However, there is no evidence of Mr Hogarth's experience and qualifications, and in a significant contest of this nature, I find that it is unsafe to accord any weight to the [T] Report.
281. Furthermore, nowhere did the report deal with whether the claimant was entitled to EOT's for delays to the WUC caused by qualifying causes of delay based on a proper assessment.
282. This was the live issue raised in the application; that the superintendent should have granted EOT's and failed or refused to acknowledge that the WUC had been delayed by qualifying causes of delay, and this was not addressed by the [T] Report at all.
283. In this regard, as in the earlier determination, it appears as if the parties' submissions demonstrated "two ships passing in the night." The claimant was essentially focusing in on the prevention principle, with few submissions about the veracity of its EOT claims; whereas the respondent directly engaged on the latter point and focused, almost entirely, on the claimant's inadequacy in providing sufficient evidence and information.
284. Accordingly, I am unable to find, as a matter of law regarding the admissibility of opinion evidence, that the [T] Report supports the respondent's submissions about EOT's.

Concluding analysis on liquidated damages

285. I was not prepared to consider the time bar issue for the reasons set out above, and the [T] Report was given no weight, also for the reasons set out above.
286. The extensive submissions of the claimant's conduct in failing to properly resource the project, and therefore never being able to reach completion by the nominated date completion because of its lack of resourcing, did not respond to the allegations of a qualifying causes of delay having arisen, which the claimant had submitted.
287. I am satisfied that there may have been a qualifying cause of delay. This would entitle the claimant to an EOT under the reserve clause, and it is evident the respondent did not exercise, or address in its submissions.
288. As I have said, I am unable to calculate these EOT's, but the point that arose in *Probuild*, at paragraph 91, where the Court held that, "viewed correctly, DDI contended the adjudicator did not find that it was entitled to an extension of time, but, rather did not accept Probuild was entitled to claim the number of days sought for liquidated damages.
289. Consistent, therefore, with the reasoning in *Probuild*, given the existence of the reserve clause, and by application of the prevention principle, to which I am entitled to have regard, I find that the onus was on the respondent to demonstrate its entitlement to liquidated damages by way of set off, and it did not discharge this onus.
290. The reason it did not do so, is that the duty on the superintendent regarding EOT's is to act for both the respondent AND the claimant, and to act in good faith. The respondent did not counter the claimant's submissions on this point, but merely sought to distinguish *Peninsular Balmain* on the facts, and then rely on the superintendent's and the [T] Report assessment of the EOT's to disallow the claims.
291. The respondent failed to address the issue of the good faith exercise of the reserve power, and demonstrate that the superintendent had exercised this power in good faith.
292. To my mind, the facts of him answering every EOT claim with the same words, that the claimant had not demonstrated delays by way of a construction program; and in the context of accepting nearly $100,000 of variations, without considering an EOT, and not anywhere demonstrating that he had properly exercised the reserve power, suggests, on balance that the prevention principle is enlivened.
293. In *Spiers*, the Court held that clause 35.5 in that case, precluded the full operation of the prevention principle, that time could be set at large, by the express words contained within the final paragraph. *Probuild* had a similar limitation, and yet both cases demonstrated that the prevention principle applied.

294. In this adjudication, Clause 34.5 does not have that limitation, with the result that time could be at large by failing to grant any EOT under the reserve power. This means the 16 June 2017 date for practical completion no longer applied. I do not have to decide whether time was set at large. The key issue, is that the respondent's start date for liquidated damages no longer was valid, which means it is not possible to calculate them.
295. **I therefore reject the set off for liquidated damages of $313,465.51.**
296. That essentially deals with the two principal objections by the claimant regarding design obligations and liquidated damages, and it is now necessary to consider the claimant's entitlement to its payment claim, and thereafter the respondent's entitlement to set off for the costs of taking out work.

VIII. The amount to which the claimant is entitled

297. I am obliged to calculate the amount to which the claimant was entitled, and the claimant had divided up its payment claim into:
    (i) A Contract Works claim;
    (ii) Variation claims.
298. To keep track of the claim items, I created a spreadsheet annexed as LM3, which identified each claim, the contending amounts the parties valued for each claim, and the adjudicated amount that I decided.
299. It comprised 2 sheets:
    (i) The summary sheet with all amounts identified; and
    (ii) A detailed Contract Works claim sheet, which had each line item claimed. I reviewed the [*redacted*] Scope of Work document [Document C1217-06-ESW-001_1] ("SOW") and cross checked each line item in the payment claim, with the work described in the SOW, to ensure that it fell within the work to be carried out. I used the descriptions in the SOW to fully describe the line items. This was not used any further because of the difficulty I had in understanding the claimant's contract works claim.
300. This spreadsheet was used to calculate the amount to be paid.

Contact Works claim $595,485.91

301. The payment claim was provided by the claimant behind Annexure 4, and I find it was sent under cover of an email sent on 21 July 2017. In the material that I was given, there were two spreadsheets provided being a summary sheet of the items under the contract plus reference to the variations which were on a separate sheet which was also provided.
302. The claimant submitted, under heading F [CLAIMANT'S ENTITLEMENT TO PAYMENT, that systems 05-14, 35, 36 and [*redacted*] were claimable, and described this claim as "Certified (in part) but not paid" in the amount of $595,485.91.
303. It then deducted the payment made by the respondent on 26 September 2017 of $91,537.11.
304. Consequently, it submitted that its Net Contract Works claim was $503,948.80.
305. The largest component of this claim was "Prelims", amounting to $484,027.20. as I found in my previous determination, it was not clear where this line item came from, as it was not in the 13 January 2017 Quote, which made up the contract sum, which was agreed.
306. It appeared to be some informal sum that the claimant used, to perhaps get paid a little earlier, by not having to complete a line item for which it had tendered.
307. Suffice is it to say, that the claimant provided me with no guidance whatsoever, as to how it was entitled to the amount claimed, and it bears the onus in doing so, and I find that it had not discharged its onus. There was no such line-item anywhere else in the contract, and it appeared to be some sort of informal agreement
308. I refer to [V's] statutory declaration at paragraph 34, and his reference to pages 76 to 81 containing his payment schedule response documents.

309. Furthermore, at paragraph 33.1 of [W's] statutory declaration, he said that [V] had assessed the additional prelims, not as an additional 25%, but only 20% with [V's] comments in red.
310. I note that 20% was identified in red on the document with the amount of $107,561.60, and I accept the respondent's assessment the respondent for this item at and in $107,561.60, which it had agreed.
311. The rest of the contract works claims also suffer from a complete lack of explanation as to how the percentages of were complete were derived.
312. Under paragraph 31 of its submissions, in Item 1 of its table, it provided further details of its claim [page 11] to which it referred to Annexure 7, as it had done in my previous determination 58.17.01.
313. Its claim for this aspect of work was based on its assessment of the completed percentages of works as at 21 July 2017 [based on a walk-around by [E]], and it then referred to the "Project NPC dated 21 July 2017 for substantiation of the accuracy of the extent and value of the Contract Works claim [paragraph 7 of the submissions relating to item 1].
314. Annexure 7 was divided up into "Contract Works claim correspondence" and "Contract Works claim NPC document". Unfortunately, again, the claimant did not explain, nor cross reference documents within this Annexure to its submissions with any meaningful detail.
315. The claimant provided no supporting statutory declarations, nor any guidance as to the evidence it attached at annexure 7.2 "*Contract Works Claim NPC Document*", to explain how it derived its calculations of the percentages of completed work claimed.
316. I appreciate that the parties to the contract understand these claim documents, but the claimant needs to appreciate that the independent adjudicator needs to understand how the claim is made up.
317. Clause 37.1 of the contract entitles the claimant to make progress claims, which are, "*to be given in writing to the Superintendent and include details of the value of WUC done and may include details of other monies then due to the Contractor pursuant to the provisions of the contract.*"
318. I looked at the material in Annexure 7 to understand the make-up of the claim.
319. There was only material behind tab 7.1 under the heading *CONTRACT WORKS CLAIM NPC DOCUMENT* where there were a whole series of spreadsheets and tables with no explanation to me how I could follow them.
320. There was no difference in the claimant's material from that in my determinations 58.17.01 & 02, so it remained impossible for me to understand the make-up of the contract works claim in any meaningful way.
321. Some of its earlier spreadsheets listed project management costs, labour and material costs and gross profit/loss, and then referred to burn rates and forecast rates, materials analysis. It also had a *Key Project Indicators* page which did not provide me with any data upon which I could make any realistic assessment.
322. There were also *Labour Activity Assessments,* but there was nothing meaningful that I could discern from the documents.
323. As I have said, the claimant did not explain these documents to allow me to make sense of them, and it bears the onus of doing so. Based on the claimant's reference in Annexure 7 document, and my analysis above, I find that the claimant has failed to substantiate its claim for contract works.
324. Nevertheless, I again have regard to the respondent's evidence supporting its payment schedule 5, to glean an understanding of what the respondent had made of the contract claim.
325. I refer again to [V's] payment schedule assessment, and note for the other contract claim items, in some cases he reduced the claim percentages and marked them in red, and in other instances he accepted the line items claimed.
326. The total in the payment schedule was $405,002.62, and I am satisfied that this assessment is the value that can be attributed to the contract works claim.

327. Accordingly, I find that the claimant is entitled to $405,002.62 excluding GST admitted by the respondent for the contract works claim, and this amount is taken to Annexure LM3.

Variation claims $165,555.25

328. The application only identified these variations which were disputed in this claim:
   (i) VO 1 $125,618.04
   (ii) VO 2 $26,749.50
   (iii) VO 26 $10,187.71

Totalling $165,555.25

Payment schedule reasons

329. At Tab 5 of the application, the claimant provided the two-page payment schedule, which only provided a summary of reasons for VO 1 and VO 2, that "*Costs are not accepted by CEA*" but also earlier referred to previous correspondence.
330. For each variation, the scheduled amount was $0.00, which for VO's 1 and 2 the respondent referred to previous correspondence, which was attached by the claimant to each of the variations claimed in Annexures 8 and 9 in the application.
331. For VO 26 the comment in the schedule was, "*Not approved in this claim, still being assessed….*" by the respondent
332. The claimant attached correspondence for VO26 at annexure 10.
333. The claimant's cost breakdown contained in its *Variation and Change Advice* essentially identified a whole series of materials which were listed in some detail, together with the labour required to carry out this work plus some living away allowances accommodation etc.
334. Given that there are only 3 variations is contest, I looked to each variation individually. I note that the objections raised in VO1, were relied on by the respondent in VO2 and VO3 as well, via [W's] statutory declaration.
335. I will start with the VO 1 and refer to the findings in that analysis to the other two variations, where necessary.

Variation VO1 $125,618.04

336. This variation relates to the provision of additional *[redacted]* arising out of drawing changes.

Claimant's submissions

337. Under item 2 on page 11 of the application, the claimant identified that it had submitted this variation on 6 April 2017 seeking payment for extra *[redacted]* that was required underneath the [*redacted*].
338. It argued that the revised drawings identified:
   (i) additional *[redacted]* and support;
   (ii) additional levels and layers of *[redacted]*; and
   (iii) changed the *[redacted]* from [*redacted*] 20B to [*redacted*] 16A ratings on various levels.
339. It argued that when it had received the revised drawings it had commenced the installation of *[redacted]* in accordance with the contract issue drawings which had provided a minimal number of *[redacted]* under the [*redacted*].
340. It referred to Annexure 8 for its substantiating documents.
341. The claimant's correspondence attached behind Tab 8.4 of the application, and the variation claim itself, identified extra *[redacted]* required for the underneath of the [*redacted*] because of the issue of new drawing numbers:
   (i) C1362 – 05 – EDA – 004 – 0
   (ii) C1362 – 05 – EDA – 005 – 0
   (iii) C1362 – 05 – EDA – 006 – 0

(iv) C1362 – 05 – EDA – 007 – 0
(v) C1362 – 05 – EDA – 008 – 0
(vi) C1362 – 05 – EDA – 009 – 0
(vii) C1362 – 05 – EDA – 010 – 0

342. At paragraph 10 on page 13, it identified 2 revisions of each of the above drawings version 0, the first issued on 29 March 2017 and the second on 31 March 2017.
343. The claimant said that it had based its tender price on the full extent of detail on the 2 tender drawings C1362–05–EDA–004–A, and C1362–05–EDA–005–A [paragraph 10.2, page 13]
344. At paragraph 11 of the application submissions (page 13), the claimant said that the provision of drawings was a direction to increase and perform additional WUC, and that it had quantified its claim based on industry standards and otherwise reasonable rates, together with cost price of materials and a reasonable amount for profit and overheads.
345. In annexure 8.1, the claimant provided the two tender drawings with suffixes 004 and 005 (both revision A) as its starting point.
346. At annexure 8.2 it then provided a whole series of drawings, which bore the dates 29 March 2017, or no date, some with IFF see written in hand with an initial for all drawings having been checked by ACK, and others with a typed issued for construction in the amendments table (the "new drawings").
347. On some of the new drawings were changes identified in either blue or red with further details provided on the drawings. I note at this point that in neither the payment schedule submissions, nor in [W's] statutory declaration, did the respondent deny the issue of these drawings. Accordingly, I am satisfied they were issued.
348. I note at paragraph 9 of the application on page 12, the claimant said that it was the respondent's failure to carry out its design responsibilities which resulted in the claimant having to procure additional *[redacted]*, install them and reorder and reinstall materials that had to be removed for the claimant to perform the variation work.
349. Before considering the broad adjudication response objections, I note that the costs breakdown provided in annexure 8.3, headed "variation and change advice," identified materials and labour, with specific quantities listed, but there are no individual line item rates against the materials, nor is then any breakup of the labour and the line items below the labour summary.
350. If the claimant is entitled to this claim, there will need to be a close analysis of the quantum claimed.

<u>Respondent's submissions</u>

351. I will start with the attachments behind annexure 8.4 of the application, because they referred to the documents (apart from one obvious error) identified in the payment schedule, on which the respondent relied to withhold payment.
352. I note the third letter identified in the schedule was C1362–01-GNO–186 (13/6/17) response 3 (15/5/17). These numbers appeared to be incorrect, and I looked at [W's] statutory declaration to identify the document which the respondent calls "response 3".
353. Unfortunately, [W's] cross reference numbering also seem to go awry, as he, at paragraph 46 of his statutory declaration, after his correct reference to his letter dated 17 May 2017 being behind tab 8.4 of the application, then referred to the claimant's response email dated 29 May 2017 by reference to tab 8.1 of the application. He must have meant tab 8.4.
354. At paragraph 47, he then said he provided a further response by email dated 13 June 2017 reiterating his previous points, and cross-referenced to tab 8.1 again, which I take to mean 8.4.
355. Importantly, he refers to his letter dated 13 June 2017, which I find behind tab 8.4 as reference C1362–01–GNO–110, so I assume the payment schedule reference to the suffix "-186 and (15/5/17)" are in error, and that this suffix "110" is the correct number for the letter.
356. I will refer to the respondent's response submissions firstly, and then go into the detail in [W's] statutory declaration. These submissions, at paragraph 20.1.2 stated:
(i) the work claimed in the variation was included in the scope;

(ii) the works were not identified as an exclusion and were part of the known and acknowledged scope. The claimant knew the *[redacted]* was included in the scope and it acknowledged it as such;
(iii) in so far as not all of the detail of the *[redacted]* was not identified, this fell within the claimant's design responsibility, and in its role as a tier 1 contractor;
(iv) the claimant's failure to resource the project was at the root of the alleged variations and delays.

357. I note that the respondent:
(i) did not deny that it had issued revised drawings on or about 31 March 2017;
(ii) also, did not deny that the *[redacted]* were of a higher [*redacted*] rating; nor
(iii) that additional *[redacted]* and associated support structures were identified on the drawings; nor
(iv) that the claimant did not have to reorder and reinstall materials.

358. It appears as if its primary objection to the variation was the *within scope argument*, which, if correct, thereby eliminated the claimant's assertions referred to directly above.
359. Within this heading is also the allegation that the [*redacted*] schedule formed part of the contract.

Within scope objection

360. The submissions did not expand any further about this argument, but referred to paragraphs 42 to 49 of [W's] declaration to which I now turn. I note this same objection was also raised in VO 26.
361. [W] argued, by reference to his letter dated 20 April 2017 that the *[redacted]* were included within the [*redacted*] Scope of work system descriptions for both the [*redacted*] and the main [*redacted*] building where there is reference to supply and install the *[redacted]*, or "all" *[redacted]*", in the case of the [*redacted*] building.
362. He added that the claimant was provided with a [*redacted*] schedule at the time of tender, which listed the [*redacted*] to be supported between the [*redacted*] and all equipment, and that all the tender drawings provided details on the *[redacted]* between the [*redacted*] and equipment.
363. He referred to the claimant's tender letter dated 13 January 2017 in which the claimant said that no specific exclusions relating to the *[redacted]* were listed.
364. Finally, he said that the *[redacted]* drawings issued to the claimant following the contract award were diagrammatic representations of the system descriptions within the scope of works.
365. At paragraph 49, [W's] *summarised* objections went into more detail as to why the claimant was denied its claim because the work was within the scope.
366. This requires a close analysis about the content of the contract, and the extent to which items not specifically described or not described in enough detail, nevertheless fell within the scope of work agreed to be carried out by the claimant.
367. The respondent's submissions were that the specification and drawings viewed as a whole meant that the claimant knew the nature of and length of [*redacted*], the start and termination points, and had undertaken to carry out the work on that basis.
368. It argued that the variation claim was part of the known and agreed scope such that no variation had occurred, and that furthermore, in the event of deficiencies and documentation, the claimant had a design responsibility.
369. During the ensuing correspondence between the parties on this point, the claimant focused on clause 5.1 of the [*redacted*] specification, which (at page 23 of 86) provides as follows under the heading ***[REDACTED]***
"5.1 [Redacted] shall be installed at the levels shown on the drawings. The routing shown on the drawings represent the desired finished arrangement. Minor deviations to avoid [*redacted*] *shall be made following approval by [the respondent]."*
370. The claimant's argument was that any deviations from what was depicted on the drawings beyond minor deviations, constituted a variation.

371. The essential contest appeared to be that the scope, drawings and the tender documents, when read together, meant that the claimant knew the extent of the [*redacted*] work, such that no variation was claimable.
372. In my earlier determination 58.17.01, I canvassed the law about this important topic, because I considered it necessary to understand the extent to which a lump sum contract, with words requiring a contractor to provide all [*redacted*] etc in several places in the specifications, meant that it was unable to claim a variation.
373. The difficulty for the respondent is the existence of clause 36 dealing with variations in the context of a lump sum contract.
374. In my view, the existence of a variation clause, overcomes the inability of the claimant to claim a variation in circumstances where the *WUC* was varied (the "*variation prohibition*"), if it is a lump sum contract.
375. As with the previous determination, neither side provided me with authority regarding the proper analysis for variations and I consulted the seminal text of Hudson[6] , and paragraph **5–024(b) Lump Sum Contracts** [pages 785-786] and **5–030 Scope of Contractual Variations Provisions** [page 791] to find authority, and discussions surrounding the *variation prohibition* in a lump sum contract that I have identified.
376. Insofar as the respondent's reasons for non-payment are concerned, it bears the onus of demonstrating that it is entitled to reject the variations, and as I say it provided no authority to support its position.
377. Again, because of the importance of this point, I have extracted part of the author's important statements as follows:

5–024(b) Lump Sum Contracts

"The first question to be decided in considering any claim for a variation based on a consultants or Employer's instruction is whether or not the work comprised in the instruction is in fact a variation, that is to say, whether, as defined above, it differs from the work which the Contractor is already obliged to carry out for the contract Price. This will not simply involve an examination the work now instructs in the light of the earlier description the contract drawings and specifications. Thus, it has already been seen that the Contractor's basic obligation in a priced contract may well include other ancillary work or processes, which although not expressly described in the documents, are "indispensable" or unavoidably necessary under the "inclusive price principle" of the proper completion of the work which has been described. …

Additionally, it has been seen that the inclusive price principle in the absolute nature of the Contractor's completion obligation may require contingently necessary, although undescribed, work, often in the areas of temporary works and methods of working, to be carried out within the overall contract price. Ultimately, whether work described in contract documents such as a specification or bills including ancillary work is a question of contractual interpretation." **(my emphasis)**

5–030 Scope of Contractual Variations Provisions

"As has been seen, the general rule is that a Contractor who has been requested to do work which is in fact a variation will be able to recover payment for it if the Employer has expressly or impliedly requested the work knowing it to be such. The Contractor, therefore, is unlikely to be in difficulty in advancing a variation claim unless either:

(a) the Employer does not know of and so has not authorised the variation; or

[6] *Hudson's Building and Engineering Contracts: Atkin Chambers, (2010) Thomson Reuters, London* pages 785 to 786

(b) the contract has been so worded as to deny legal effect to any request authorisation by or on behalf of the Employer or their Architect which is relied on by the Contractor."

378. I am therefore required to interpret the contract to see if the "*inclusive price principle*" identified by Hudson applies. I turned firstly to the FIA which does not state that the price is all-inclusive. At clause 9 it states, "*The total Contract Price is AUD $2,896,200 ex GST*"
379. Clause 8 is an *entire agreement clause* which states that:

"This Contract constitutes the entire agreement between the parties in respect of the Works and sets out a full statement of contractual rights and liabilities of the parties in relation to the Works and no negotiations between them nor any document agreed or signed by them prior to the date of this Contract in relation to the Works is of any contractual effect."

380. At clause 4, the documents constituting the contract were listed, and the respondent's RFQ, the [*redacted*] schedule, and the claimant's tender letter were not listed as part of those documents.
381. Therefore, I am unable to consider the effect of the claimant's tender letter as having any bearing on the contract, because it did not form part of the contract documents, so it is devoid of any contractual effect.
382. In addition, the respondent's RFQ was part of the pre-contract negotiations and is devoid of any contractual effect.
383. Furthermore, I note that at paragraphs 12 through to 18 of his statutory declaration, [W] submitted that the [*redacted*] schedule did form part of the contract. It was not listed in paragraph 4 of the FIA, but [W] indicated that it was referenced in several places in the contract.
384. The difficulty I have is that it was not called up specifically by reference to a particular identification number, nor was it referenced as being attached to the contract, in either the General Specification or the [*redacted*] Scope of work, although I accept it had been referred to.
385. I note [W's] paragraph 14.1 reference to the tender letter where the claimant referred to the [*redacted*] schedule documents, but as I found above, the tender letter is devoid of any contractual effect.
386. Accordingly, as a matter of strict contractual interpretation, I am unable to consider that the [*redacted*] schedule formed an express part of the contract. It may be that its existence could be implied as a matter of trade usage, but neither party addressed me on that point, so it must be left alone.
387. In any event, the claimant argued, in its 26 April 2017 email reply to [W's] Item 2 in response 1, behind Tab 4 in the application, that the [*redacted*] schedule failed to identify which areas of support were to be provided by the claimant. It said that this lack of information required it to seek the information from the design drawings, in the light of clause 5.1 (referred to below). I therefore find that the [*redacted*] schedule does not assist the respondent to activate the *inclusive price principle* and deny the claimant a right to variations.
388. I then turn to the respondent's allegations regarding the *scope of work*, requiring the claimant to supply and install the *[redacted]*. In answer to that submission, the claimant referred to clause 5.1, which is the [*redacted*] Specification document number C1217–04–ESP–001, and that minor deviations from the layout could be allowed in the event of [*redacted*].
389. Paragraph 4 of the FIA provides the list of documents in descending order of priority, and the [*redacted*] Specification is above the scope of work, so where there is a conflict, the [*redacted*] Specification must prevail.

390. Accordingly, the contract recognises that the claimant needed to install the *[redacted]*, and provide for minor deviations in the event of clearance, but I do not see that it demonstrates that it falls within the "*inclusive price principle*" identified by Hudson.
391. This leaves the:
    (i) Tender drawings showing the [*redacted*],
    (ii) Schedule A requiring the supplier or labour and materials and equipment; and
    (iii) the *[redacted]* drawings being a diagrammatic representation of the system descriptions in the scope of work.
392. The tender drawings and the *[redacted]* drawings being a diagrammatic representation, does not suggest that the contract falls within the *inclusive price principle*, as they are dealing with the extent of the *[redacted]*.
393. This leaves Schedule A, which states, "*This contract is for the supply of all labour, materials and equipment necessary to* [*redacted*] *… as defined in the relevant scope of work documents, drawings and specifications*."
394. The General Conditions of Contract ("GCC") is listed as 4(d) in the FIA, which is above the schedules, so in circumstances of conflict, I find the GCC prevail, and the GCC include a variation clause which governs the parties' relationship, and allows the claimant to claim extra costs for variations.
395. The variation clause, if it applies, must as a matter of logic preclude the contract from being subject to the *inclusive price principle* because it contemplates payment for changes to the WUC.

Works not identified as an exclusion

396. The respondent's arguments in relation to this point, that the claimant in its tender letter NT/17/06 dated 1/2/17 had not excluded anything about the *[redacted]*, falls away because of my finding that the tender letter was devoid of any contractual effect through the operation of clause 8 of the FIA.
397. Accordingly, this objection does not preclude this work from being a variation.

Claimant's design responsibility and Tier 1 contractor

398. This was one of the respondent's objections, but I have earlier found against it on this point, so that cannot preclude this from being a variation.
399. The respondent's arguments that the claimant was a tier 1 contractor, such that items that were not identified on drawings, should nonetheless have been expected to be installed by the claimant, was not supported by any authority.
400. To my mind this submission falls within the *inclusive price principle*, which I have rejected because of the existence of the variation clause.

Claimant's failure to resource the project

401. This submission derived specific support from [W] in his paragraph 49.10.4 of his statutory declaration.
402. However, it did not appear as if the respondent expanded anywhere on the submission and provide any authorities to support its submission.
403. Whether or not the claimant sufficiently resourced the project, does not on my reading of clause 36.1 prevent it from claiming a variation. It may be liable to pay damages or be subject to a set off claim, as the respondent has done in this case, but that does not disqualify the claimant from claiming a variation.
404. Given that there is no authority to support such a submission, I cannot accept it, which means it does not preclude the work from being a variation.
405. As a matter of prudence, although it was not a major objection identified in the respondent's submissions, I thought it important to capture [W's] complaint about the *[redacted]* drawings being a diagrammatic representation of the scope of work.
406. This is one of the difficulties where witnesses of fact provide submissions in their statutory declarations, which are not taken up in the submissions proper.

[redacted] drawings were a diagrammatic representation of the scope of works

407. [W's] correspondence regularly identified this as a reason for non-payment.
408. Again, the claimant's regular response was, "*Please see clause 5.1 of the contract, this advises there were only going to be minor deviations from the drawings provided at tender time hence why there is no specific exclusions*".
409. I understand the claimant's position that there would be no need to provide any qualifications to its tender, if only minor deviations of the route had to occur because of [*redacted*] reasons.
410. To my mind the issue of drawings showing additional information regarding the *[redacted],* including the requirement for a different *[redacted]* rating must mean that they were more than a diagrammatic representation of the scope of works. The earlier drawings to my mind may well have fallen within this category, but as soon as further drawings were issued, clause 36.1 to my mind was enlivened to take it outside any previous agreed scope of works.
411. I find that all the respondent's reasons for non-payment are not justified.
412. Nevertheless, the claimant must demonstrate that the activity falls within clause 36.1, to discharge its onus regarding the entitlement to a variation, and, it must be clear that a variation has occurred, and the claimant must discharge this onus, as well as its onus with respect to quantum.

My finding on VO 1

413. In the circumstances, I am satisfied that the work fell within clause 36.1 as:
    (i) an increase in work [36.1 (a)] given there were additional items involving the *[redacted]* identified on the drawings, and additional *[redacted]* had to be procured;
    (ii) changed the levels, lines, positions or dimensions of the work, as these were shown on the revised drawings: [36.1 (c)];
    (iii) required the claimant to carry out additional work, because additional *[redacted]* had to be installed [36.1 (d)]; and
    (iv) required the claimant to demolish or and remove work no longer required because the claimant had already commenced work on the old drawings [36.1 (d)].
414. Accordingly, the claimant has satisfied its onus regarding entitlement.
415. Insofar as quantum is concerned, I find the claimant provided a breakdown of costs in its variation and I note that the claimant submitted that the costs were based on industry standards and otherwise reasonable rates for installation, cost price of materials and reasonable amount for profit and overheads.
416. However, it only provided global amounts for materials and labour; and although it had identified the quantities in relation to each, no rates were identified in this variation claim.
417. I am not prepared to accept the claimant's global amounts, and must look at other material to see if there is a means of determining this quantum.
418. The respondent engaged [*redacted*] ("the R Report"), who were put forward as providing an independent expert's report.
419. I have similar concerns regarding this report as I did with the [T] Report, in that the director did not establish his qualifications and experience anywhere in the report. For the same reasons, as identified above, and based on High Court authority, it is unsafe to accept the veracity of this report, as opinion evidence, when the basis of expertise has not been established.
420. The respondent utilised the R Report to demonstrate that, in the opinion of the writer, the claim was not a variation under the contract. This is swearing to the issue, in circumstances where the expertise of the expert has not been established, and I am not prepared to accept it for that reason.
421. Nevertheless, I note the R Report provided 2 alternative valuations for this variation:
    (i) Option 1 based on the quantities provided by the claimant in the calculated sum of $83,188;

(ii) Option 2 based on the quantities assessed by the author in the calculated sum of $58,069.50.

422. In both instances, the report stated that the assessment of the labour required was based on the material content quantified and assumed standard industry productivity for the work. The report said that the labour hours suggested by the claimant had no justification.
423. In my previous determination 58.17.01 regarding VO1 I was able to look to payment claim 6 in that dispute, where some rates were provided by the claimant, which enabled me to carry out a calculation to value that variation.
424. I looked at payment claim 6 to see if there were any material rates which I could use, and there were no comprehensive rates provided.
425. This left me with the only quantum where rates were available, were found in the R Report.
426. On balance, and after careful consideration, I selected Option 1 from the R Report, because, as I said previously, there was no demonstrable qualification and expertise identified in the report, upon which I could rely to accept Option 2.
427. However, the report Option 1 had identified standard industry rates, and used the claimant's quantities, which allows quantum to be established.
428. **I therefore accept the valuation of $83,188 for this VO1, and it was taken to LM3.**

VO 2 $26,749.50

429. Under item 3 on page 14 of the application, the claimant identified that it had submitted this variation on 8 May 2017, following the amendment and issue of a revised [*redacted*] schedule on 29 March 2017.
430. It referred to Annexure 9 for its substantiating documents.
431. The claimant argued that the additions and omission of [*redacted*], and the inclusion of [*redacted*] of varying lengths which differed from the original [*redacted*] schedule provided to the claimant at tender.
432. It said that VO 2 was in relation to the costs incurred by the claimant for changes to materials and labour arising from the revised [*redacted*] schedule.
433. I have reviewed the VO 02 cost breakdown in the claim document and it identified 2 items:
    (i) materials – quantity 1 – $25,400
    (ii) labour – quantity 1 – $63,765.
434. It was provided on a standard format which also listed a series of line items, none of which were filled out.
435. At paragraph 4 of its explanation, the claimant said that the respondent rejected the variation because the claimant did not clearly demonstrate where the WUC had been varied, and requested that the claimant provided a breakdown of:
    (i) cabin number and type;
    (ii) [*redacted*]; [*redacted*] rate per metre in accordance with industry standard rate; and
    (iii) termination rate per [*redacted*] in accordance with the industry standard rates.
436. The claimant alleged that on 29 May 2017 it provided the respondent with the breakdown and it was included at annexure 9.
437. I have had regard to annexure 9 and note that under cover of the email dated 29 May 2017, the claimant provided a copy of the VO 2 updated [*redacted*] schedule in both PDF and Excel format.
438. The [*redacted*] schedule comprehensively detailed the following comments per line item which fell under discrete work areas as follows:
    (i) additions;
    (ii) no changes;
    (iii) deletion; and
    (iv) replace.

439. I am satisfied that this [*redacted*] schedule demonstrates changes to the contract, such that would fall within clause 36.1 (a) as an increase, decrease or omission of any part.
440. The difficulty I have, nevertheless, is that the claimant bears the onus of demonstrating its claim, and nowhere in the material provided by the claimant, did it cross-reference the [*redacted*] schedule provided on 29 May 2017 to its variation claim cost breakdown.
441. There were no materials listed in any follow-up, nor were any installation rates or termination rates provided by the claimant anywhere in its variation claim.
442. It simply had a global sum for materials, and another for labour, with no breakdown of how those items were calculated.
443. Furthermore, the total of the VO 2 claim was $89,165 and yet it only claimed $26,749.50 in this adjudication, and I have no idea how this number emerged.
444. As I said, the claimant had a prima facie entitlement to a variation because of the issue of the [*redacted*] schedule, however, it provided:
    (i) no breakdown as to what materials were:
        (a) additional;
        (b) deleted;
        (c) replaced;
    (ii) no explanation or identification of the rates it used for the additional materials, nor any rates for deducting the costs of materials no longer required;
    (iii) no explanation or identification of the labour rates used, nor the provision of timesheets or any substantiating evidence of the labour hours deployed to carry out this variation.
445. There is no need therefore to consider the respondent's material, because I find the claimant has not discharged its onus regarding VO 2, **and I value this variation as $0.00 and transfer this amount to "LM3"**.

VO 26 $ $10,187.71

446. Under item 11 on page 15 of the application the claimant identified that it had submitted this variation on 21 July 2017 seeking payment for extra work following the issue of a site instruction for the installation of *[redacted]* in various locations.
447. It substantiated the claim by reference to the day work sheets which had been signed off by the respondent's personnel.
448. It referred to Annexure 10 for its substantiating documents.
449. These documents clearly identified a list of materials, some of which included a length, or alternatively a number of items that were provided. The materials cost totalled $1697.71.
450. It also referred to day worksheets which identified the person carrying out the work, the materials that they worked on, and a signature of both the claimant and the respondent's representative.
451. I find the respondent's representative [M], was also the person who issued the site instruction dated 29 June 2017, and on this site instruction which is behind tab 10.2 of the application, was a note "All cost to be signed off on day worksheets at the end of each day".
452. I am satisfied that the claimant has discharged its onus for this variation claim, and now turn to the adjudication response for the respondent's position regarding the claim.
453. The payment schedule is of no assistance, because it rejected the claim on the basis that it was still being evaluated.
454. In the adjudication response the respondent dealt with this variation under paragraph 20.3, in which the respondent referred to paragraphs 66 to 71 of [W's] declaration and confirmed that the variation was rejected on the basis that:
    (i) the works fell within the scope of works included in the contract and tender drawing;
    (ii) the claimant always knew the extent of the *[redacted]* it would need for the work on that if the drawings provided assisted the claimant in relation to the position and

height of the *[redacted]*, it did not increase the scope that the claimant knew it had to undertake;
(iii) the claimant had assumed design responsibility; and
(iv) failed to mobilise to the site promptly and did not pre-order the material.

455. At paragraph 20.3.3 of the response, the respondent said that the amount of the variation was exorbitant, and that materials are part of the scope agreed to be supplied.
456. Having regard to paragraphs 66 to 71 of [W's] statutory declaration, I note that he said that [M] issued the site instruction because [M] said the claimant would not otherwise carry out the work [paragraph 68].
457. There is no explanation as to why [M] could not have provided a statutory declaration in support of the submission.
458. Although I am not bound by the rules of evidence, it is inherently unsafe to rely upon hearsay evidence from [W] about what the claimant may or may not have said to [M].
459. What is evident is that there is no denial the site instruction was issued, and the essential question is whether this site instruction increased the work to fall in line with clause 36.1(a) of the contract.
460. His rejection of this variation echoed the payment schedule objections identified at paragraph 20.3.2 of the response.
461. [W] does not deny that fresh drawings were issued about the extent of the *[redacted]*, its position and height, so his essential objection, apart from the design objection which I have already rejected, was that this work fell within the scope.
462. What was unfortunate was [W's] statement in paragraph 69 of his statutory declaration, in which he said "[*The respondent*] refers to paragraphs 42 – 60 above. This work relates to connecting *[redacted]* below the [*redacted*]. This work was necessary and incidental to the laying of [*redacted*] and as part of the scope which refers to the general installation of "*[redacted]*".
463. [W] is a repository of fact, not a mouthpiece for the respondent's submissions, so it becomes somewhat awkward when a witness makes submissions within a statutory declaration. I have already referred to another paragraph of [W's] statutory declaration that contained submissions, not pressed elsewhere.
464. Nevertheless, paragraph 42 through to 60, were statements made by him in his statutory declaration, which I have already considered under VO 1 above.
465. I am not satisfied that the issue of drawings was merely a clarification of what the claimant was already obliged to do about this work.
466. I rejected the respondent's submissions regarding VO1, which included [W's] interpretation of the contract, identified in his statutory declaration.
467. Accordingly, I am satisfied the claimant is entitled to this variation, as it:
(i) was in response to a site instruction from the respondent; and
(ii) the site instruction described the activity of installing vertical *[redacted]* in various locations to maintain support for the [*redacted*]; and
(iii) the site instruction referred to costs being signed on a day worksheet, and although costs were not explicitly identified in these day worksheets, the material item numbers, together with the labour hours for each day were clearly identified and [M] signed these day worksheets;
(iv) had no design obligations.
468. Although the respondent referred to the [*redacted*] Scope of work, the respondent did not point specifically to where the [*redacted*] schedule was identified within the scope of work, and I earlier found that it was not part of the contract documents.
469. I note at paragraph 1.1 under the heading **Scope** that the, "The works are to be executed in accordance with the project general specification C1362–04–ESP– 001 and [*redacted*] specification C1362–04–ESP–001, [*redacted*] Scope of work C1362–06–ESW 001 (this document) and to the approved construction plans and drawings.

470. To my mind, if the approved construction plans and drawings were amended, to identify equipment that had not been identified earlier, together with a site instruction, suggests to me that the works fell within the variation mechanism.
471. I am satisfied of the claimant's entitlement to the additional work, and that it has adequately substantiated its claim in the material provided behind tab 10.
472. I note that the R Report specifically said that [W] did not ask it to comment on this variation, so there is no material challenging the quantum.
473. **Accordingly, the sum of $10,187.71 is accepted and has been transferred to "LM3".**
474. **I totalled the contract works claim and the variations in LM3 and I find the amount to be paid to the claimant is $498,378.33 excluding GST, to which GST should be added.**
475. However, the claimant conceded it was paid $91,537.11 on 26 September 2017, which must be deducted to determine the payment claim amount. I calculated these amounts in LM3
476. **The payment claim amount due was to $406,841.22 including GST, which converts to $447,525.34 including GST.**
477. However, I am obliged to consider on balance the amount owing to the claimant, after considering the respondent's setoffs to which I now turn.

IX. Set-offs claimed by the respondent

478. The respondent is claiming for a set off liquidated damages and for the costs of the work taken out [paragraphs 22 and 23 of the response].
479. In paragraph 1 of its submissions on page 21, the claimant referred to Annexure 11, which contained the respondent's letter dated 18 September 2017, setting off liquidated damages in the sum of $313,465.51.
480. The claimant, at paragraph 33.1, of the application, said that the respondent did not raise it set-off claims in the payment schedule or otherwise prior to the date by which it ought to have paid the amount certified in the payment schedule, and that the respondent was in substantial breach by failing or refusing to pay the full certified value of the payment claim [paragraph 33.2].
481. Nevertheless, s33(1)(b) of the Act requires me to determine on the balance of probabilities whether any party is liable to make a payment, and if so, the amount to be paid, and any interest payable, and the date on which the amount must be paid.
482. Whether or not one party is in breach of contract, is only relevant, if such breach in some way disentitles a party from claiming monies under the contract or being able to set off monies against those that are being claimed.
483. Whilst I have found against the respondent about its entitlement to set off liquidated damages, I thought it important to consider the claimant's objections to the respondent's entitlement to set off, based on its allegation that the respondent had followed a flawed process in attempting to set off the claim value of liquidated damages against the certified amount.
484. The reason for carrying out this analysis, is that the respondent relied on its authorities to support its works taken out set off claim by analogy, so it is important that I analyse this issue.
485. In my previous determination 58.17.01, based on the material before me, I found that the respondent was unable to set off monies because it had not certified the set off in the same certificate in which it had certified the amount payable to the claimant. This was based on case of *Main Roads Construction Pty Ltd v Samurai Enterprises Pty Ltd* [2005] VSC 388 provided by the claimant, and there were no submissions on this point from the respondent.
486. The claimant has used the same submissions again in this adjudication. The one difference was that in the previous submissions, the claimant also identified the extra over costs that the respondent had claimed as part of its set off.

487. In this adjudication, the letter of 18 September 2017, only referred to liquidated damages and not the cost of the work taken out, and it was only in the adjudication response that the works taken out set off was included.
488. As I have already mentioned above, I was not prepared to consider the costs of the work taken out in this adjudication, as they did not form part of the letter dated 16 September 2017 of the respondent's set off. Moreover, they did not form part of the *payment dispute* of 4 September 2017.
489. It was nearly a month later that these costs were certified by the superintendent, by which time payment claim 6 had been issued.
490. These costs will be considered in the payment claim 6 dispute. I thought it best nevertheless to consider the contending submissions about the first and second certificate argument, because the respondent has raised its objections to that issue in this adjudication.
491. The respondent was at pains to argue that the claimant's submissions regarding the first and second certificate was not supported by authority, and I need to deal with them.
492. At paragraph 32 of the application, the claimant said that the respondent had sought in a letter dated 16 September 2017, to include for the first time a claim for set-offs of liquidated damages. As I said, there was no reference to the costs of the works taken out.
493. At paragraph 33.1, the claimant emphasised that the respondent had not raised its set-off claims in the payment schedule, or otherwise prior to the date by which it ought to have paid the amount certified in the payment schedule.
494. However, at paragraph 33.5 of the application, the claimant said that even if liquidated damages (which it denied), it submitted that the respondent had adopted a flawed process in attempting to set off the liquidated damages against the certified amount.
495. In paragraph 33, as it had done in the previous determination 58.17.01, the claimant argued that:
    (i) clause 37 of the contract required 2 certificates to be issued, with the second certificate assessing any monies due from the claimant to the respondent;
    (ii) the second certificate was required if the respondent wanted to set off against the value appearing on the first certificate;
    (iii) the first and second certificate were to be issued concurrently within 28 days of the progress payment being submitted by the claimant;
    (iv) the claimant argued that the set off liquidated damages and extra over costs were not set out in the certificate issued concurrently with the first certificate for the July payment claim. It argued the second certificate relating to the July payment claim was set out in a document on 4 September 2017;
    (v) it argued that therefore, the prescribed contractual process for setting off any amounts had not been followed in respect of the July payment claim and could not be brought to account to set off against the certified amount in the payment schedule; and
    (vi) the contract provided no other mechanism for setting off amounts claimed to be payable by the claimant to the respondent against the amounts appearing on the first certificate, and the respondent had a strict obligation to pay the amount paid on the first certificate, where a second certificate was not issued concurrently. It cited the case of *Main Roads Construction Pty Ltd v Samurai Enterprises Pty Ltd* [2005] VSC 388 ("*Main Roads*") as authority.
496. I analysed these submissions in determination 58.17.01, without anything controverting for the respondent, and found for the claimant. In this adjudication, however, the respondent argued that the claimant had misapplied *Main Roads,* and that Habersberger J in the same case in 2006 at VSC 144 ("*Main Roads 2*") implicitly overruled his earlier decision.
497. Furthermore, the respondent relied on the case *RCR O'Donnell Griffin Pty Ltd v Forge Group Power Pty Ltd* [2015] QSC 168 ("*RCR*"). In this case Byrne SJA at [44] to [47] held that there was a difference between the clause 34.7 and the clause 37.2 certificate regimes.

His Honour held that the clause 34.7 certificate created a liability to pay liquidated damages, and the certificate suffices it to do so.

498. In the case of clause 37, the certificate merely relates to monies *due*, rather than *due and payable* which are the words used in clause 34.7. Byrne JA respectfully disagreed with Habersberger J's reasoning in *Main Roads*.
499. *RCR* went on appeal, although not on the point decided by Byrne J, and McMurdo JA's obiter remarks agreed that what clause 37.2 did with respect to progress claims did not confine the superintendent's power to certify for liquidated damages under clause 34.7.
500. It appears as if liquidated damages certification renders the certified amount immediately due and payable, and is not coupled to the clause 37.2 progress payment certification regime. Whilst it is not determinative in this adjudication, I do find that liquidated damages can be certified independently of the progress payment regime certification.
501. At paragraph 23.8, the respondent argued that clause 39.6 is analogous to 34.7, in that certification of the works taken out renders the monies due and payable, and cited *RCR* and *Main Roads 2*, as support for this principle.
502. Those cases were dealing with clause 34.7, not 39.6, but I can see the similarity in the effect of the certificate. I am not bound by the cases provided by the respondent, because they are not directly on point.
503. However, as I have said previously, the work taken out costs were only certified on 6 October 2017, and were not identified in the 16 September 2017 letter. They could only have been due and payable on 6 October 2017, 1 month after the claimed due date for payment of payment claim 5.
504. In my view, it would not be appropriate to deal with this set off claim in the adjudication, and that it should wait until the adjudication for payment claim 6.
505. In addition, the respondent, at paragraph 1.23 of the response, submitted that I was obliged to bring to bear any other set off amounts that I may have found in my previous determinations, in accordance with clause 37.6 of the contract.
506. In my determination 58.17.02, I found that the respondent was entitled to a set off, which extinguished the claimant's payment claim, and that was the finding. I appreciate that there was a calculation in LM2 which showed an amount of set off that exceeded the claimant's claim (the "*shortfall*"), but it was not part of my finding.
507. In 58-17-02, I focussed only on deciding what the respondent was liable to pay the claimant, as that was the extent of the payment dispute. I did not make a finding of what the claimant owed the respondent, as that would have been outside my jurisdiction, because that was not the ambit of the payment dispute.
508. The respondent requires me to bring this *shortfall* amount to bear against the claimant in this adjudication. It has provided me with no authority to support such a submission.
509. I am not prepared to do so for several reasons:
    (i) I did not make a finding in the previous determination about the *shortfall* – I merely decided that the claimant was to receive no payment from the respondent, because the respondent's set off exceeded the amount due to the claimant;
    (ii) I cannot convert the *shortfall* into a finding in this adjudication, as the facts of that determination are not in contest here;
    (iii) if I tried to do so, I would be outside jurisdiction;
    (iv) in any event, without requesting submissions from the claimant, it would be a breach of natural justice to do so; and
    (v) the respondent provided me with no binding authority to do so.
510. I therefore find the respondent is unable to raise any setoffs against payment claim 5 in this adjudication, which means the claimant is entitled to its adjudicated amount that I have calculated plus GST.

X. <u>Due date for payment</u>

511. The claimant submitted at paragraph 71, that the due date for payment was 4 September 2017, and at paragraph 2.4.2 of the response, the respondent agreed with this date.

512. I therefore find the **due date for payment is 4 September 2017**, about which the parties had no contest.
513. Given that this date has already passed, and I am obliged by s33(1)(b)(ii) of the Act to determine the date on or before which the amount must be paid.
514. The respondent made several submissions following my 58-17-01 determination about me having to make a finding of when the amount is payable.
515. Neither party provided me with any authority about this point, and the Act appears to be silent about it.
516. Given that the due date for payment has already past, in my view (without any binding authority provided to me) that to promote the objects of the Act s3(2)(c) of rapid recovery of payments, that the adjudicated amount of **$447,525.34 including GST** is payable within 7 business days of the date of this decision.

XI. Rate of interest

517. The claimant submitted that I could award the contractual rate of interest of 18% [Item 30 of Annexure Part A of the contract], as provided by s35 of the Act.
518. s35 (1)(a) allowed me to determine the interest for any overdue payments.
519. The due date the payment for payment claim is 4 September 2016.
520. I have been invited by the claimant in paragraph 73 to calculate the interest on the overdue payments, and time commences on 5 September 2017.
521. In the suggested calculations in paragraph 74, the claimant sought interest on the total claim demand from which it deducted some variations that it had not included in its claim, and the amounts paid by the respondent on 4 September and 25 September 2017.
522. However, I have found that it is entitled to **$447,525.34 inc GST from 5 September 2017,** the day after the due date for payment, and my calculation is 18% on that amount for the period 5 September 2017 up to 12 December 2017.
523. I calculate that period as 14 weeks = 98 days.
524. Interest equals 18% * 98/365 * $447,525.34 = **$21,628.35.**
525. **I find the amount of interest is $21,628.35 payable on the overdue amount**.

XII. The costs of the adjudication

526. The default provision contained in s36(1) of the Act makes the parties liable to bear their own costs, including the costs that they are liable to pay the adjudicator.
527. s46(4) of the Act provides that the parties are jointly and severally liable to pay the costs of the adjudicator in equal shares, but this can be altered if I am satisfied that a party has incurred costs of the adjudication because of unfounded submissions by a party, in which case I may decide that the other party pay some or all of those costs.
528. The claimant has partially succeeded in its *payment dispute* regarding payment claim 5, and adjudication time was spent on the Scope of the contract and the alleged design obligation objections raised by the respondent, as well as the extensive set off claims which were unsuccessful.
529. Nevertheless, the claimant did not clearly explain how it derived its contract works claim and VO 2, nor did it sufficiently substantiate some of them. In fact, insofar as the contract works claim and VO1 are concerned, which form the bulk of the adjudicated amount, I relied upon the valuation accepted or carried out by the respondent.
530. On balance therefore, I see no compelling reason to deviate from the default position of the parties sharing my fees equally and I find that the respondent is liable to pay 50% of my fees and the claimant 50%, which are part of the costs of the adjudication under s36(3) of the Act.

Chris Lenz

Adjudicator 12 December 2017

ATTACHMENT LM3 FOLLOWING