

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
TECHNOLOGY ENGINEERING AND CONSTRUCTION LIST

Not Restricted

S ECI 2014 000049

APN DF2 PROJECT 2 PTY LTD

Plaintiff

v

GROCON CONSTRUCTORS (VICTORIA) PTY LTD

First Defendant

and

GROCON (SCOTS CHURCH) PTY LTD

Second Defendant

and

MR MICHAEL HEATON QC (In his capacity as Adjudicator
in an adjudication under the *Building And Construction
Industry Security Of Payment Act 2002*)

Third Defendant

JUDGE: Vickery J
WHERE HELD: Melbourne
DATE OF HEARING: 17 September 2014
DATE OF JUDGMENT 27 November 2014 (First Revision 2 December 2014)
CASE MAY BE CITED AS: APN DF2 Project 2 Pty Ltd v Grocon Constructors
(Victoria) Pty Ltd & Ors
MEDIUM NEUTRAL CITATION: [2014] VSC 596

BUILDING AND CONSTRUCTION - JUDICIAL REVIEW -Adjudication determination made pursuant to the *Building and Construction Industry Security of Payment Act 2002* (Vic) - Jurisdiction of adjudicator to determine purported payment claim - Jurisdictional error - Error of law- Progress payment claim to which Act applies - Meaning of 'construction contract' for purposes of the Act - Construction contract to which Act applies - Side Deed entered after D&C Contract - Whether Side Deed a construction contract - Whether Side Deed has effect of varying D&C contract - Whether Side Deed terminates D&C contract - Arrangement to carry out construction works under the Act - Whether operation of Act excluded- Broad construction of 'payment claim' - Purpose of the Act as a whole - Proper Valuation of the Construction Work by the Adjudicator - No error of law.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr T Shnookal QC with
Mr Reid of Counsel

Arnold Bloch Leibler

For the Defendant

Mr R Craig of Counsel

Minter Ellison

HIS HONOUR:

Introduction

1 The application of the plaintiff, APN DF2 Project 2 Pty Ltd ('APN'), is to set aside and/or quash the adjudication determination of Mr Michael Heaton QC (the 'Adjudicator') dated 30 July 2014 (the 'Determination'), which was purportedly made pursuant to the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the 'Act'). APN claims the relief on the grounds that the Adjudicator did not have jurisdiction and the Determination contains errors of law.

2 APN relies on three groups of grounds:

- (a) The relevant payment claim was not a payment claim to which the Act applies because it was not a claim made under a construction contract within the meaning of sections 4 and 7(1) of the Act (Grounds 1, 2 and 6);
- (b) Alternatively, the application of the Act was displaced by the operation of s. 7(2)(c) of the Act (Ground 1A and 6); and
- (c) In assessing the payment claim the Adjudicator was required to:
 - (i) value the construction work under s. 11(1)(b) of the Act; and
 - (ii) consider the effect of the defective work on the value of the construction work carried out (Grounds 3, 4, 5, 7 and 8); and the failure to do so renders the Determination void.

3 The relevant sections of the Act principally relied upon by APN are as follows:

- (a) Section 4 contains the following definition of 'construction contract':

'construction contract' means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party;

Section 7(1) provides for the Act to apply in relation to 'any construction contract' in the following terms:

- (1) Subject to this section, this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than Victoria.

Section 7(1) is reinforced by s. 9(1) which creates the statutory right to a progress payment in relation to a 'construction contract' in the following terms:

- (1) On and from each reference date under a construction contract, a person –
 - a) who has undertaken to carry out construction work under the contract; or
 - b) who has undertaken to supply related goods and services under the contract –

is entitled to a progress payment under this Act, calculated by reference to that date. [Emphasis added]

Section 7(2) excludes the Act from applying to certain defined contracts, including construction contracts falling within s.7(2)(c) which is in the following terms:

- c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied.

Section 11(1) of the Act provides for the way in which construction work carried out or undertaken to be carried out under a construction contract is to be valued. Section 11(1) is in the following terms:

- (1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued –
 - a) in accordance with the terms of the contract; or
 - b) if the contract makes no express provision with respect to the matter, having regard to –
 - i. the contract price for the work; and
 - ii. any other rates or prices set out in the contract; and
 - iii. if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and

iv. if any of the work is defective, the estimated cost of rectifying the defect.

4 By way of factual background to this proceeding, APN entered into a number of agreements with entities controlled by Grocon Group Holdings Pty Ltd for the purpose of carrying out the development, leasing and sale of improvements at 150 Collins Street Melbourne (the 'Project'). The Project involved the second defendant, Grocon (Scots Church) Pty Ltd ('Scots'), and APN, being co-developers of land leased to APN under a 99 lease from Scots Church Property Trust. The Project further involved the design and construction of a 12 story office tower by the first defendant, Grocon Constructors (Victoria) Pty Ltd ('Grocon').

5 The Project proceeded under a complex suite of agreements involving the parties to this proceeding and third parties, however the most relevant for the determination of this application are:

- (a) On 30 November 2011 a Joint Venture Agreement was entered into between APN and Scots in respect of the development, leasing and sale of the improvements on 150 Collins Street Melbourne.
- (b) On 15 May 2012, APN and Scots, as the principals, entered into a contract with Grocon, as the contractor, for the development of 150 Collins Street. The contract was comprised in a Formal Instrument of Agreement and amended General Conditions of Contract for Design and Contract AS4300-1995 (incorporating Amendment No 1) (the 'D&C Contract'). The Formal Instrument of Agreement by clause 4 provided for a fixed contract sum of \$109,455,897 (excluding GST). The Project works comprised the design, construction, commissioning and completion of an office building on the site and ancillary retail component and any additional works required to be completed by the Principal including the construction, commissioning and completion but not the design of the Agreed Fit out Works under the Transaction Documents and associated works as more fully defined in the D&C Contract; and

(c) On 4 July 2012, APN and Scots entered into a deed called the '150 Collins Street, Melbourne - Building Contract Side Deed' with Grocon (the 'Side Deed'). Amongst other things, the Side Deed provided for payment by the Contractor to the Principal or by the Principal to the Contractor of amounts calculated according to whether Actual Trade Costs, together with the Preliminaries Amount, were less than the contract price or whether the Actual Trade Costs and the Preliminaries Amount were more than the contract price.

6 The D&C Contract provided for the submission of payment claims on a monthly basis to a superintendent agreed by the parties, the assessment of each claim by the superintendent, the issuing of a certificate by the superintendent and payment each month by the principal.

7 Clause 42 of the D&C Contract provided for payment claims, certificates, calculations and time for payment.

8 Clause 3.1 of the General Conditions obliges the Principal to pay the Contractor the 'Fixed Contract Sum' for the Works. The trade breakdown of the 'Fixed Contract Sum' is set out in 'Annexure Part M' to the General Conditions. It is by reference to this breakdown that progress claims are made for the value of work carried out pursuant to clause 42.1 of the General Conditions.

9 Clause 42.1 of the General Conditions requires the Contractor at the time of making payment claims (ie the 1st day of each month) to 'deliver to the Superintendent (with a copy provided to the Principal) 'evidence of the amount due by the Principal to the Contractor.' Clause 42.1 requires each claim to clearly identify what amount claimed is part of the 'Fixed Contract Sum' and what amount claimed is due to adjustments for additions or deductions made pursuant to the Contract.

10 Clause 42.1 is in the following terms:

42. CERTIFICATES AND PAYMENTS

42.1 Payment Claims, Certificates, Calculations and Time for Payment
Subject to clause 42.1A, at the times for payment claims or upon completion of the stages of the work under the Contract stated in Annexure Part A and upon the issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.5, the Contractor shall deliver to the Superintendent (with a copy provided to the Principal) claims for payment supported by:

- a) evidence of the amount due by the Principal to the Contractor:
- b) in respect of the first claim under this clause 42.1
 - i. a quality assurance plan, satisfactory to the Superintendent;
 - ii. an environmental management plan, satisfactory to the Superintendent;
- c) evidence of all insurances required under this Contract to the
- d) Superintendent's satisfaction;
- e) such certificates as the Principal may reasonably require in respect of the design of the work under the Contract from the Contractor or any Consultant and subcontractors (as relevant) (including from Key Consultants in the form required by Clause 42.11); and
- f) such information as the Superintendent may reasonably require.

Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract (and details of additions or omissions to the work, and the respective adjustment to the Fixed Contract Sum) to that time together with all amounts then otherwise due to the Contractor arising out of the Contract.

If the time for any payment claim under the preceding paragraph falls due on a submit the claim either on the day before or next following that date which itself is not a Saturday, Sunday, Statutory or Public Holiday.

If the Contractor submits a payment claim before the time for lodgement of that payment claim, such early lodgement shall not require the Superintendent to issue the payment certificate in respect of that payment claim earlier than would have been the case had the Contractor submitted the payment claim in accordance with the Contract.

Within 10 Business Days of receipt of a claim for payment, the Superintendent shall assess the claim and shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the Superintendent's opinion, is to be made by the Principal to the Contractor and in such instance the amount the Principal proposes to pay to the Contractor or by the Contractor to the Principal. For the purpose of the Superintendent assessing the claim, the Superintendent may have reference to the trade breakdown schedule of the Fixed Contract Sum as set out in Annexure Part M.

The Superintendent shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference. The Superintendent shall also set out, as applicable, in any payment certificate issued pursuant to Clause 42, the allowances made for:

- a) the value of work carried out by the Contractor in the performance of the Contract to the date of the claim;
- b) amounts otherwise due from:

- i. the Principal to the Contractor;
- ii. the Contractor to the Principal;
- c) amounts assessed under Clause 46.4 and not duly disputed
- d) amounts paid previously under the Contract;
- e) amounts previously deducted for retention moneys pursuant to Annexure Part A; and
- f) retention moneys to be deducted pursuant to Annexure Part A, arising out of the Contract resulting in the balance due to the Contractor or the Principal, as the case may be.

If the Contractor fails to make a claim for payment under this Clause 42.1, the Superintendent may nevertheless issue a payment certificate and the Principal or the Contractor, as the case may be, shall pay the amount so certified within 14 days of that Certificate.

Subject to the provisions of the Contract including clause 42.1A(b), within 14 days of issue by the Superintendent of the Superintendent's payment certificate and within 14 days of the issue of a Final Certificate, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in such certificate as due to the Contractor or to the Principal, as the case may be. A payment made pursuant to this Clause 42.1 shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or the Contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable.

Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided under Clause 42.6.

Each payment claim and payment certificate delivered in accordance with this clause must clearly and separately identify what amount is part of:

- a) the Fixed Contract Sum (ignoring any adjustment for additions or deductions made pursuant to the Contract); and
- b) any adjustment for additions or deductions made pursuant to the Contract and, in that case, a breakdown of that amount by reference to which clauses of the Contract the entitlement to the addition or deduction arises under (other than Clause 40.5).

11 Clause 57 of the D&C Contract related to the *Security of Payment Act* (the Act). Clause 57(b), (c), (d) and (f) provided:

57. SECURITY OF PAYMENT ACT

...

- (b) The parties agree that the Superintendent is the agent of the Principal for the purposes of:

- (i) accepting service of payment claims served by the Contractor under the Security of Payment Act;
 - (ii) assessing payment claims served by the Contractor under the Security of Payment Act; and
 - (iii) providing the Contractor with payment schedules under the Security of Payment Act.
- (c) If the Contractor delivers or arranges to deliver to the Principal any written communication in relation to the Security of Payment Act, the Contractor must ensure that a copy of the written communication is provided to the Superintendent at the same time.
- (d) Without affecting the Principal's right to issue payment schedules itself, the Principal authorises the Superintendent to issue payment schedules on the Principal's behalf. If within the time allowed by the Security of Payment Act for service of a payment schedule by the Principal, the Principal does not:
- (i) give the required notice itself; or
 - (ii) notify the Contractor that the Superintendent does not have authority from the Principal to issue the payment schedule on its behalf, then a payment certificate issued by the Superintendent under the Contract which relates to the relevant period shall be taken to be the payment schedule for the purpose of the Security of Payment Act, whether or not it is expressly stated to be a payment schedule.

...

- (f) If the Principal becomes aware that a subcontractor is entitled to suspend work under the Security of Payment Act, the Principal may pay the subcontractor such money that is, or may be, owing to the subcontractor for work forming part of the work under the Contract and the Principal may recover any amount paid as a debt due from the Contractor to the Principal.

- 12 In Annexure A item 46 of the times under the D & C Contract for payment claims (General Condition 42.1) was said to be 'first day of each month'. Under item 49 the rate of interest on overdue payments (General Condition 42.7) was set out as '11% per annum'.
- 13 Part M of the Annexure to the General Conditions of the D&C Contract was a Trade Breakdown Schedule with costs of the breakdown totalling the fixed contract sum of \$109,455,897.
- 14 Each month Grocon submitted its claim in accordance with the D&C Contract.

- 15 On 2 June 2014 Grocon made Progress Payment Claim No.23 under the Act pursuant to the D&C Contract claiming \$3,670,202 excluding GST ('D&C Contract Progress Claim 23'). This was in respect of a claimed entitlement for construction work carried out to the end of May 2014. The claim claimed a percentage complete in relation to each trade engaged on the Project.
- 16 The superintendent arranged to have the D&C Contract Progress Claim 23 assessed by the project Quantity Surveyor, which was WT Partnership.
- 17 On 17 June 2014 the superintendent accepted that assessment and issued a certificate under the D&C Contract at \$3,392,504. The amount certified, plus GST, was paid to Grocon on 30 June 2014.
- 18 On 10 June 2014 Grocon also made a payment claim purportedly under the Act pursuant to the terms of the Side Deed, which was also numbered 23 ('Side Deed Progress Claim 23'). (Whether this payment claim was in law made under the D & C Contract, as varied by the Side Deed, is a critical issue in this proceeding). The sum claimed by Grocon in this case was \$3,796,206 excluding GST (which together with GST claimed \$4,175,827).
- 19 On 24 June 2014 the Principal assessed the Side Deed Progress Claim 23 at \$2,200,856 excluding GST.
- 20 On 8 July 2014 Grocon made an adjudication application purportedly under the Act seeking to challenge this assessment. The Adjudicator was appointed on 11 July 2014 and delivered his adjudication Determination on 30 July 2014.
- 21 The Adjudicator, after disallowing certain items, determined that Grocon was entitled to a total of \$292,315.10, and this should be the adjudicated amount (including GST). This was determined to be payable on 1 July 2014. Determinations were also made as to the rate of interest to apply and the as to payment of the fees of the Adjudicator.

22 It is the statutory validity of the Side Deed Progress Claim 23 purportedly made under the Act and the Adjudicator's Determination upon it, that is challenged in this proceeding.

Plaintiff's Contentions as to Whether Side Deed a Construction Contract

23 APN contends that the Construction Contract for the purposes of ss.4 and 7(1) of the Act comprises simply the D&C Contract and that the Side Deed is a separate agreement, which stands alone.

24 It submitted that the Side Deed does not provide for the carrying out of construction work or the supply of related goods and services. It is therefore not a construction contract for the purposes of the Act.

25 The Side Deed, in clause 2, creates a series of contractual entitlements as to payment as between APN, Grocon and Scots. APN submitted that these are collateral to the entitlement of Grocon to be paid under the D&C Contract.

26 APN further submitted that the terms of the Side Deed extended beyond a construction contract. It was put that its terms also affect rights under the Joint Venture Agreement, and entitlements created under the Side Deed include other entitlements as between the parties.

27 It was further contended by APN that the D&C Contract, on the other hand, is a construction contract within the meaning of ss. 4 and 7(1) of the Act. However, the relevant purported payment claim was made only under the Side Deed.

Determination of the Adjudicator on the Side Deed and Error Claimed by the Plaintiff

28 The Adjudicator however, and contrary to the contention of APN, determined the D&C Contract and the Side Deed were 'combined' and 'intertwined' and that this gave jurisdiction to determine the purported payment claim for the Side Deed entitlement.

29 APN submits this is an error of law going to jurisdiction. It says that the purported payment claim was made only under the Side Deed, and as the Side Deed is not a contract under which construction work was carried out, the Act cannot apply to it.

30 However, the Adjudicator also found that the Side Deed effected a *variation* of the D&C Contract in a number of respects. Specifically:

- (a) Clause 2(a) and (c) changed the rights and obligations of Grocon Constructors and the Principals under the D&C Contract in relation to what Grocon Constructors is to pay and receive and what the Principals are to receive and pay.
- (b) Clause 2(g) expressly waived rights under the D&C Contract to the extent they were inconsistent with clause 2 of the Building Contract Side Deed.
- (c) Clause 4 amended the D&C Contract to deal with latent conditions and amendments required by the 'Investor'.
- (d) Clause 8.1(a) expressly acknowledged that the Building Contract Side Deed amended the D&C Contract.

31 Further, the Adjudicator found that the variation effected by clause 2 of the Side Deed was important. He reasoned that, by the provisions of this term, the Side Deed required payments to be made in respect of construction works that would not otherwise be payable under the D&C Contract. In this respect, the Adjudicator found in paragraphs [51] and [60] of his Determination:

- [51] I consider the effect of clause 2(a) to be that if there is what I may term a positive profit (i.e. actual costs are less than contract price) then that is payable by the Contractor to the Developer subject to the clause 2(b) and to be applied in accordance with clause 2(e) so that any net positive differences will be maintained by the Developer in its Project Budget Cash Flow and bank account as Contractor's contingency to be available for payment of any subsequent net negative difference (e.g. cost overrun) claimed by the Contractor at a later date until at least the Assessment Date. Clause 2(a) together with (b) and (e) effectively deal with a positive profit. Clause 2(c) and (d) apply in effect where actual costs exceed the contract price. In this case the Developer pays the difference to the Contractor and under clause 2(d) the Developer must

pay any amount payable under clause 2(c) as and when progress claims are due under the Building Contract.

...

[60] ...The Side Deed is more than an accounting of and distribution or redistribution of funds. As pointed out above, if there is a net profit the Contractor (the Claimant) is required to pay an amount it would not otherwise have to pay under the D&C. Further if the Actual Trade Costs exceed the fixed amount posited by the First Respondent then the Principal is obliged to pay the Contractor which the Principal would not otherwise be obliged to do under the D&C. In these circumstances the Side Deed is more than an accounting of and redistribution of funds. It in fact requires payments to be made that would not otherwise be payable under the D&C.'

Grocon's Contentions as to Whether Side Deed a Construction Contract

32 Grocon contends that the construction contract for the purposes of the definition of 'construction contract' in s.4 of the Act and the application of the Act under s. 7(1) is constituted by:

- (a) the D & C Contract; and
- (b) the Side Deed.

33 It was submitted on behalf of Grocon that this construction of the transaction documents was consistent with authority and a purposive approach. Accordingly, the relevant 'construction contract' under the Act comprised both the D&C Contract and the instrument effecting its variation, being the Side Deed.

34 As such, the Payment Claim was made under a construction contract within the meaning of the Act and Adjudicator had jurisdiction to make his Determination.

Analysis as to Whether Side Deed a Construction Contract or Formed Part of a Construction Contract

Whether Side Deed Collateral to and Separate from the D & C Contract

35 APN submitted that in this case the Side Deed and the D & C Contract were collateral to each other and co-existed as separate contracts.

36 The following are some of the features of the continuing existence of the two contracts as separate contracts relied upon by APN:

- (a) All the construction work is carried out under the D&C contract;
- (b) No construction work is carried out under the Side Deed;
- (c) A superintendent administers the D&C Contract;
- (d) The superintendent has no role under the Side Deed and there is no independent certification of Actual Trade Costs;
- (e) The payment entitlement under the D&C Contract is determined by the value of construction work carried out as assessed by the superintendent;
- (f) The payment entitlement under the Side Deed depends on there first being a determination of the amount payable under the D&C Contract, then determining which clause applies under the Side Deed and then, if applicable, calculating the additional amount to be paid; and
- (g) The Side Deed also provides other entitlements, including:
 - i. entitlements and limits on entitlements under the Joint Venture Agreement;
 - ii. entitlements creating a 'contractor's contingency'; and
 - iii. entitlements dependant on the first defendant using 'reasonable endeavours to recover any additional Actual Trade Costs'.

37 Although the Adjudicator in his Determination (especially at [63]) described the relationship between the Side Deed and the D & C Contract as 'combined' and 'intertwined', to my mind, this does not in its context amount to a finding that the two contracts were not collateral to each other or that they had lost operation as separate contracts. Rather, the Adjudicator was describing the factual outcome resulting from a finding that the Side Deed had the legal effect of providing variations to the D & C Contract, a matter which will be analysed below in these reasons. As such, no error of law is disclosed resulting from these particular descriptions being applied to the transaction documents by the Adjudicator.

38 The critical issues are whether the Side Deed in law varied the D & C Contract, and if it did, whether this left the D & C Contract in place, subject to the alterations reflected in the variations. If these questions are answered in favour of the defendants, then the parties have made two contracts: the D & C Contract as amended by the Side Deed; and the Side Deed itself.

39 Further, if the relevant payment claim purportedly made under the Act was made under the D & C Contract as varied by the Side Deed, then clearly enough, the payment claim was made under a 'construction contract' as defined in the Act.

Whether Side Deed Varied the D & C Contract

40 The Side Deed is between the same persons who are parties to the D&C Contract, except that the guarantor of the D&C Contract (Grocon Constructors Pty Ltd) is not a party to the Side Deed.

41 Recitals F and G in the Side Deed provide:

F APN and Grocon [Grocon (Scots Church) Pty Ltd] will enter into a Building Contract with the Contractor and the Guarantor for the design and construction of a building on the Land as part of the Development.

G In consideration of APN and Grocon entering into the Building Contract, the Contractor has agreed to enter into this Deed for the purposes of clause 9.2 of the Joint Venture Agreement.

42 References are made throughout the Side Deed to the D & C Contract, which is described in the document as the 'Building Contract'. This is defined in the Side Deed as follows:

Building Contract means the design and construction contract between APN, Grocon, the Contractor and the Guarantor for the design and construction of the works referred to therein dated on or about the date of this Deed, as that contract may be varied from time to time.

43 The Side Deed also contains the following definitions of relevance:

ACL means the advanced consequential loss policy (Option B, with a 60 day excess) as required to be provided by the Contractor pursuant to clause 21C of the Building Contract with an estimated cost of \$155,897.00 (excluding GST).

Actual Trade Cost means:

- (a) the actual trade, supplier, consultant or subcontract cost payable by the Contractor for work undertaken, materials supplied, defects rectified or services provided to or on behalf of the Contractor for the purposes of the Building Contract (including any Agreed Fit Out Works as defined in the Building Contract, compliance with GBCA and NABERS Ratings); and
- (b) the amount payable to Agreed Project Consultants for the provision of services in respect of the Building Contract; and
- (c) any excess payable under the ACL - such amount to be treated as variation should it become payable.

Agreed Project Consultants means the consultants specified in **Schedule 3** or such other duly qualified additional or substitute consultants as may from time to time be appointed by the Developer in accordance with this Deed.

Contractor means Grocon Constructors (Victoria) Pty Ltd (ACN 148 006 624).

Development means the development of the Land as a 12 storey PCA A Grade Commercial Office tower with premium services with a mixed use component and associated works and services, in accordance with the Plans and Specifications, the Agreement for Lease and any other Tenancy Agreements entered into in accordance with the Development Agreement.

Development Agreement means the agreement between the Developer and the Investor entered into on or about the date of this Deed.

Developer means APN and Grocon who have joint responsibility for delivery of the Development.

Fixed Contract Sum is the amount of \$109,455,897.00 which is the amount payable to the Contractor under the Building Contract at the date of this Deed (which sum may be varied in accordance with the Building Contract). This excludes:

- (a) any variations (**Westpac Variations**) issued (or to be issued) by Westpac under the Agreement for Lease (including any Agreed Fit Out Works, or Base Building Modifications including the gap list).
- (b) any variations directed by the Investor under the Development Agreement.
- (c) the agreed variation in clause 4.2 hereof re Latent Conditions during early works phase.
- (d) any bonding required to be provided by the Contractor that will be provided to Westpac under the Agreement for Lease or to the Investor under the Development Agreement.

Grocon means Grocon (Scots Church) Ply Ltd (ACN 143 388 087).

Guarantor means Grocon Constructors Pty Ltd (ACN 006 703 091).

Head Lease means the lease dated 7 April 2008 between APN and the registered proprietor of the Land for a term of 99 years (registered number AG668201 P) and the Second Overriding Deed between the same parties dated 4 April 2012.

Investor means GPT Funds Management Limited ACN 115 026 545 (as responsible entity of the GPT Wholesale Office Fund No.1).

Joint Venture Agreement means the joint venture agreement in respect of the Project between APN and Grocon dated 30 November 2011, as that agreement may from time to time be amended, revised, supplemented, novated or replaced.

Preliminaries Amount means an amount fixed at \$13,155,897 (including \$155,897.00 for the ACL) (excl. GST) for the scope of preliminaries items as set out in Schedule 1.

44 Clause 2 of the Side Deed assumes importance in this proceeding. It is set out in full as follows:

Actual Trade Costs and Preliminaries

- (a) The Contractor agrees to pay to the Developer, to the extent that this is a positive figure:

- (i) the amount payable by the Developer to the Contractor under and in accordance with the Building Contract, including for variations; less
- (ii) the amount calculated as follows:
 - (A) the total of the Actual Trade Cost and the Preliminaries Amount (on a drawdown basis consistent in percentage terms with the drawdown profile in Schedule 12 of the Development Agreement) at the times as stipulated for payment of progress claims in the Building Contract (as adjusted by clause 2(f) below); and
 - (B) any margin for profit payable by the Developer to the Contractor will be calculated at the rate of 0%.
- (b) The parties irrevocably agree that the amount payable by the Contractor under clause 2(a) (**‘Set Off Amount’**) will be set off progressively against each progress claim under the Building Contract and is not required to be paid by the Contractor until the Developer makes a payment on account of the relevant progress claim at least equal to the Set Off Amount. The Set Off Amount will be dealt with by Grocon and APN in accordance with clause 2(e).
- (c) The Developer agrees to pay to the Contractor, to the extent that this is a positive figure:
 - (i) the amount calculated as follows:
 - (A) the total of the Actual Trade Cost and the Preliminaries Amount (on a drawdown basis consistent in percentage terms with the drawdown profile in Schedule 12 of the Development Agreement) (as adjusted by clause 2(f) below) at the times as stipulated for payment of progress claims in the Building Contract; and
 - (B) any margin for profit payable by the Developer to the Contractor will be calculated at the rate of 0%; less
 - (ii) the amount payable by the Developer to the Contractor under and in accordance with the Building Contract, including for variations; and
- (d) The Developer must pay any amount payable under clause 2(c) as and when progress claims are due under the Building Contract.
- (e) APN and Grocon agree that to the extent there are any net positive differences as calculated under clause 2(a) (including those caused by, for example, letting gains), that the net positive difference will be maintained by the Developer in its project budget cash flow and bank account as ‘Contractor’s Contingency’ to be available for payment of any subsequent net negative difference (e.g. cost overrun) claimed by the Contractor at a later date until at least the Assessment Date (unless APN and Grocon otherwise agree in writing).
- (f) For the avoidance of doubt the parties agree that variations issued by the Developer shall be treated as follows for the purposes of clauses 2(a) and (c) above:
 - (i) Subject to (ii) below, if the variation is issued under the Building Contract in circumstances where the Contractor is entitled to be paid a sum of 15% referred to therein (in relation to Agreed Fit Out Works and other variations) such sum shall be retained by the Contractor and deemed to include any additional preliminaries in relation to that varied work.

- (ii) Notwithstanding (i) above, if the variation is an Extra Floor Variation the Contractor shall be entitled to charge the Actual Trade Cost plus the actual additional preliminaries (**Extra Floor Preliminaries**):
 - (A) calculated in manner that is consistent with the list of items the Contractor is responsible for providing as part of its preliminaries as set out in Schedule 1; and
 - (B) incurred by the Contractor solely as a consequence of that variation (but noting that the Contractor will not be required to incur any loss in relation to its preliminaries solely as a consequence of that variation). The Extra Floor Preliminaries are to be paid to the Contractor over and above the Preliminaries Amount.
- (g) To the extent that either the Contractor's rights against APN or Grocon under the Building Contract or APN and Grocon's rights as Developer against the Contractor under the Building Contract are inconsistent with this clause 2 then, to the extent of that inconsistency, each of APN, Grocon and the Contractor irrevocably waives those rights as against each other, as applicable.
- (h) In consideration of the Contractor, APN and Grocon agreeing to fix the Preliminaries Amount in accordance with this Deed, Grocon and APN agree that the Joint Venture Agreement (including clauses 2.3, 16.2 and 23 of it) is varied as follows: (i) if the Actual Trade Cost at the Assessment Date is below \$96.3m (being the Fixed Contract Sum less the Preliminaries Amount) the first \$3,000,000.00 of that saving up to \$93.3m is to be shared between APN and Grocon as follows:

APN 100%, Grocon 0%

(and any savings on the Actual Trade Costs beyond \$93.3m are thereafter enjoyed as per Clause 2.3 of the Joint Venture Agreement).

- (ii) subject to (iii) below, if the Actual Trade Cost as at the Assessment Date is above \$96.3m that cost overrun will be shared between APN and Grocon as follows:

APN 50%, Grocon 50%

- (iii) if the Actual Trade Cost as at the Assessment Date is above \$99.3m that cost overrun will be shared between APN and Grocon as follows:

APN 0%, Grocon 100%

- (i) For the purpose of sub-paragraphs (i), (ii) and (iii) of paragraph 2(h) Grocon and APN agree to ignore and exclude the cost impact on Actual Trade Costs of any variations under the Building Contract.
- (j) As long as the Contractor has used all reasonable endeavours to recover any additional Actual Trade Costs from its subcontractors, consultants and insurance after the issue of the Final Certificate under the Building Contract, if the Actual Trade Cost increases after the Assessment Date:
 - (i) the Developer shall be obliged make a further payment of such additional costs to the Contractor in accordance with this Deed upon 30 days' written notice; and
 - (ii) either APN or Grocon (as the case may be) will make any adjustment payment as between themselves for contribution at

that time in accordance with the Joint Venture Agreement (as varied above).

45 I agree with the Adjudicator's analysis of the critical effect of clause 2 of the Side Deed as to payment under the D & C Contract, when he said at [51- 53] of his Determination:

51. I consider the effect of clause 2(a) to be that if there is what I may term a positive profit (i.e. actual costs are less than contract price) then that is payable by the Contractor to the Developer subject to the clause 2(b) and to be applied in accordance with clause 2(e) so that any net positive differences will be maintained by the Developer in its Project Budget Cash Flow and bank account as Contractor's contingency to be available for payment of any subsequent net negative difference (e.g. cost overrun) claimed by the Contractor at a later date until at least the Assessment Date. Clause 2(a) together with (b) and (e) effectively deal with a positive profit. Clause 2(c) and (d) apply in effect where actual costs exceed the contract price. In this case the Developer pays the difference to the Contractor and under clause 2(d) the Developer must pay any amount payable under clause 2(c) as and when progress claims are due under the Building Contract.

52. Clause 2(a) and (c) change the rights and obligations of the Contractor and Principal under the D&C as to what the Contractor is to pay or receive and as to what the Principal is to receive or pay. This is a variation to the D&C in my view.

53. Clause 2(g) expressly waives rights under the D&C if they are inconsistent with clause 2. This is a variation to the D&C.

46 The Side Deed also varied other elements of the D & C Contract.

47 Clause 3 of the Side Deed imposed obligations on the Claimant as Contractor in respect of subcontractor selection which were additional to those in the D&C Contract. Clause 3 provided:

Subcontractor Selection

In addition to the approval process in clause 9.2 of the Building Contract, the Parties agree that the process which the Contractor must follow in respect of the letting of any subcontract works will be in accordance with Schedule 2.

48 Clause 4 of the Side Deed further varies the D&C Contract. These provisions provide:

4.1 Latent Conditions

Latent Conditions (as defined in the Building Contract) have been experienced by the Contractor in performance of the Works (as defined in the Building Contract) under the terms of the Early Works letter prior to execution of this Deed causing a delay of 24 Business Days in the form of delays caused to the

ground works by the Citipower Substation. The Contractor has taken steps to seek to mitigate this delay and is presently reasonably confident that all but 5 Business Days of that delay will be mitigated (should the subcontractors perform in accordance with their estimates). The Contractor also presently hopes to mitigate the remainder of that delay during the remainder of the Works (with an emphasis on the superstructure). The parties agree that, as between them, to the extent that this delay is unable to be mitigated, the

Contractor will not be liable for the consequences of such delay and shall be entitled to compensation in the terms set out in the Building Contract for such Latent Conditions.

4.2 Early Works Latent Conditions

The parties agree that the additional Actual Trade Costs previously submitted under the Early Works letter relating to latent conditions (e.g. asbestos removal, existing vestry north wall works, demolition re sequencing around existing substation, and support for adjoining building air conditioner units) are an agreed variation to the Fixed Contract Sum. Such a claim is to be made formally by the Contractor as soon as practicable after the date of this Deed.

4.3 Amendments for Investor

As part of agreeing the final form of the Building Contract with the Investor, the Contractor and the Developer agreed as follows (for so long as they are parties to the Building Contract) and subject to clause 8.1(b):

- (a) The Contractor will not be liable for any cost or delay caused by having to commercially agree access to the following adjoining property Certificate of Title Volume 11509 Folio 796 (the site of Georges' apartments) - by reason of agreeing to delete former clause 12.1 (b) of the draft Building Contract. That clause provided as follows:

'Any consents necessary from or conditions required to be complied with by the Contractor in favour of, owners of land which adjoin the Site to enable to the Contractor to complete the Works in accordance with the Contract.'

- (b) The Contractor can rely on the Principal's Warranties contained that the former clause 4.3 of the draft Building Contract that provided as follows:

'Without limiting the warranties given by the Contractor pursuant to clause 4.1, the Principal warrants to the Contractor that the Principal's Project Requirements constitute a complete statement of the Principal's expectations and its technical and functional requirements for Works, when completed.'

- (c) The Developer agrees to comply with the sentence that was formerly in clause 35.5 of the draft Building Contract that provided as follows:

'The Principal agrees that it will not deduct liquidated damages from any payments due to the Contractor or otherwise seek recovery of liquidated damages from the Contractor until either all claims for extensions of time under clause 35.5 have been determined by the Superintendent or until such time as the Contractor achieves Practical Completion.'

- (d) The parties agree to be bound by following provisions that were formerly part of clause 62 of the draft Building Contract that provided as follows.

'Where the Contractor is requested to provide the Development Security the Contractor will be entitled to be paid its cost of obtaining and providing that security and the Contract Sum amended accordingly.'

49 For the reasons detailed above, there can be little doubt that the Side Deed did bring into effect variations of the D&C Contract.

Whether Side Deed Terminated the D&C Contract

50 A further question is whether the Side Deed also had the effect of terminating the D&C Contract or whether it remained in place subject to the amendments effected by the Side Deed.

51 The answer to this question is in significant part provided by the Side Deed itself.

52 Clause 8.1 of the Side Deed expressly provides that the D & C Contract is to continue to have full force and effect by the following terms:

General

8.1 Building Contract

- (a) Except as expressly amended by this Deed, the Building Contract shall continue to have full force and effect.
- (b) The Contractor agrees that, if the Investor exercises its rights under clause 6 or 7 of the Builder's Side Deed entered into between the parties to this deed and the Investor, it must, in favour of the Investor, comply with the Building Contract disregarding the effect of this Deed on the Building Contract.
- (c) Without affecting any rights of the parties in relation to circumstances that cause the Investor to exercise its rights under clause 6 or 7 of the Builder's Side Deed, clause 8.1(b), shall not affect subsisting rights between the parties to this Deed prior to the date of such event.

53 In *FCT v Sara Lee Household and Body Care*¹ the High Court² said:³

When the parties to an existing contract enter into a further contract by which they vary the original contract, then, by hypothesis, they have made two

¹ *FCT v Sara Lee Household and Body Care* (2000) 201 CLR 520 at 533, 534.

² Gleeson CJ, Gaudron, McHugh and Hayne JJ.

³ Emphasis Added.

contracts. For one reason or another, it may be material to determine whether the effect of the second contract is to bring an end to the first contract and replace it with a second, or whether the effect is to leave the first contract standing, subject to the alteration. For example, something may turn upon the place, or the time, or the form, of the contract, and it may therefore be necessary to decide whether the original contract subsists. In the present case, if the effect of what occurred on 30 August 1991 had been to rescind the agreement of 31 May 1991, then that would go a long way towards providing an answer to the appellant's argument that the assignment which occurred on 30 August was pursuant to the agreement of 31 May, with whatever that entails for the application of Pt IIIA of the Act.

In *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* Taylor J said:

'It is firmly established by a long line of cases ... that the parties to an agreement may vary some of its terms by a subsequent agreement. They may, of course, rescind the earlier agreement altogether, and this may be done either expressly or by implication, but the determining factor must always be the intention of the parties as disclosed by the later agreement.'

That passage was cited with approval by Wilson and Dawson JJ in *Dan v Barclays Australia Ltd*. It accords with principle and with authority.'

[Emphasis added and Citations omitted].

54 In *Alcan Gove Development Pty Ltd v Thiess Pty Ltd*⁴ where Angel J held that:⁵

It was argued that the Deed of Variation standing alone constituted a construction contract to which the Act applies. However this is not so. The Deed is not a 'standalone' contract but wedded to the earlier agreement. If, which is not immediately apparent, a discrete construction contract can be carved from other of its provisions nevertheless any such 'contract' is to be treated as an addition by way of amendment to the original contract, that is, as part of the original contract, even though 'as a matter of formal logic' it is a new and different contract, cf. *British and Benningtons Ltd* at 68-69, per Lord Sumner, *United Dominions Corporation (Jamaica) Ltd v Shoucair* at 347-348, per Lord Devlin. The parties never intended that there be a 'self-contained' or 'self-subsisting' agreement in addition to or substitution for the agreement of 20 April 2005.

[Emphasis added]

55 Applying these principles to the facts of this case, the Side Deed did not have the effect of terminating the D&C Contract, which remained in place subject to the amendments effected by the Side Deed.

⁴ *Alcan Gove Development Pty Ltd v Thiess Pty Ltd* [2008] NTSC 12, (Angel J).

⁵ *Alcan Gove Development Pty Ltd v Thiess Pty Ltd* At [13].

Whether the Two Contracts Comprised an 'Arrangement' to Carry Out Construction Work under the Act

56 A secondary argument advanced before the Adjudicator by the first defendant was that the Side Agreement and the D & C Contract together comprised an 'arrangement' to carry out construction work within the meaning of the definition of 'construction contract' found in s. 4 of the Act, with the effect of making the relevant payment claim subject to the operation of the Act.

57 This was not pursued in the present application and in any event in the light of my principal findings, there is no utility in dealing with the issue.

Conclusion

58 It is plainly obvious that the concept of 'construction contract' as defined in s. 4 of the Act, encompasses both an original contract entered into between the parties (in this case the D&C Contract) and any instrument which validly effects a variation to the original contract (in this case the Side Deed). The Act could not properly operate in a commercial context if this was not the case.

59 In this case the Side Deed in law varied the D & C Contract, including the payment regime in critical respects. Further, the D & C Contract remained in place following entry into the Side Deed, subject to the alterations reflected in the variations. This resulted in the parties making two contracts which co-existed: the D & C Contract as amended by the Side Deed; and the Side Deed itself.

Whether the Payment Claim made under the D & C Contract as Varied by the Side Deed

60 The relevant payment claim for present purposes is the Side Deed Progress Claim 23 made on 10 June 2014. As earlier observed, whether this payment claim was in law made under the D & C Contract, as varied by the Side Deed, is a critical issue in this proceeding.

61 The payment claim was made on 10 June 2014, well after entry into the Side Deed on 4 July 2012 and the preceding D & C Contract dated 15 May 2012. It was made by the first defendant 'Grocon Constructors (Victoria) Pty Ltd' in respect of the project

described as '150 Collins Street' and was directed to 'APN DF 2 Project 2 Pty Ltd and Grocon (Scots Church) Pty Ltd (Developer)' for payment. The accompanying transmittal form noted the 'Subject' as: 'Side Deed App May '14' and recorded: 'Dear Joint Venture. Please find attached the assessment of the Side Deed's Actual Trade Cost payable by the Contractor works to end of May '14 for a Net Payment, excluding GST, of \$3,796,206.' The payment claim was endorsed with the standard notation required by s.14(2)(e) of the Act for a valid payment claim: 'This is a payment claim under the Building and Construction Industry Security of Payment Act 2002 (Vic)'.

62 The claim was for '*Actual Trade Cost payable by the Contractor works to end of May '14.*' the claim was made in respect of construction work carried out on the Project, which was in turn governed by the D & C Contract as varied by the Side Deed. Although this was expressed in the transmittal as being referable to the Side Deed, in fact it was a claim made under the payment structure of the D & C Contract as that structure had been amended by the Side Deed.

63 For this reason, Side Deed Progress Claim 23 made on 10 June 2014 was made under a construction contract as defined by the Act.

Conclusion as to Grounds 1, 2 & 6

64 It follows that Grounds 1, 2 and 6 must be dismissed.

Whether the Act displaced by operation of s.7(2)(c) of the Act (Grounds 1A and 6)

Contentions of the Plaintiff

65 APN contended that by s.7(2)(c) the operation of the Act was excluded.

66 Section 7(2) provides for a number of instances where the Act is not to apply. Sub-paragraph (c) excludes construction contracts where the consideration payable for construction work performed under the contract is to be calculated otherwise than by reference to the value of the work carried out. The provision is in the following terms:

- (c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for

related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied.

67 APN submitted that the value of the work, for the purposes of s. 7(2)(c) is not the cost of the work, saying that it is the value to the principal or third party, not the cost to the contractor in carrying out the work, which is critical.

68 Reference was made to the decision of McDougall J in *Brian Leigh Smith & Anor v Coactivity Pty Ltd*⁶ where the relationship between s.7(2)(c) and the valuation of the construction work provided for in s. 10 of the *Building and Construction Industry Security of Payment Act 1999* ('the NSW Act') was considered.⁷ His Honour said at [59]:

Some indication of what the legislature had in mind when it referred to the concept of value is to be found in s10 [section 11 in Victoria]: specifically, as to related goods and services, in ss(2). Section 10 makes reference to the kinds of matters that one would ordinarily expect to be considered in valuing construction work (ss(1)) or related goods and services (ss(2)). Although s7 appears in Part 1 of the Act and s10 appears in Part 2, there is no reason to think that the legislature intended that value, for the purposes of s7, should be anything different to the concept of value described in s10. Section 10, after all, state how construction work and related goods and services are to be valued; and the value of construction work or related goods and services is one of the referents in s7(2)(c).

Contention of the First Defendant

69 The Grocon submitted that s.7(2)(c) has no application because, by reference to s.11(1) of the Act, the valuation exercise to be undertaken under the Act is to be carried out in this case under s.11(1)(a) in accordance with the terms of the contract, unless the contract failed to make any express provision for the matter, which was not the case. Section 11(1) is in the following terms:

Valuation of construction work and related goods and services

- (1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued –
 - (a) in accordance with the terms of the contract; or

⁶ *Brian Leigh Smith & Anor v Coactivity Pty Ltd* [2008] NSWSC 313.

⁷ New South Wales Act's equivalent of section 11(1)(b) of the Victorian Act is s. 10(1)(b) of the NSW Act.

- (b) if the contract makes no express provision with respect to the matter, having regard to –
 - (i) the contract price for the work; and
 - (ii) any other rates or prices set out in the contract; and
 - (iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and
 - (iv) if any of the work is defective, the estimated cost of rectifying the defect.

Analysis

70 The New South Wales Court of Appeal in *Edelbrand Pty Ltd v H M Australia Holdings Pty Ltd*⁸ considered the issue in the context of similar provisions found in the equivalent legislation to the Victorian Act, where s.11 of the Victorian Act is, for present purposes, relevantly the same as s.10 of the NSW Act.

71 Section 10 of the NSW Act is set out below:

- 10 Valuation of construction work and related goods and services
- (1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued:
 - (a) in accordance with the terms of the contract, or
 - (b) if the contract makes no express provision with respect to the matter, having regard to:
 - (i) the contract price for the work, and
 - (ii) any other rates or prices set out in the contract, and
 - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and
 - (iv) if any of the work is defective, the estimated cost of rectifying the defect.
 - (2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued:
 - (a) in accordance with the terms of the contract, or

⁸ *Edelbrand Pty Ltd v H M Australia Holdings Pty Ltd* [2012] NSWCA 31 (Bathurst CJ, McColl JA and Tobias AJA).
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- (b) if the contract makes no express provision with respect to the matter, having regard to:
 - (i) the contract price for the goods and services, and
 - (ii) any other rates or prices set out in the contract, and
 - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and
 - (iv) if any of the goods are defective, the estimated cost of rectifying the defect, and, in the case of materials and components that are to form part of any building, structure or work arising from construction work, on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out.

72 In *Edelbrand*, the relevant contract stipulated that a fixed price management fee plus a bonus payment was payable. The basis upon which the bonus payment would become payable was set out in the contract, which in this case related to the provision of goods and services under a construction contract, so s.10(2) of the NSW Act applied.⁹

73 Bathurst CJ speaking for the Court of Appeal relevantly said that:¹⁰

In my opinion s 7(2)(c) does not apply to the agreement. This is because the consideration is calculated by reference to the value of the services supplied.

Section 10(2) of the Act provides that related goods and services are to be valued in accordance with the terms of the contract or, if there is no express provision, in accordance with the mechanisms set out in s 10(2)(b). This provision appears in Pt 2 of the Act which deals with the rights to progress payments. Section 7(2)(c) applies to exclude contracts where that mechanism cannot have application; that is where the consideration cannot be determined by reference to the terms of the contract or the mechanisms in s 10(2)(b).

In the present case the agreement provided for a fixed payment of \$130,000. That payment was payable by six instalments of \$21,666.67 at the time set out in steps 1, 5, 6, 9, 10 and 11. The relevant reference date for those payments are the events specified in each of those steps. The amount payable is the amount

⁹ *Edelbrand Pty Ltd v H M Australia Holdings Pty Ltd* [2012] NSWCA 31 At [2].

¹⁰ *Edelbrand Pty Ltd v H M Australia Holdings Pty Ltd* [2012] NSWCA At [46] to [51] (Bathurst CJ, with whom McColl JA and Tobias AJA agreed).

calculated in accordance with the terms of the contract (see s 9(a)). For the purpose of s 7(2)(c) these amounts are not calculated other than by reference to the value of the services supplied as they are calculated in accordance with the contract price consistent with s 10(2)(b)(i).

Step 12 of the agreement provides that the bonus payment is payable within seven days of an invoice after direct reconciliation following occupation and/or building completion. Thus, the reference date for the payment of the bonus can be ascertained in accordance with s 8(2)(a) of the Act.

Further, the bonus amount is calculated in accordance with the terms of the contract consistently with s 9(a). For the purposes of s 7(2)(c) and s 10(2)(a), the contract provides how the amount is to be valued, namely 50% of savings below at targeted budget.

Accordingly, s 7(2)(c) does not apply. As I have pointed out, the date of any payment due and its value can be determined in accordance with the contract as required by the Act. It is immaterial in my view that the amount of the bonus payment cannot be calculated until completion of the contract. What is of importance is that the contract provided the mechanism for its calculation at the reference date provided for by s 8(2)(a). The fact that no bonus may be payable when the reconciliation is done is immaterial. The contractor retains \$130,000 which has been paid. It simply does not get a bonus.

74 This approach receives support from the decision of McDougall J in *Biseja v NSI Group*.¹¹ In *Biseja*, NSI agreed with Biseja to perform the building work at cost and agreed separately to provide project management fees for a fee of 10 percent of the cost of the building works. The fee could be satisfied by the transfer of three units in the completed development.

75 Biseja contended that the NSW Act did not apply to the agreement for the provision of project management services by reason of s.7(2)(c). McDougall J rejected Biseja's contention and found that:¹²

In my view, it is plain that the adjudicator found that the project management fee (ie, the consideration for the related goods and services) was to be quantified at 10% of the construction cost. That is apparent from what he said in para 36(1) and (6). Thus, when he said in para 39 'that the parties agreed that the fee may be paid by the transfer of units', he was using the word 'paid' to mean discharged or acquitted. The fee was not anything other than the 10%; the three units that might constitute its acquittal (in whole or in part) were the discharge of the obligation, not its quantification.

In other words, I think, para 39 is to be read in the first of the senses suggested by Mr Corsaro, as referred to above.

¹¹ *Biseja v NSI Group* [2006] NSWSC 835.

¹² *Biseja v NSI Group* [2006] NSWSC 835 At [21] to [23].

If that is a correct reading of para 39, then it follows inevitably that the adjudicator was correct in concluding that the agreement for provision of project management services was not caught by s 7(2)(c) of the Act. That is because the parties agreed that the value of those project management services was 10% of the cost of the building works. It matters not that they agreed that this value could be paid in a particular way.

[Emphasis added]

76 In the present case, the D & C Contract, as amended by the Side Deed, the contract provided a detailed mechanism for the calculation of the consideration payable under the contract. By this means the parties agreed what the value of the work should be. The Act gives recognition to this agreement and does not seek to supplant it.

77 For this reason, s.7(2)(c) has no application.

78 It follows that Grounds 1A and 6 have not been made out.

Whether Proper Valuation of the Construction Work by the Adjudicator (Grounds 3, 4, 5, 7 and 8)

Contentions of the Plaintiff

79 APN contended that in assessing the payment claim the Adjudicator was required to:

- (i) value the construction work under s. 11(1)(b) of the Act; and
- (ii) consider the effect of the defective work on the value of the construction work carried out;

and, having failed to do so, the Adjudicator's Determination is rendered void.

80 APN submitted that, properly considered s.11(1)(b) of the Act applies and s. 11(1)(b)(vi) of the Act in turn required the Adjudicator to take into account the defective work in valuing the construction work that had been carried out. His refusal to consider the acknowledged rectification work, which the Act required him to take into account to determine the statutory entitlement, was said to be a significant error that it goes to the heart of the Determination and renders it void.

Contentions of First Defendant

81 The first defendant pointed to Clause 2 of the Side Deed, which amended the D & C Contract, and submitted that this clause clearly 'provided a contractual mechanism which was capable of producing a calculation of the amount due under a progress

payment or a valuation of construction work carried out under the relevant construction contract’.

82 It pointed to the following findings of the Adjudicator as being correct:

83 The learned Adjudicator held that:¹³

Under s.10(1)(a) the amount of a progress payment to which a person is entitled under a construction contract is the amount calculated in accordance with the terms of the contract. Under s.11(1)(a) the work is to be valued in accordance with the terms of the contract. The construction contract provided for Actual Trade Costs. I do not consider s.10(1)(b) or s.11(1)(b) and in particular subparagraph s.11(1)(b)(iv) to be applicable.

84 The Adjudicator further reasoned as follows:¹⁴

[360] The First Respondent in the Adjudication Response submits that two items in Item 2 of Annexure A of the Payment Schedule constitute rectification of work previously performed, claimed, certified and paid by the Principal in respect of façade work.

... The Claimant in response says that the claimed amounts for glass supply of \$484,196 and swing stage supply and installation of \$89,574 are Actual Trade Costs payable to the Claimant. The Claimant submits at paragraph 34.4(a) to (e) and paragraph 34.5 as follows:

34.4 *In accordance with the submissions in its Adjudication Response, Grocon says that the relevant amounts are Actual Trade Costs payable to Grocon because:*

- (a) *clause 4.1(f) of the D&C requires Grocon to:*
 - (i) *carry out the works under the D&C so as to enable the Landlord and the Principal to fulfil their respective obligations under the Westpac Agreement for Lease, Wilson Agreement for Lease and the Development Agreement in relation to the Works; and*
 - (ii) *not do anything or omit to do anything in carrying out the works under the Contract that will cause the Landlord or the Principal to be in breach of any of their obligations under the Westpac Agreement for Lease, Wilson Agreement for Lease or the Development Agreement in relation to the Works;*
- (b) *GPT Funds Management (GPT) (the Investor under the Development Agreement) has asserted that the curtain wall glazing system as was*

¹³ Determination at [364].

¹⁴ Determination at [356], [360] - [361].

currently installed 'was not in accordance with the requirements of the Development Agreement' (see letter at Tab 101 of the Adjudication Application);

- (c) Westpac (the tenant under the Westpac Agreement for Lease) has:
- (i) stated that 'the reflected light colour inconsistency in the glass facade is unacceptable' (see letter at Tab 102 of the Adjudication Application); and
 - (ii) asserted that 'there are two separate and distinct defects in the façade panels' (see letter at Tab 104 of the Adjudication Application) in noncompliance with the Westpac Agreement for Lease;
- (d) given the obligations in the D&C referred to at paragraph 34.4(a) above, it was appropriate to replace the glass to address:
- (i) GPT's assertion that the curtain wall glazing system as was currently installed 'was not in accordance with the requirements of the Development Agreement'; and
 - (ii) Westpac's stated position that 'the reflected light colour inconsistency in the glass facade is unacceptable' under the Westpac Agreement for Lease and its assertion that 'there are two separate and distinct defects in the façade panels' in non-compliance with the Westpac Agreement for Lease; and
- (e) given the above, the replacement of the glass constituted 'work undertaken, materials supplied, defects rectified or services provided to or on behalf of the Contractor for the purposes of the Building Contract [the D&C]' within the definition of Actual Trade Costs payable to Grocon.

34.5 In any event, APN's assertion that the relevant amounts are claims for rectification works does not take the amounts outside the definition of the Actual Trade Costs that Grocon is entitled to be paid being:

'the actual trade, supplier, consultant or subcontractor cost payable by the Contractor for work undertaken, materials supplied, defects rectified or services provided to or on behalf of the Contractor for the purposes of the Building Contract [the D&C] (including any Agreed Fit Out Works as defined in the Building Contract, compliance with GBCA and NABERS Ratings).'

[361] I accept the Claimant's submission.

Analysis

85 I accept that in the present case, the parties agreed that the construction work was to be valued by reference to Actual Trade Costs.

86 For this reason, s.11(1)(a) of the Act applied, and the construction work was to be valued in accordance with the terms of the contract. Section 11((b)(iv), which included a facility to take into account any defective work and the estimated cost of rectifying such defective work, only has application in the event that the construction contract made no express provision with respect to how the construction work was to be valued, which is not the case here.

87 I see no reason to overturn the findings of the Adjudicator on the point.

88 It is the intention of the Act to buttress the obligations of the relevant parties to make progress payments under construction contracts. The main purpose of the Act is specified in s.1 to be:

The main purpose of this Act is to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts.

89 It is for this reason that primacy of the contractual provisions is provided for in the mechanism for the valuation of progress claims by s. 11(1) of the Act. This sub-section provides that construction work carried out or undertaken to be carried out under a construction contract is to be valued 'in accordance with the terms of the contract', and it is only if the contract makes no express provision with respect to the matter will other factors be taken into account in the valuation exercise, as provided for in s.11(1)(b) of the Act.

90 By this means, the Act gives effect to the construction contract by enforcing the value that the parties themselves have attributed to a particular body of work, as evidenced by their agreement.

91 It would undermine a central purpose of the Act, which is to support obligations to make progress payments under construction contracts, if s.11(1)(a) was to be narrowly construed so as to exclude its operation in circumstances where the

payment regime provided for in the construction contract is structured by reference to a formula regulated by reference to concepts such as 'Actual Trade Costs'. In such circumstances, the valuation to be performed is the application of the payment formula to the facts at hand, which is what the Adjudicator did.

92 It follows that Grounds 3, 4, 5, 7 and 8 have not been established.

Disposition and Orders

93 The plaintiff's application should be dismissed with costs.

94 I will hear the parties on the particular orders which should be made.
