

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CIVIL DIVISION
COMMERCIAL LIST
BUILDING CASES DIVISION

Not Restricted
Suitable for Publication

Case No. CI-11-02265

E & E STERLING ENTERPRISES PTY LTD (ACN 006 294 239) (as trustee for THE STERLING FAMILY SUPERANNUATION FUND) Plaintiff

v
WATPAC CONSTRUCTION (VIC) PTY LTD (ACN 104 451 130) Defendant

JUDGE: HIS HONOUR JUDGE GINNANE
WHERE HELD: Melbourne
DATE OF HEARING: 20-21,23-24,28-31August,3-4,6September,11,19
October, 7-8 November 2012
DATE OF JUDGMENT: 22 May 2013 Revised 29 May 2013
CASE MAY BE CITED AS: E & E Sterling Enterprises Pty Ltd v Watpac Construction
(Vic) Pty Ltd
MEDIUM NEUTRAL CITATION: [2012] VCC 1033

REASONS FOR JUDGMENT

BUILDING CONTRACT – whether warehouse floor built in accordance with contract
BUILDING CONTRACT – whether liquidated damages for delay payable - extension of time application
BUILDING CONTRACT- bank guarantee given by builder – whether returnable – damages for failure to return
BUILDING CONTRACT – progress payment claim – adjudication – judgment – judgment sum paid into trust account – disposition of funds - *Building and Construction Industry Security of Payment Act 2002* s 48
DAMAGES – rectification damages - whether owner liable to tenant for damages for breach of quiet enjoyment covenant – whether owner could recover damages under indemnity in building contract

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr R Andrew

Middletons (K + L Gates)

For the Defendant

Mr M Stirling

Piper Alderman

HIS HONOUR:

1 There are two main issues in this proceeding. First, whether the plaintiff can recover damages from the defendant for breach of a building contract because of the condition of the floors that were constructed. Secondly, whether any, and if so, what sum is owing by the plaintiff to the defendant under the building contract.

2 On 9 October 2008, the plaintiff (Sterling Enterprises) and the defendant (Watpac) entered into a contract under which Watpac agreed to construct dual pre-cast concrete factories with common office facilities for Sterling Enterprises in Heidelberg. The first portion of the factory was to be the manufacturing side and the second portion was the warehouse side.

3 The Contract was entered into by Sterling Enterprises as trustee for the Sterling Family Superannuation Fund for the construction of a new factory and warehouse facility at 140-152 Bamfield Road, West Heidelberg, Victoria for the lump sum of \$4,344,095.00 plus GST.

4 Watpac was the builder under the Contract.

5 The Contract incorporated amended AS4000-1997 General Conditions of Contract and Annexures. The Contract also included the documents listed in the Contract documentation summary dated 30 September 2008, including the Tender documentation summary and notes for tender and contract.

6 The recitals to the Contract included that:

“The Principal enters into this Contract relying on the Contractor’s representation that it is experienced in the construction of works of similar nature, size and complexity to the Works.”

7 The project had two parts:

(a) Separable Portion 1 was the manufacturing site of the complex, not including the warehouse side of the complex, the amenities block, and

the front office of the plant platform (“the manufacturing or factory works”); and

- (b) Separable Portion 2 was the warehouse side of the complex, together with the amenities block, the front office and the plant platform (“warehouse works”).

SUMMARY OF DECISION

8 Sterling Enterprises has established that the warehouse floor does not comply with the Contract specification. Sterling Enterprises is entitled to recover against Watpac the sum of \$146,277.00. This amount includes the sum of \$90,000 for damages to rectify the warehouse floor and \$14,135.00 for additional workforce and consultants’ costs, that have been incurred. The amount also includes the sum of \$42,142 for liquidated damages for delay. Sterling Enterprises’ other claims for damages have not been proved.

9 Watpac is entitled to recover from Sterling Enterprises the sum of \$326,443.00 being the balance of the moneys due under the Contract, less the delay damages.

10 Watpac is also entitled to the return of the bank guarantee and damages in the sum of \$6,019.73, being \$11.51 per day from 17 December 2011 and 22 May 2013, for the failure to return it.

11 The sums that Watpac is entitled to recover from Sterling Enterprises amount to \$332,462.73.

12 I will hear the parties as to the appropriate final orders, including costs. I will also hear any further submissions as to the appropriate disposition of the funds held in the solicitors’ trust account, including whether Watpac should receive the interest that has accrued. In that regard, I refer to the judgment in

Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 4).¹

STRUCTURE OF JUDGMENT

13 This judgment is divided into the following main sections:

- (a) the Facts: paragraphs 16-197;
- (b) Whether Sterling Enterprises has proved that Watpac breached the building Contract: paragraphs 198-364;
- (c) Damages: paragraphs 365-540;
- (d) Watpac's counterclaim: paragraphs 541-597.

Issues

14 The parties formulated a set of issues which were involved in the determination of the proceeding. They are attached as an annexure to this judgment. The parties were in agreement in respect of a number of the introductory issues relating to the terms of the contract. I have addressed all of the issues that remained in contention, although not always in the same order that the parties had arranged them.

Evidence of witnesses

15 Witnesses provided witness statements and most were cross-examined on them. I have set out the facts from that evidence. Much of the chronology of events was not in dispute.

Section A The Background and the Building Work

The Sterling Group of Companies

16 Sterling Enterprises is a trustee company acting as the trustee under a deed

¹ [2012] VSC 155

of trust made between Mrs Elizabeth Sterling as founder, and Sterling Enterprises as trustee. Sterling Enterprises holds property on trust for members of the Sterling family. It has owned properties in West Heidelberg for many years. One such property was located at 151-157 Bamfield Road, West Heidelberg.

17 Westaflex (Australia) Pty Ltd (“Westaflex”), is a company owned and operated by the Sterling family, which specialises in producing and distributing products for heating and cooling systems. Westaflex was founded by Mr E Sterling in about 1974. Since his death in 1992, Westaflex has been operated by Mrs Elizabeth Sterling with her sons, Mr Paul Sterling and Mr Michael Sterling. Mrs Sterling owns 22,900 of its 23,000 shares. Mrs Sterling was hospitalised at the time of the trial and unable to give evidence.

18 Mr Paul Sterling is a director of Westaflex Pty Ltd.

19 Westaflex has manufactured, imported and distributed plastic products since 1974. Westaflex traded from 1990 at the premises of 151-157 Bamfield Road under a lease from Sterling Enterprises. It leased three premises in the same area: 22 Culverlands Road, 150 Bamfield Road and 156 Bamfield Road.

20 Westaflex has also used premises in Mount Waverley, since the early 1980s, as a manufacturing and distribution outlet, and premises in East Keilor for distribution.

21 Westaflex also has two premises in Western Australia for manufacturing and distribution and one in Queensland. There are four manufacturing plants. Revenue from those plants goes to Westaflex.

22 There are eleven distribution outlets in total. Three of them are in Victoria, the majority of which trade under the name Westaflex, with the remainder trading under the name Uniflex.

- 23 On 10 July 2000, Sterling Enterprises entered into a lease of 155 Bamfield Road, West Heidelberg to Westaflex for ten years.² The lease provided two further terms of five years and could therefore be extended until July 2020. Clause 6.1 of the Lease provided:

“The landlord must give the tenant quiet possession of the premises without any interruption by the landlord or anyone connected with the landlord as long as the tenant does what it must under this lease.”

- 24 In August 2005, the Bamfield Road building was destroyed by a fire. Also destroyed by the fire were the stock in the warehouse and manufacturing equipment. The Sterling family decided to build a connected factory and warehouse using funds provided by the insurers and additional funds from the Family Superannuation Fund. The cost of the new building was to be about \$12 million. Mr Paul Sterling was, in effect, appointed to manage the reconstruction with assistance from his brother, Mr Michael Sterling, and under the general oversight of Mrs Sterling. He engaged Associated Project Control Pty Ltd (APC) to act as project manager. Mr Paul Vincent was APC’s representative. He had the day to day, hands on management of the project. He was later appointed as the Superintendent under the contract.

- 25 Another company in the Sterling Group is Uniflex Pty Ltd, which employs most of the workforce.

The specification – standard of work required

- 26 On or about 1 August 2008, APC issued a document headed “Notes for Tender and Contract”. This document was issued to tenderers, including Watpac, and mentioned the requirements for the floors in the warehouse and factory. Note 10 provides as follows:

“This purpose built facility has been designed to accommodate both manufacturing and warehousing for the proprietor, Westaflex Australia P/L.

The Manufacturing side located in the Southern half of complex will be

² Court Book (CB) 5.331

used to produce components associated with the ducted heating and cooling systems, via injection and blow moulding specialized machinery.

The Warehouse side in Northern component of the building will be set up to facilitate wire guided Forklift loading in regimented aisles for maximum storage space.

The majority of works associated with Plant, Equipment and Warehousing will be carried out directly by the proprietor and his representatives following hand over of the various building areas. Some builders work is described in the documentation such as electrical switch boards, line marking, floor coating etc.

The concrete floor slabs within both areas have been designed to minimize movement and will require screeding during construction to an exacting standard.

Screeding of concrete should be carried out from West end towards East so as to minimize any discrepancy across aisle widths. Accuracy to +or- 5 mm over a distance of 4.5 metres is required.

With this in mind the construction sequence as noted in structural documents calls for the ground slabs to go in after structure, thus enabling them to be presented in an unmarked state. Careful attention to controlled curing (moisture loss) associated with concrete slabs, particularly in hot weather shall be noted.”³

- 27 Sterling Enterprises’ case was put on the basis that the highest obligation imposed on Watpac was to comply with Note 10.⁴

Particular terms of the contract

- 28 Clause 2.1 of the Contract, “Nature of Contract”, provided:

“2.1 Performance of Contract

The *Contractor* shall carry out and complete *WUC* in accordance with the *Contract* and *directions* authorised by the *Contract*.

The *Principal* shall pay the *Contractor*:

- a) for *work* which the *Principal* accepted a lump sum, the lump sum; and
- b) for work for which the *Principal* accepted rates, the sum of the products ascertained by multiplying the measured quantity of each section or item of work actually carried out under the *Contract* by the rate accepted by the *Principal* for the section or item,

adjusted by any additions or deductions made pursuant to the *Contract*.”

³ CB 4.093

⁴ Transcript (T) 1010

29 Clause 2.6 contained the Contractor's warranties in the following terms:

"Without limiting the generality of subclause 2.1, the *Contractor* warrants to the *Principal* that the *Contractor*:

- a) has examined carefully and assessed the contents of the *Contract* and any other documents, information or data made available to the Contractor by or on behalf of the Principal, prior to the date of the Contract;
- b) at all times shall be suitably qualified and experienced and shall exercise the due skill, care and diligence in the execution and completion of the WUC expected of a competent contractor;
- c) has taken into account all of the risks related to or connected with the Works and execution of the WUC which the Contractor could have discovered by making detailed enquiries, including by visiting and assessing the site and its surroundings, and has made full allowance for those risks in the Contract Sum. Those risks include without limitation:
 - i) all risks related to or connected with the *site* including the *site conditions*;
 - ii) industrial conditions;
 - iii) the availability and quality of all things required to carry out the WUC including, without limitation, materials, construction plant, equipment, labour, subcontractors and specialist services; and
 - iv) the requirements of all authorities and laws; and
- d) has informed itself of all laws and any likely changes to laws that will or are likely to take place during the execution of the WUC and effect the WUC."

30 Mr Paul Sterling was the main witness for the plaintiff. He gave evidence that the floor had to be of an exacting standard because Sterling Enterprises wanted to build a top end complex, which was to be as multifunctional as possible and would make use of a high roof line by having high rise, palletised goods. In particular, the warehouse floor had to be so exact because of the high rise pallet racking system and forklift which the company intended to use.

31 Mr Sterling stated that the design provided for two separate, but connected, buildings so that they could either be used as one facility or two. He said that depending on the economic climate, it was possible that the Sterling Group

might cease manufacturing and either use what is now the factory as an additional warehouse, or sell part, or all, of the buildings. It was therefore important that all the floors be to the exacting standard and consistent, so that, if needed, the whole complex could be used for high rise palletised goods, either by Sterling Enterprises, another tenant or a purchaser.

32 Mr Adrian Artico was project manager for the Contract on behalf of Watpac. He gave evidence that structural drawings usually specified the required tolerance of the floor, typically by reference to the relevant Australian standard. More often than not, it is plus or minus 3 millimetres over 3 metres for levelness. If a flatness requirement is required, it would be further specified, such as no greater than a deviation of 2 millimetres over 100 millimetres. He stated that in this case, there was no requirements regarding floor tolerance set out on the structural drawings or the architectural drawings.

33 Mr Artico gave evidence that, from his experience, if flatness was important, a clearer and higher standard than that contained in note 10 would be specified and it would be included in the drawings made by the consultants. This Contract only called for a monolithic slab, which meant that it was “literally just a concrete slab”. If a higher standard of finish was required, then the Contract should have required the slab to be poured with an infill and a screed used to achieve the required level. A screed involves the slab being set down approximately 20 to 50 millimetres and then coated with cementitious/epoxy screed installed to achieve flatness and level. Cementitious or epoxy screeds are self levelling and are applied by effectively flooding the floor and allowing the screed to settle at a uniform level. Mr Artico stated that he had not heard of a stringent standard for a slab finish being achieved without using a screed.

34 Mr Artico said that he did not recall the term “exacting standard” being discussed in site meetings.

35 Mr Daryl McIlvena, who was Watpac’s construction manager responsible for

overseeing and running several projects, including the Sterling Enterprises project, gave evidence about the slab. He stated that the “for construction” issue drawings did not specify the floor tolerance requirements in the architectural or structural drawings or in the specifications. The project only specified this aspect in a “preamble note to tenderer”.

The proposed timetable for the work

36 Stage 1 of the factory was due for practical completion on 27 February 2009 but was not completed until April 2009.

37 Stage 2, which was the warehouse, was due for practical completion on 1 June 2009. Due to delays, the date for practical completion of the warehouse was extended to 14 July 2009. Watpac did not bring the warehouse to practical completion until 11 September 2009. An issue for determination is whether an extension of time should be granted to that date. Mr Vincent issued a Certificate of Practical Completion on 18 September 2009.⁵

38 Sterling Enterprises took possession of the factory first, then the warehouse and then the offices and car park.

The racking system and forklifts

39 Mr Paul Sterling gave evidence that Sterling Enterprises’ choice of pallet racking system and forklift was very important as it would greatly add to the efficiency and capacity of the warehouse. In particular, it would allow the vertical space to be utilised. That meant that pallets could be stored on racks that ascended to a high level.

40 Sterling Enterprises eventually purchased the Jungheinrich Model EKX 515K forklift. This was “the narrow aisle high rise” forklift. It is a high tech forklift with the operator raised on a platform to the full height of the racking system with the load ascending to approximately 10 metres. The forks are able to swivel

⁵ CB 6.027

from left to right in the front of the forklift so that it does not have to turn in the aisles. Therefore, Sterling Enterprises could have narrow warehouse aisles, providing greater storage capacity in a given floor area. The forklift was designed to travel down an aisle approximately 2200 millimetres wide, which was too narrow for conventional forklifts. To keep the forklift on course and avoid it hitting the pallet racks, a guide wire is fitted into the ground with transponders. A computer system then governs the operation of the forklift backwards and forwards along the narrow aisles, lifting pallets from designated storage areas.

41 This forklift will not operate on an uneven floor. Mr Sterling said this was the reason for the requirements for the floors contained in Note 10 in the Notes for Tender.

42 Mr Sterling stated that there were other measures taken to accommodate the needs of the forklift system, such as having control joints cut into the floor at 45 degree angles, because the forklift is three-wheeled and potentially unstable, bearing a total load of up to 12 tons. Having diagonal control joints means that only one wheel at a time will cross the joint.

43 Watpac completed the factory slab by April 2009 and the warehouse slab by about August 2009.

44 Mr Pietro Imperatori commenced on the project as a leading hand/carpenter, and after about July 2009, became Watpac's site foreman. At that point, the last concrete pour for the north warehouse was occurring. He gave evidence about the installation of the racking by installers engaged directly by Sterling Enterprises. Mr Imperatori gave evidence that the forklift used in the warehouse was operated by a wire-guided system through the aisles. However, when moving between aisles, the forklift was operated manually in the same way a normal forklift would be operated. Mr Vincent told him that the different heights of the forklift wheels were causing swaying, when the forklift

was lifting things from the racking, especially from the higher shelves. He stated that from a practical perspective, a difference of a millimetre or two at ground level can actually cause quite a significant difference when the forklift operated at height, as the height accentuates the differences.

45 Mr Imperatori gave evidence that one day before practical completion, Mr Vincent asked him why the slab was varying so much and why the contractor was installing packers. Mr Imperatori looked at the contract and when Mr Vincent asked him again about a week later, he said that he slab was within contractual tolerances. Mr Vincent said, "Let's just see how it goes".

46 On 16 August 2009, J R Design Pty Ltd, the project architect, issued a Practical Completion Stage 2 inspection report and sought confirmation that "the warehouse slab finished level meets stringent specifications as set down". On 20 August 2009, Mr McIlvena of Watpac wrote to Mr Vincent stating that they had left the "site in full possession of the client and the floor levels installed to tolerance with laser screed and taken over by the client".⁶ In fact, the slab did not have a laser screed, but was manually screeded.

47 Mr Artico gave evidence of reports from J R Design on 14 August 2009, and a report of practical completion on 14 September 2009, with no reference to the floor, except that the summary report identified "warehouse floor level queried during forklift install".

48 By 12 August 2009, Sterling Enterprises had taken possession of the Stage 2 works. The certificate of Practical Completion was issued on 18 September 2009, certifying that the date of Practical Completion was 11 September 2009.

Problems with the floors

49 Mr Sterling gave evidence that as soon as his company gained possession of the warehouse in September 2009, he arranged for the pallet racks to be

⁶ CB 5.415

installed. This had been programmed to occur well in advance and due to the delays, the pallet racks had been delivered into the warehouse in disassembled/flat packs prior to Sterling Enterprises taking possession. They were installed over a three week period in August 2009 by the APC Group. Then a technician came to lay the code wires into the slab. A further three technicians then arrived to commission the forklift and calibrate the guide system and computer controls.

50 Mr Sterling was advised by Mr P Haydon of NTP Forklifts, the supplier and installer, that he had a major problem with the warehouse floor, which he said was out of level. He pointed to various racks which were placed on packers to overcome the problem. He said that there would be problems using the forklift on such an uneven surface and they could only allow it to operate at half speed for fear of it vibrating itself apart. He told Mr Sterling that he would void the warranty if he insisted on it being used at full speed. Mr Sterling was very concerned to learn this and agreed to have the forklift set at half speed in order not to void the warranty. This impacted on productivity.

51 Mr Sterling contacted Mr Vincent and met him at the site. Mr Vincent conducted some tests using a straight-edge on the warehouse floor. He told Mr Sterling that the floor was out of spec. He told Mr Sterling that in numerous locations, when the straight-edge was placed on the ground, it showed peaks and troughs in the floor which gave it the appearance of a washboard effect. Mr Sterling stated that it was clear from the testing with the straight-edge that the floor did not achieve the required accuracy of +/- 5 millimetres over 4.5 metres.

52 Sterling Enterprises decided to engage Hawthorn Consulting Engineers Pty Ltd to provide an independent report. He asked Mr Haydon and Mr Anthony Walsh from the APC Group to confirm their views to him in emails.

53 On 14 September 2009, Mr P Haydon sent Mr Sterling the following email:

“Further to our discussions last week, I wish to confirm that the concrete floor layered (sic) in your warehouse where the Jungheinrich EKX515 truck will be operating, is well under the specifications required by Jungheinrich and supplied through Greg MacNamara (sic). As such we have serious concerns in regard to safety and premature failure of the equipment. During operation the machine shudders and jars the operator significantly making it hard to operate the unit safely. For this reason, we have had to adjust the speed of the truck down to half the possible speed allowable on a smooth floor. Unfortunately, the result of this will be seen in productivity and the effectiveness of the machine. Even at the slower pace operation is far from smooth.

We also found while conducting set up calibrations that the sealant for the guidance wire was lifting at a number of points. The sealant has obviously not adhered effectively to the concrete. This will need to be addressed promptly before any damage can occur to the wire.”⁷

- 54 On 15 September 2009, Mr Vincent emailed Mr Moleta, a quantity surveyor employed by Rider Levett Bucknall, stating that Watpac were clearly due for a payment, referring to the “floor problem” but asking:

“How do you suggest we hold money without getting into a full on stoush. We of course still hold the defects period BG for about &110K.”⁸

- 55 On 24 September 2009, Mr Walsh of APC emailed Mr Sterling as follows:

“As per our numerous discussions whilst we were on site completing your installation of the pallet racking. We found that in our experience the floor in your building by comparison to many other sites we work (new or old), is not very level.

This did cost us considerable time and materials during the installation, as extra packing was required in more than a few location to square up the racking.

For example, the site we were at in Moorabbin the week prior to your site was also a new building and we used a total of 12 x 1mm levelling plates for the entire 1500m² site.

Not over 80mm x 3 and 120 x 1 mm levellers.”⁹

- 56 On 25 September 2009, following a site inspection four days earlier, Mr Steven Shannon, who is an engineer employed by Hawthorn Consulting Engineers, reported to Mr Vincent. He set out the concerns of the forklift manufacturer and racking company and stated:

7 CB 6.023
8 CB 6.023A
9 CB 6.046

“During the site inspection a 4.5 metre long straight edge was laid on the concrete slab surface at various random locations. The use of the straight edge revealed that the surface levels undulate significantly at multiple locations.

Photos 1 to 3 show the straight edge placed in the northern most forklift aisle. The straight edge revealed a difference in floor level of approximately 15mm over a length of approximately 1300mm.

Photos 4 and 5 show the straight edge placed in the third forklift aisle from the north. The straight edge reveals the difference in floor level of approximately 6 mm over a length of approximately 950mm.

Generally, placement of the straight edge at other random locations revealed floor level differences of approximately 6mm to 7mm over a length of approximately 1000mm to 1200mm.”

(The report then referred to note 10 of the Notes for Tender and Contract.)

Conclusions

As noted above, the ‘Notes for Tender and Contract’ require an accuracy to +or- 5 mm over a distance of 4.5 metres.

Based on our site inspection and measurements taken with a 4.5 metre long straight edge, the concrete floor slab finish does not comply with the requirements of the ‘Notes for Tender and Contract.’”¹⁰

57 Mr Artico stated that he was not aware of problems with the slab until a visit by Mr Vincent to Watpac’s office on 18 September 2009 to return the bank guarantee. According to Mr Artico, Mr Vincent said, “There’s some talk about problems with the forklift but keep your heads down and we’ll see what happens.” Mr Artico said that he did not respond, because he did not understand the nature of the problem and Mr Vincent could not enlighten him.

58 On 24 September 2009, Mr Artico wrote to Mr Vincent stating that Watpac would take no further action in respect of the warehouse floor.

59 Mr Artico received a call in or about late September 2009 from Mr Vincent, who stated that the forklift was not working to its full capacity. He said the “forklift’s chattering and having difficulty getting over the construction joints”. He said that he would come out to the site and have a look at it.

¹⁰ CB 6.060

60 On 28 September 2009, he received a Superintendent's direction of the same date and a report from HCE that identified that "the racking company also expressed concerns regarding the undulations in the floor slab". He provided the report to Civiworks, which was Watpac's concreting sub-contractor.

61 Mr Imperatori gave evidence that in late September 2009, Mr Vincent came to the site with a 2 metre piece of medium density fibreboard which he tried to use to measure the level of the warehouse floor in the way a builder would use a straight edge. Mr Imperatori told him that he could not use a 2 metre piece of wood and "that was not the tolerance we signed up to". It was not calibrated to any standard. However, Mr Vincent continued with his measurements.

Site meeting of 2 October 2009

62 On 2 October 2009, a site meeting was held to discuss the problems raised by Sterling Enterprises. It was attended by Mr Sterling, Mr Artico, Mr McIlvena and Mr Ridgeway of J R Design. Mr McIlvena and Mr Artico entered the cabin of the forklift with Mr Michael Sterling, who drove it around to show them what he was talking about. Mr Artico noticed that where the forklift passed over the construction joints, it did move around. He told the Sterlings that he would look into the problem and provide a response.

63 Mr Imperatori's evidence was that at that meeting on 2 October 2009, the floor marks caused by the forklift were discussed. Mr McIlvena and Mr Artico said words to the effect that they would grind and fill the wheel tracks and epoxy over the affected areas to prevent problems in the future.

64 Mr McIlvena stated that the Sterlings said the forklift was not able to operate at full speed because, if it did, it started to sway. He stated that the forklift specification had various requirements for the floor, including that expansion joints should not be positioned within the aisle and that there was a need for a

screed to be used.

65 On 2 October 2009, Civiworks stated by email that there were “2 or 3 areas with a tolerance 10 mm or more”, but “the rest of the highs or lows are in the range of 3 mm to 5 mm which I consider to be within tolerance.” Civiworks also suggested the use of a “heavy duty self leveller Cerntop XD supplied by Parchem”. That self-leveller is a filler.

66 Mr Artico downloaded the forklift specifications from the Internet. They had the following requirements for the floor:

- (a) “As rule, expansion joints should not be positioned within the aisle.”
- (b) “As a result, industrial floors consist of a sub-base, a concrete layer and surfacing (screed).”
- (c) “The tolerance of DIN 15185, part 1, apply to truck tracks in the narrow aisle area.”
- (d) “The requirements of this DIN cannot be met by concrete and screed generally applied in the trade. Additional measures are required here.”
- (e) “The DIN 15185 requirement should today be regarded as minimum required.”

| Distance of measuring points | 1.0m | 2.0m | 3.0m | 4.0m |
|--|-------|-------|-------|-------|
| Max. permissible deviation from levelness, sample dimensions as limit value in the tracks (Sp) | 2.0mm | 3.0mm | 4.0mm | 5.0mm |
| Levelness test carried out in accordance to DIN 18202 | | | | |

The first attempt at rectification

67 Following the meeting, Mr Artico drafted a letter, that Mr McIlvena sent to Sterling Enterprises and which stated in part:

“Work would commence on the northern aisle first with only two aisles being worked on at any one time. This is the only aisle known to date that may require a ‘fill’ product. It is proposed by our subcontractor for this application to use Cemtop XD supplied by Parchem.”¹¹

68 On 5 October 2009, Mr McIlvena emailed Mr Vincent stating inter alia:

1. Prior to the meeting we had the opportunity to witness the operation of the forklift down all the aisles. It was noted that the northern most aisle at the concrete joint junction displayed the worst affect on tolerance. Other aisles were less affected with the third from north aisle being checked at a straight edge at each racking leg and mid points between the legs 3-5 locations in the aisle requiring some degree of grinding.
2. Work is targeted to commence on Tuesday 13.10.09 but will be confirmed as we locate an appropriate machine.
3. The grinding machine will need to be dust captive type but some minor dust may be emitted;
4. The day prior to commencing grinding the relevant spots will be paint marked by witnessing the actual locations affecting the forklift”.¹²

69 The letter also stated that only two aisles would be worked on at any one time, that following recoating the floor a six day curing period was required and remedial work may need to cease should access to an aisle be required. The letter also said that the northern factory slab configuration of 45 degrees did not lend itself to the use of a laser screed and Watpac had been reliant on their subcontractor who has over 40 years experiencing in laying such floors.

70 Mr Imperatori was responsible for grinding and filling the aisle floors in October 2009. This was done using a 4.5 metre straight-edge set along the aisle floor, parallel to the racking to identify high and low spots in the concrete. He did this on his hands and knees. The high spots were then grinded back by Watpac’s subcontractor, Civiworks, using a manual grinder and any low spots were filled with structural grout. After the grinding and filling, Mr Imperatori arranged for the aisles to be patch coated with epoxy in spots

¹¹ CB 6.390

¹² CB 6.390

where they had been grouted or grinded. Where the filling needed to occur or where the forklift guiding wire was, Mr Imperatori clipped the wire, filled the affected area with structural grout, established a chalk line where the wire was to go, saw cut a divot for the wire to sit in and then soldered the wire back in position. He then caulked over the divot to ensure that no debris could interfere with the wire and affect the operation of the forklift. The forklift company representative who was installing the wire told him to keep the wire down 3 to 5 millimetres from the finished concrete. At this stage he was trying to achieve that tolerance.

71 Mr Imperatori stated that during the repairs, Westaflex was stacking the warehouse by bringing dies in from the warehouse across the road. Repairs were being undertaken in certain areas at the instruction of Paul or Michael Sterling each day. Sometimes, when he turned up to site, he was told that Watpac could work in aisle 3, but not the other aisles, because Sterling Enterprises needed them that day.

72 Mr Sterling said that he was dumbfounded when he saw the equipment that the two Civiworks employees had brought to the site to rectify approximately 1100 square metres of concrete floor. It looked like the type of domestic floor polisher that is available to hire at supermarkets. He said words to the effect, "You might as well leave that on the ute, because you're not going to fix it with that." However, he let them proceed because he did not consider it his role to interfere. He stated that for approximately two weeks they moved about the warehouse floor creating a lot of dust and not making much difference. After they left, the warehouse floor was still as bad and unsuitable as it had been.

73 Mr Imperatori saw the HCE report and the photographs in it that indicated variances up to 20mm in the warehouse floor. He called Mr Vincent and stated, "on this floor we don't have 20mm variances". He asked Mr Vincent to show him where he was taking the measurements? Mr Vincent did not

answer. He asked Mr Vincent to come on site. Mr Vincent said, "Keep working on it".

74 Mr Vincent did come on site later, in order to show Mr Imperatori where the variances were. Mr Artico also attended. Mr Imperatori said that Mr Vincent moved the straight edge along the floor until he found a high spot. Instead of measuring from that point, he proceeded to move the straight edge until the end was within millimetres of the high spot. He then stood on the straight-edge and measured the distance from the other edge, which was now in the air. Mr Imperatori did not agree with this method of measurement and compared it to moving the plank of a see-saw. He stated that measurement should have been taken from wherever the straight-edge was and not positioned to maximise the deviation.

75 By letter dated 20 October 2009, Mr Artico informed Sterling Enterprises that grinding had been completed. Prior to sending that letter, he had gone with Mr Imperatori to take measurements. He estimated that a dozen spots were measured around the construction joints and in the aisles over approximately three hours. All were within the tolerance permitted by the Contract.

76 On 22 October 2009, Mr Artico wrote a summary report to Mr Vincent dated 20 October 2009. At item 10, in relation to the warehouse floor, Mr Artico stated: "Grinding complete" and "caulking & recoating of epoxy will occur on acceptance of trial forklift runs by client".

77 On 23 October 2009, Mr Sterling spoke to Mr Artico and told him that he did not consider the warehouse floor to be fixed. Mr Artico asked him to check with the forklift and the straight edge. Mr Sterling drove the new forklift down the aisles, with the platform elevated to 10 metres. He stated that as the forklift went down the aisles, at half speed, at certain points the forklift swayed. He said that he could best describe the experience as "waddling like a penguin, swinging from side to side almost hitting the pallet racks on each

side”.¹³ It was unsafe and he would not allow any of his staff to operate it in those conditions.

78 Mr Sterling is a licensed forklift driver with WorkSafe and was aware of the strict safety requirements of operating forklifts. He was also aware of his responsibilities as an employer to ensure that the workplace is safe.

79 Mr Sterling also made checks with his straight-edge and the tests showed that the floor still did not comply with the specification. The floor still had peaks and troughs in it, giving it the appearance of a washboard effect. He emailed Mr Artico stating that he believed a significant amount of work still needed to be done to bring it within specification and get the floor flat.

80 Mr Artico responded to him on the same day stating:

“I can confirm that a larger grinding machine was engaged to carry out works at considerable cost, however it was found to be too aggressive for this application & therefore we reverted back to the smaller machine with a courser disk.

An independent surveyor checked the conditions of the rectification works in relation to the specified tolerances on 16/10/2009.

Rectification works were completed on the 19/10/2009 with all tolerances re-checked & confirmed on site using the specified 4.5 metre straight edge measuring the tolerance at +/- 5 mm.

The rectification works carried out to date have in our opinion resolved this issue & believe the floor is now ready for the final application of the epoxy finish.

If you do not believe our analysis to be correct we recommend that a meeting be coordinated at your earliest convenience.”¹⁴

81 On 28 October 2009, Mr Vincent emailed Mr McIlvena and Mr Artico advising that: “Urgent action is required to finalize all work so that Westaflex can get on with business uninterrupted.”¹⁵

82 In his inspection report, Mr Vincent wrote that the rectification works were

¹³ Paul Sterling witness statement paragraph 54

¹⁴ CB 7.002

¹⁵ CB 7.007

incomplete, and although works in some locations had improved the situation, many areas needed further action. He referred to discrepancies ranging from 5mm up to 11mm over short distances.

83 On 29 October 2009, Mr Tony Moleta emailed Mr Vincent stating: “Seems like a shambles” and suggesting that he nominate a date for completion of the rectification and if that did not occur, then Sterling Enterprises should proceed to complete the rectification at Watpac’s expense.

84 At that time, Mr Sterling was contemplating engaging a contractor to do the works and back charging Watpac. He obtained prices for flood coating the entire floor, including under the racks, with an epoxy compound to achieve a level surface. He had received a quote for approximately \$80,000 from Remedial Concrete Works and an estimate of approximately \$93,000 from Tony Moleta of Rider Levett Bucknall.

85 Around this time, Mr Sterling says that he attended a meeting with Mr McIlvena who said: “It’s fixed” or words to that effect. Mr Sterling replied that it was not and suggested they flood coat the whole floor with a levelling agent as Watpac had considered at an earlier point.

86 He said that Mr McIlvena refused to flood coat the whole floor. He did suggest to him localised filling of the low spots but Mr Sterling rejected this because the product he was going to use was not suitable with feather edges and Mr McIlvena would not agree to square cut the affected areas.

87 Watpac agreed to try a second grinding attempt with larger equipment using another contractor, Hanlay Pty Ltd, who also supplied and installed the coating to the floor. Mr Sterling said he agreed to this because he had little choice.

The second attempt at rectification

88 On 30 October 2009, Mr Vincent sent an email to Mr Artico and Mr McIlvena stating in relevant parts:

“Floor rectification will resume within the warehouse first thing next Thursday morning.

Efforts will be concentrated on one aisle initially to achieve satisfactory completion of same prior to moving on to other areas. (Paul Sterling or Lou, the factory manager will provide direction as to which aisle to select with a view to least interrupting their daily operations).

What ever method employed to carry out the rectification, dust control is critical.

I will attend to inspect progress at 3.00 pm on Friday as requested. (If this is not suitable let me know.)”¹⁶

89 On 30 October 2009, Mr Artico responded to Mr Vincent stating:

“Please be advised that slab rectification works are scheduled to commence at 7.30 am Thursday 5/11.

We have engaged a concrete grinding company experienced with this type of work with access to much larger equipment.

The contractor will have an individual on site attending to dust & will have access to tarps to cover any equipment likely to be directly effected-we appreciate the difficulty involved in such a request but it would be much appreciated if any sensitive equipment could be relocated prior to the commencement of works.

Works will be concentrated on one aisle at a time & shall be measured for level using the 4.5 m straight-edge with tolerances of +/- 5 mm.

...”¹⁷

90 Mr Sterling gave evidence that while Hanlays were carrying out the further grinding in November 2009, areas where Civiworks had laid the levelling agent began to chip out around the edges at the point where the forklift drove over them. The Hanlay personnel said that they would not accept this work and removed it and ground down the areas to achieve the level.

91 On 13 November 2009, Mr Artico sent an email to Mr Vincent stating, inter alia, in respect of the warehouse floor:

- Grinding works underway with an expected completion date of the

¹⁶ CB 7.030

¹⁷ CB 7.031

13/11/09; and

- Caulking & recoating of epoxy will occur on acceptance of trial forklift runs by the client.

92 On 18 November 2009, Mr Artico sent an email to Mr Sterling stating that:

- (a) yesterday's cleaning and sealing of the warehouse floor sees the completion of major grinding rectification works;
- (b) epoxy filling and final epoxy paint coating to commence in the warehouse on 12 December 2009;
- (c) for these works to be completed within the timeframe all materials and equipment are needed to be removed from the warehouse floor to enable clear access; and
- (d) A meeting should be held between all key parties.

93 Mr Sterling stated that he was not happy with the results of the second attempt at rectification. The aisles were more even than they had been, however the grinding had created deep steps of up to 19mm along the side of the aisles. These were trip hazards which were not permissible in a warehouse where staff walked around.

94 On 25 November 2009, Watpac submitted a payment claim to Sterling Enterprises following practical completion. It was not certified by the Superintendent. Instead, on 1 December 2009, Mr Moleta suggested that "we intend to wrap up all outstanding items on the project in one final payment certificate", once all rectification works had been completed.¹⁸

Meeting of 3 December 2009

95 A meeting was held between Mr Sterling, Mr Vincent, Mr Artico, Mr Moletta and Mr McIlvena on 3 December 2009 at the Westaflex boardroom to discuss what works could be undertaken to improve the operation of the slab. Mr McIlvena stated that Sterling Enterprises was lucky to have Watpac because it could work with them to sort it out. They discussed whether Watpac would undertake any works under the racking. Mr McIlvena said that the program

¹⁸ CB 9.001

was based on grinding in the aisles only.

96 At that meeting, Mr Sterling expressed his concerns about the deep steps that the grinding had caused in some of the aisles, and said that they were a tripping hazard. His evidence was that Mr McIlvena said that Watpac would, starting at the northernmost aisle, grind each aisle completely, until he was satisfied. He said that Mr Sterling should determine whether it was satisfactory or not, by driving the forklift down the aisles. Mr Sterling stated that he was prepared to accept this proposal, but also said that he was not happy with the deep steps which had been created. He said that Sterling Enterprises had only ever talked about rectifying the aisles. Mr Sterling also pointed out that the storage under the racks at floor level were for wheel trolleys and he could not have his staff wheel trolleys over deep steps. Mr McIlvena would not agree to work under the racks and the meeting ended inconclusively.

97 Mr Artico denied that there were deep steps in the floor.

98 The minutes of the meeting under the heading “WAREHOUSE SLAB RECTIFICATION” recorded that:

“19.2.1 Hanlay to commence preparation works on the 12/12/09 & continue on the 13/12/09. Watpac to supervise works, provide access to site & lock up on completion- PS to provide keys & security codes. Access to Office amenities will be required throughout the rectification works.

19.2.2 Hanlay will commence works necessary to ensure Warehouse aisles meet the specified tolerances on the 14/12/09 in the far North aisle. Client is to conduct a test run & approve rectification works prior to Hanlay moving into the next aisle. This methodology will continue until rectification works are complete. Client to have all materials & equipment off the Warehouse floor before the 12/12/09.

19.2.3 Hanlay will not commence final epoxy coating until all aisles have been approved by the client.

19.2.4 Rectification works are to be completed by COB on the 22/12/09 – Access may need to be provided to site after hours to ensure program is met.

19.2.5 Line marking to be scheduled for the 22/12/09. Contractor responsible for the forklift guidance system is to be placed on notice as wire has been found to have inadequate cover – Wire may require

ongoing repairs through the rectification works.

19.2.6 The whole of the Warehouse slab is to be recoated with the specified epoxy coating – Epoxy is to be cut in around racking & will continue directly over the top of the wire guidance system.

19.2.8 Hanlay will not have representation on site on the 17/12/09.

19.2.9 The client questioned whether any works were to be undertaken under the Warehouse racking.

Watpac have confirmed that this stated methodology is based on the rectification works being undertaken only in the Warehouse aisles which is consistent with all previous communication.

The current program nominating completion on the 22/12/09 cannot be achieved if the client wishes for areas under the racking to also be considered.

Unless instructed otherwise Watpac will proceed with rectification works on the 12/12/09 in the Warehouse aisles only.”¹⁹

99 Mr Imperatori gave evidence that at some later point after the meeting of 3 December 2009, he was asked to go to the site again. When he did, Mr Vincent, using two MDF planks, measured random spots and said that the floor was not within the tolerances. Mr Imperatori told him, “You can’t use that.” He then went and got his 4.5 metre aluminium straight-edge. The straight-edge dimensions were 125 mm x 25 mm x 4.5 mm.

100 Mr Sterling stated that it was either at this meeting, or shortly after, that Watpac first said that there were problems with the Contract specification. He did not agree that the Contract was under specified. He said that Watpac was aware of the required finish to the slabs. He rejected the contention that Sterling Enterprises was asking for more than the contract required.

101 Mr Sterling has no experience in working in the building or construction industry.

102 On 8 December 2009, Mr Vincent wrote to Mr Artico stating that Sterling Enterprises could not accept the rectification works without the need for rectification under the racks as well. He also wrote that:

¹⁹ CB 9.003

“The extent and method for rectification, as previously noted, will remain your responsibility, we just require the problem to be corrected without further compromise to the project, as per Watpac’s contractual obligations.”

103 On the same day, Mr Mclivena replied, stating that Watpac was “shocked” at Mr Vincent’s comments about the floor levels under the racks and said that it was only the aisles that were being discussed. His email also stated:

“We have never demonstrated anything other than professionalism. What has turned things upside down was the introduction of Tony Moleta who actually poured petrol onto the discussion to date. In your letter Paul failed to mention my comment that the slab tolerances are under specified. We will respond further by COB 10/12/09 as requested.”²⁰

Site meeting on 10 December 2009

104 A site meeting was held on 10 December 2009, which was attended by Paul and Michael Sterling, Mr Artico, Mr Shannon of HCE and Mr Nick Pavlovic, who had become state manager of Watpac in February 2009.

105 Mr Sterling stated that Mr Pavlovic wanted to know what Sterling Enterprises’ position was with regard to liquidated damages and variations being included in the final payments. Mr Sterling said words to the effect that it would be to the detriment of Sterling Enterprises if he made a payment and if Mr Moleta had signed off on the outstanding variations, before the floor was fixed.

106 Mr Pavlovic said that Sterling Enterprises wanted Watpac to achieve more than the Contract and the forklift specifications required.

107 Mr Pavlovic asked Mr Shannon, the structural engineer, whether he had read and understood the tolerances. Mr Shannon said that he hadn’t and asked Mr Pavlovic the same question. Mr Pavlovic said that he had and handed him various documents, including the Tolerances for Concrete Surfaces (Sept 2005) Guide produced by Cement Concrete & Aggregates Australia and explained the DIN standard, the forklift specifications and the requirements of the Contract preamble. Either Mr Pavlovic or Mr Artico said that if Sterling

²⁰ CB 9.009

Enterprises had wanted a stringent finish floor, then it should have been detailed differently – there should have been a set down with a screed and the joints should have been under the racking. Mr Pavlovic explained that there were time and cost implications of what Sterling Enterprises was asking Watpac to do and he suggested the parties should split the costs.

108 Mr Pavlovic said that Watpac was trying to work diligently through the issues. He said that if the Superintendent wanted Watpac to work on the slab below the racks, he should have raised this from the start, rather than just before they were about to recoat the floors – this would have made the works more efficient. Watpac now needed to reassess its methodology. He also stated that the work which Watpac was now being required to carry out would be beyond its contractual scope and more stringent than the standard required by the Contract. He stated that Watpac would continue to assist Sterling Enterprises so that the forklift was operational, but they were looking for an amicable settlement of all outstanding commercial issues. Since Sterling Enterprises wanted the area under the racking done, Watpac would go away and reassess the best way to flatten the whole floor. This could involve flooding the whole floor with a self-levelling screed, or extensive grinding, or a combination of both.

Events between 11 December 2009 and the middle of 2010

109 After the meeting of 10 December 2009, Mr Imperatori received a call from Mr Pavlovic instructing him to make the floor perfect – to give Sterling Enterprises what they wanted.

110 Mr Imperatori said that Watpac previously used a large bobcat fitted with an 800 mm diameter grinding stone to carry out the mass grindings between the aisles. This was not suited to grinding under the pallet racking. As such, the subcontractor had to go back to using the stand behind grinders which had been initially used, making the task more time consuming.

111 On 17 December 2009, Mr Artico sent an email to Mr Vincent with a letter attached from Mr McIlvena which said that there were some areas where its subcontractor had not achieved the concrete slab tolerance as specified for the project, +/- 5mm. The best way forward was for rectification work to continue to the aisles, for the work to be resurveyed and for the next course of action agreed. Mr McIlvena stated that the current design of the floor slab did not appear to meet the requirements of the client's forklift.²¹

112 Mr McIlvena also stated that:

"As discussed on site on Thursday 10th December 2009, we have undertaken a further survey of the entire floor with the flooring contractor. Given the current status of the floor and the client's ongoing operations, and in consultation with the flooring contractor, we believe the best way forward is as follows:

1. Hanlay commenced works on 12/12/09 to make good the rectification attempted by Civiworks.
2. Resurvey the floor (planned for 15/12/09).
3. Inspect floor with forklift supplier and Hanlay to agree next course of action required.
4. Consult with the Client/Superintendent.

In summary, we believe the ultimate problem is that the floor slabs have been underspecified. Watpac will however, continue to work through the problem with the client in line with the process outlined above."²²

113 Mr McIlvena stated that a problem compounding Watpac's attempts to rectify was that Mr Vincent was difficult to contact during this period and Watpac was being left to deal with Mr Moleta and Mr Sterling.

114 Mr Sterling stated that despite several requests, he did not receive copies of the surveys referred to in Mr McIlvena's letter until discovery occurred. Presumably, these were the Survey 21 documents.

115 On 18 December 2009, Mr McIlvena sent an email to Mr Vincent and Mr Sterling stating that they had received the final survey data and had passed it

²¹ CB 9.017

²² CB 9.019

on to Hanlay for assessment and quotation options. The quotations were expected on 21 December 2009. They proposed a meeting for 22 December 2009 to present those options. However, the meeting did not occur.

116 On 22 December 2009, Mr Mclvena emailed Mr Moleta, asking that Mr Vincent confirm that Watpac was not required to make the forklift specification, that only the contractual specification of +/- 5 mm in 4.5 metres applied. On 3 January 2010, Mr Vincent responded stating:

“We require our floor to an exacting standard, accurate to 5 mm over any given distance of 4.5 metres relative to level, and straight along 4.5 metre length.”

117 Mr Mclvena stated that this instruction effectively sought to reduce tolerance from 10 mm to 5 mm.

Site meeting on 13 January 2010

118 A site meeting was held on 13 January 2010. Mr Paul Sterling, Mr Michael Sterling, Mr Shannon, Mr Pavlovic, Mr Mclvena and Mr Artico attended. Discussion occurred about the use of a self levelling screed over the floor.

119 Mr Pavlovic described the history of the steps that had been taken and outlined the difference between the forklift specification and Contract requirement. He said words to the effect of: “We’ll do some more grinding and then use an epoxy to give you what you need for the forklift.” He explained the work that would take place around the feet of the racking so that it could be removed in the future without damaging the floor. He also explained how Watpac would go about reinstalling the wire-guided tracks. Watpac provided the product data for the epoxy that was to be used.

120 Mr Pavlovic stated that the main reason that they were in the current position was that the right tolerance had not been correctly specified. If it had, the floor would probably have been constructed in a two stage process – a structural base slab with a topping screed cast over the top most likely in smaller pour

strips to control the flatness. He said that this was typical of a “super floor construction”. It was the way the floor construction was described in the forklift specification, but not the way it was documented in the Contract. Mr Pavlovic stated that Watpac had already spent over \$30,000 performing the work and that was partly wasted, given the push to now flatten the whole floor. The change in methodology had wasted a lot of time. The Superintendent had been very difficult to get in touch with.

121 Mr Pavlovic said that they discussed the revised methodology to achieve the desired flatness over the whole floor. This included options from flooding the floor with a self levelling compound to extensive grinding. It was going to cost Watpac in the vicinity of \$140,000 to complete. Watpac would go away and confirm the proposed methodology. He said that Watpac did not want to commit to these costs without some certainty on the other commercial issues, including: liquidated damages, credits, outstanding claims and variations and the manufacturing floor tolerances. Mr Sterling said that they were waiting on information from Rider Levett Bucknall to finalise these issues.

122 In a letter of 15 January 2010, Watpac proposed the use of self-levelling screed. The proposal was to flood coat the entire warehouse with a levelling screed. The letter attached a Technical Data Sheet for Ultra Tuf 55.

123 On 18 January 2010, following correspondence from Mr Sterling, Mr Artico sought confirmation from the subcontractor that the epoxy was capable of sustaining the loads from the equipment in use at the premises and pointed out aspects of the specification sheet for the product. Mr Sterling stated that he did not understand why Watpac did not proceed with the flood coating and was somewhat perturbed that they had returned to localised grinding.

124 On 19 January 2010, Mr Artico emailed Mr Sterling concerning floor rectification providing “further confirmation/clarification of the nine raised items”. Item 6 stated: “The application of the levelling screed will meet the

design tolerance of +/- 5mm over 4.5m.”

125 On 19 January 2010, Mr Artico instructed Sure Tec to proceed with the epoxy work.

126 However, on 22 January 2010, Mr Artico instructed Sure Tec not to proceed with applying the epoxy until further notice. Mr Sterling stated that the product did not specify a maximum weight point load and was described as suitable only for light forklift traffic.

127 The proposal to use a levelling screed did not proceed.

128 Mr Artico said the reason that epoxy floor coating was not used was because Mr Sterling raised issues in mid January 2010 about the turning circle of the forklift and the loads. The product was fine, but Mr Sterling would not accept it.

129 Mr Imperatori gave evidence that he rang Mr Vincent in late January 2010 and said, “I am not epoxying this floor until you sign this off”. He arranged for Mr Vincent, Mr Shannon and Mr Paul Sterling to attend the site and said to them both, “Forget the gridlines, take your straight-edge and put it anywhere on the warehouse floor, if I can’t fit this part of the ruler under it, then it passes. Do it all day. If I can’t fit it under there I pass the test.” He was confident the floor was level and working outside of the gridline framework was a far more rigorous requirement than the contractual tolerances.

130 Mr Vincent, Mr Shannon, Mr Paul Sterling and Mr Imperatori spent approximately two to three hours measuring the floor at different points. Mr Vincent, Mr Shannon or Mr Sterling would pick a random location and use their straight levels to undertake measurements. At no point was Mr Imperatori able to fit the 5 millimetre thick ruler underneath. No area on the floor had failed the test and both Mr Vincent and Mr Sterling said words to the effect that the levelling of the floor was acceptable. There was no suggestion

that the racking needed to be moved to undertake rectification under it.

131 Mr Sterling said that he was not present for all of the inspection, that he did not recall the outcome of Mr Imperatori's testing and he did not ever sign off or accept that the warehouse floor was acceptable.

132 Mr Imperatori gave evidence that at no time did Mr Michael Sterling or Mr Paul Sterling, who were on the site every day, ask when the rectification works would be finished or tell him to hurry up because it was affecting Westaflex's operations. Watpac had always worked around the client in completing the floor works. He pre-planned and moved the stock around so as not to cause disruption to Westaflex operations. He was never told by anyone on site that the floor grinding work was preventing Westaflex from accessing critical supplies or meeting deadlines.

133 Further grinding work was done on the floor in January 2010.

134 Mr Imperatori stated that by late January 2010, Watpac had finished rectifying the floor to the standard required for the forklift. Having spent weeks on his hands and knees manually pushing around a straight-edge over all areas of the floor, he considered that the floor was practically perfect – there were no deviations of more than 10 millimetres, as allowed by the contract, and all deviations were well less than 5 millimetres. He estimated that he spent approximately one day per 4.5 metre area on the floor. It was very hard going because the floor was concrete.

135 Mr Shannon of HCE inspected the floor again on 22 January 2010 and provided a report dated 25 January 2010. The report stated that the floor level "undulated significantly in multiple locations". It contained measurements of 19 locations. The report stated that Mr Shannon's tests with the straight-edge revealed that surface level undulations had been significantly reduced since the last inspection. The surface level undulations complied with the

requirements of the specifications for the majority of the slab. There were, however, some areas observed where this did not occur, however not significantly. He stated that grinding/filling had not been carried out under the racking leg locations and, therefore, if the racking was removed in the future some localised high/low points may exist. He also stated that the works carried out to the warehouse slab have achieved as accurate a result as could be expected considering the method adopted, with the majority of the slab complying with the specifications.

136 On 28 January 2010, Mr McIlvena wrote to Mr Vincent in the following terms:

“RE: BOO6 WESTAFLEX –WAREHOUSE FLOOR REWORK

We are in receipt of the letter dated 25/1/2010 from your structural engineering consultant Steve Shannon and comment as follows:

- The flatness of the slab was reassessed with the specialist flooring contractor on 21/01/2010, after several days of grinding.
- Significant improvements had been made and the flooring contractor recommended that further localised grinding and filling was now the most appropriate method to rectify the floor.
- We agree that the whole floor does not currently conform with the specified tolerances as our rectification works are not yet completed.
- We disagree that significant works are required to bring the slab to within the specified tolerances.
- We are confident that the proposed course of action recommended by the specialist flooring contractor will bring the slab to within the specified tolerances.
- The guidance wire was reinstalled on the 25/1/10 due to the installer not otherwise being available until 24/02/2010. The guidance wire contractor also confirmed that the wire and caulking was best installed prior to the final floor coating, so as to provide a better floor finish.

We confirm here our revised methodology to bring the floor slab into the specified flatness tolerance.

1. Grinding and localised filling will be complete on Monday 01/02/2010.
2. No screed will be applied alleviating the risks expressed by Steve Shannon with regard to forklift loads (Information

received 18/01/2010) and Paul Sterling's concerns regarding scouring at changes of direction.

3. We propose Watpac and the client (and consultants) inspect the floor from Tuesday 02/02/2010 at 1pm.
4. We propose to commence floor priming and coating on Wednesday the 03/02/2010.
5. Line marking will commence in the following week. We remind that curing of the final coat will be 7 days before floor is trafficable.

We trust that we will reach consensus on the flatness of the slab at Tuesday's inspection prior to coating".²³

137 Mr Artico said that during this period, Mr Vincent was very difficult to contact. He said that Sterling Enterprises kept shifting the "goal posts" of the project. At no time was Watpac asked to perform work on the factory floor or to remove the racking. He said that lengthy delays were caused by the need to work around Westaflex's operations, Sterling Enterprises' "shifting goal posts" and the unavailability of the Superintendent for long periods.

138 Mr Sterling stated that the rectification works continually disrupted Westaflex's business, including the use of the forklift. Westaflex used other premises to ensure access to components and to enable it to receive new stock.

139 On 4 February 2010, Rider Levett Bucknall informed Mr Pavlovic that "variations will be finalised once the floor rectification works have been satisfactorily completed".

140 Mr Shannon of HCE prepared a further report of 5 February 2010 in respect of the warehouse slab. It stated in part:

"The use of the straight edge revealed that the surface undulation has been reduced significantly since out site inspection carried out on 22 January 2010.

The use of the straight edge revealed that the surface level undulation complies with the requirements of the specification for the majority of the slab.

It should also be noted that some areas were observed where the

²³ CB 9.367

surface level undulation does not comply with the requirements of the specification, however not significantly.

It should also be noted that grinding/filling has not been carried out under the racking leg locations and therefore if the racking is removed in the future some localised high/low points may exist.

It also be noted that only surface undulations over a 4.5 metre long straight edge have been measured, floor levels relative to a datum have been measured.

In our opinion, the works carried out to the north building concrete slab surface levels, have achieved as accurate a result as could be expected considering the method adopted, with the majority of the slab complying with the specification.²⁴

141 Mr Sterling stated that following this report, he did not request Watpac to return to continue rectification works. He was fed up that the defective floor was still not rectified after nearly five months. He described the warehouse floor as looking like a pockmarked lunar surface due to the localised grinding that had occurred. The unsuccessful rectification works had been extremely costly and disruptive to Westaflex's operations and caused dust to settle on everything, including on the new forklift. He drew these problems to Watpac's attention on a number of occasions.

142 He said that that reason for not proceeding with the rectification program was not conveyed in as many words to Watpac, but was blindingly obvious.²⁵

143 Mr Sterling gave evidence that during the rectification period, Sterling Enterprises' business was constantly being disrupted. It had to move the trolleys containing supplies from under the racking to allow access to the floor. While Watpac worked in a particular aisle, Sterling Enterprises could not access supplies in that aisle and could not store new supplies, which had been delivered. On a number of occasions, the grinding works pulled up the wire guidance system, which was fixed at Watpac's expense. However, until it was fixed, the forklift could not operate at all in any aisle.

²⁴ CB 10.037-038
²⁵ T 207

144 After the grinding works were completed, the warehouse floor had to be repainted. Each time the floor was repainted, the forklift could not be used on the warehouse floor for seven days. These matters prevented Sterling Enterprises accessing critical supplies to meet deadlines.

145 The grinding also created dust and Sterling Enterprises had to attempt to protect equipment and supplies from it. However much of them still got dusty and had to be cleaned. Because of these disruptions and limitations on Sterling Enterprises' business and to avoid impeding the rectification, Sterling Enterprises used other warehouses to ensure access to vital components and to receive new stock. It would otherwise have been impractical to continue to operate. However, these issues still impacted very negatively on productivity.

146 Mr Sterling gave evidence that the factory and warehouse floors remain out of specification. The factory has an uneven floor throughout. In the warehouse, the quality of the floors is very poor, as the surface has an irregular ripple finish. The forklift still has to be set at half speed.

147 The recommissioning of the forklift and the warehouse occurred on 17 and 18 February 2010.

148 Mr Sterling stated that as a result of the issues with the warehouse floor, he was concerned about the factory floor. On 12 February 2010, Mr Shannon inspected the floor in the factory and issued a report concluding that:

“Based on our site inspection and measurements taken with a 4.5 metre long straight edge, the concrete floor slab finish does not comply with the requirements of the *'Notes for Tender and Contract'* at multiple locations.”²⁶

149 Mr Artico said that he first saw that report on or about 28 April 2010. By that time, the defect liability period for the factory separable portion had already expired.

²⁶ CB 10.046

150 Mr McIlvena gave the following evidence about the manufacturing/factory southern slab. Laser screeds were used to get the levels. It had 90 degree horizontal joints through it, while the northern warehouse slab had diagonal joints. He stated that there was no general forklift in use in the factory. Sterling Enterprises took possession of the factory premises in April 2009. At no time had he had any discussion with anyone representing the client in which Watpac was asked to rectify the factory slab. Further, Watpac has never been instructed to rectify the factory floor and, in fact, a letter from Mr Sterling of 8 December 2009 stated that Sterling Enterprises did not intend to rectify it. That letter stated, regarding the factory, that:

“Note: Random in house testing has indicated that the manufacturing side floor is also not within required tolerance, albeit far better than the warehouse side. it is not our intent to pursue additional rectification works in this area, although we shall confirm this once further level checks have been carried out by Hawthorn Consulting. The results will be forwarded to you as soon as they are available.”²⁷

151 Mr Sterling stated that he was concerned with the effect that any grinding rectification works would have on the factory and the disruption that it would have on Westaflex’s operations. Mr Sterling said that there were forklifts in use in the factory daily and the high forklift from the warehouse is also used to access the high storage of plastic pallets of raw materials in the factory.

Meeting on 27 April 2010

152 A meeting between the parties occurred on 27 April 2010, which was attended by Mrs Sterling and Mr Paul Sterling and Mr Pavlovic. Sterling Enterprises tabled their first summary of economic loss, which was for \$677,000, including costs for work to the manufacturing floor. Mrs Sterling said that she was not happy that the floor had not been constructed to their expectations and that the time taken to fix the floor had been very disruptive to their operations.

²⁷ CB 9.006

153 Mr Pavlovic explained that while the floor works had taken some time to resolve, Watpac always tried to work through the issues diligently. He stated that several factors had contributed to the process being drawn out. This included the Superintendent's performance, the inadequate initial specification of tolerance and the initial attempt to fix the floor by the original concrete subcontractor. He stated that the initial contractor was capable of producing the floor as specified, but not to the requirements of the forklift specification. He said that the main problem was that the floor tolerance specified was inadequate for the operation of the forklift. Watpac had been proactive in trying to address the issues. It had procured the forklift specifications to understand the issues that Sterling Enterprises had and engaged a specialist flooring contractor to carry out the final works. He was disappointed that Sterling Enterprises had tabled a large ambit claim for economic loss, which included the manufacturing floor. That floor had never been raised as a problem, but was now being raised as a leverage after Watpac had undertaken works required to make the warehouse floor operational. Mr Sterling said that if Westaflex left the building, the Sterling Super Fund would be left with a substandard floor.

154 Mr Pavlovic disputed that the floor was substandard. Works had proceeded in good faith, even though Watpac had not been paid for contract works or variations, despite seven months having passed since practical completion.

155 Mr Pavlovic stated that Sterling Enterprises' design issues had delayed the completion of the project and Watpac's works to fix the floor were in excess of the contract requirements as the original tolerance specification was inadequate for the forklift. Watpac had not intended to pursue these issues because of the previous relationship with Sterling Enterprises and the fair approach it had shown to the time taken to carry out the floor works. However, in view of Sterling Enterprises' changed approach, Watpac would now need to table those issues.

156 Mr Pavlovic stated that after the meeting, he received HCE's report of 12 February 2010 from Mr Sterling. The defects liability period for that separate portion had already expired. This was the first time that liquidated damages had been proposed by Sterling Enterprises.

157 Mr Sterling stated that at the conclusion of the meeting he understood that Watpac was going to go away and come back with a counteroffer. He did not hear anything from them until 26 July 2010 when Watpac made two claims for extensions of time.

158 Sterling Enterprises stated that the purpose of preparing the 27 April 2010 claim was to have negotiations with Watpac, and Sterling Enterprises wanted to go in with "some strength so that [it] could get a reduction on the amount which [it] owed Watpac under the building contract."²⁸

159 On 23 June 2010, Mr Sterling wrote to Watpac:

"The economic loss was suffered by Westaflex during the period September 2009 - February 2010 for the warehouse, where Watpac performed remedial works after handover to bring the floor within specification as detailed within the building contract and the factory floor remains unresolved."²⁹

160 Mr Sterling said that this was a poor choice of words and that he was not saying that Watpac had remedied the problem.³⁰

Visit to the factory on 6 July 2012

161 On 6 July 2012, Mr Imperatori inspected the floors. He used a straight-edge to conduct measurements on the floor of the warehouse at approximately eight to 16 locations, including at least two to four measurements in each of the four aisles. Whilst the position at which he conducted measurements using the straight-edge were random, he focussed on placing it on the diagonal joints. At no location was there a deviation of 5 mm below the bottom of the

²⁸ T 239
²⁹ CB13:257
³⁰ T296 and 298

straight-edge. He also placed the straight-edge in three to four locations in the factory. Again, there was no deviation of 5 mm from the bottom of the straight-edge. He asked Mr Sterling whether he could see the forklift in operation, but Mr Sterling refused him.

Meeting on 10 August 2010

162 On 10 August 2010, a meeting occurred between Mr Paul Sterling, Mrs Sterling, Mr Michael Sterling, Mr Pavlovic, Mr Peter Collins and Ian West. Ian West is Watpac's national commercial manager for the construction division. Watpac tabled an assessment of the financial summary of the project. Mr Pavlovic reiterated that the biggest problem was that the tolerances were not appropriately specified to suit the forklift and that therefore the floor issues were not the result of a construction defect. Sterling Enterprises' losses should be resolved with their consultants who specified the original tolerance.

Events after the meeting of 10 August 2010

163 By payment claim dated 4 August 2010, Watpac sought payment of the sum of \$574,890. This was based on a total adjusted contract sum of \$4,789,317, less the sum of \$4,214,427, as paid. It included Extension of Time claims 17 and 18 and slab rectification work as variation claims.

164 Mr Sterling said that he was surprised to get Watpac's final reconciliation document, which included the sum of \$130,793 for "slab rectification beyond specification as requested". He had never been told that the rectification work was considered to be a variation.

165 By fax dated 24 August 2010, Mrs Sterling sent a letter to Watpac claiming \$677,057.14. The claim was headed "final reconciliation".

166 On or about 26 August 2010, Watpac received a certificate from the Superintendent in the amount of \$219,930, consisting of \$199,936 plus GST. Sterling Enterprises has never paid this amount. Mr Artico stated that, even

though Watpac had achieved practical completion, the certificate reduced the value of the concreting works that had previously been certified, so that \$93,000 was held back from the contract sum from the concrete trade item.

167 Mr Pavlovic stated that the August certificate was the first time liquidated damages had been certified. The Superintendent had not previously told him that he intended to impose liquidated damages. By this time, the defects liability period for Separable Portion 1 had expired on 8 April 2010 and the defects liability period for Separable Portion 2 was due to expire in approximately two weeks.

168 Mr Artico stated that Watpac has finished the works and, although it is more than three years since practical completion was certified on 11 September 2009, Watpac has not been paid the Adjusted Contract Sum, or even its certified entitlements.

169 Mr Pavlovic stated that it was apparent to him that Sterling Enterprises would seek to set off from any certificate the amount that it claimed to be entitled to. Accordingly, seeking payment under the Contract was futile. He also stated that because Sterling Enterprises had indicated in its letter that it did not intend to make payment in accordance with the August certificate, Watpac did not send it an invoice for the amount of the August certificate.

The Security of Payment Claim

170 On 5 November 2010, Watpac delivered a progress payment claim to Sterling Enterprises and the Superintendent under the *Building and Construction Industry Security of Payment Act 2002* ("the Act"). It sought payment of the amount of \$630,561.80.

171 The Superintendent issued a certificate dated 18 November 2010, certifying a nil payment.³¹ This was premised upon Sterling Enterprises having paid the

³¹ CB 11.156

August 2010 certificate. In fact, it had not done so.

172 Sterling Enterprises issued a payment schedule under the *Act* dated 19 November 2010. It took issue with Watpac's claims for delay costs and the slab upgrade variation and claimed \$736,473.76 from Watpac.

173 Watpac made an adjudication application under the *Act*. On 13 January 2011, the adjudicator determined an adjudicated amount of \$368,585.80 plus interest and 50% of the adjudicator's fees. An adjudication certificate was issued by the nominating authority on 24 January 2011. The amount was not paid and on 27 January 2011, Watpac obtained a judgment of this Court for that sum. The sum was still not paid and Watpac obtained a warrant of seizure and sale to enforce the judgment. Negotiations then followed between the solicitors for the parties.

174 On 29 June 2011, Watpac agreed to accept the sum of \$401,123.61, being the amount plus interest then owing, being paid into a solicitor's interest bearing trust account in the joint names of Watpac and Sterling Enterprises, until the final resolution of matters and the determination of this proceeding.

175 On 4 July 2011, Sterling Enterprises' solicitors wrote to Watpac's solicitors stating:

"Our client is pleased to accept your client's proposal acknowledging the interim nature of your client's judgment in the context of all the other issues in dispute between the parties."³²

176 Sterling Enterprises paid the sum into the account on or about 6 July 2011.

Issue 11 Did on 21 June 2012, the Superintendent issue to Sterling Enterprises and Watpac a final certificate dated 20 June 2012, pursuant to clause 37.4 of the Contract, which certified \$148,656.00 (including GST) as due and payable by Watpac to Sterling Enterprises?

Issue 12 Is Sterling Enterprises entitled to the sum of \$148,656.00 pursuant to the certificate issued by the Superintendent on or about 21

³² CB 14.069

June 2012?

Issue 13 Was the final certificate procured by fraud on the part of Sterling Enterprises?

177 On 19 June 2012, Sterling Enterprises wrote a letter to the Superintendent headed “confirmation of payments to Watpac” and “schedule of all payments to Watpac”. The letter stated that:

“ Please take into account in assessing and issuing the final certificate, that since your last certificate numbered 12 and dated 18 November 2010 we paid a further \$401,123.61 on 6 July 2011.”³³

178 Without having recourse to Watpac, the Superintendent issued a Final Certificate dated 20 June 2012 which disallowed Watpac the sum of \$93,000 in respect of the concrete trade item and allowed Sterling Enterprises the sum of \$42,142 on account of liquidated damages.³⁴ The Certificate stated that Watpac owed Sterling \$148,656, inclusive of GST.

179 The Certificate was issued under clause 37.4 of the Contract, which is headed “Final Payment Claim” and states:

“Within 28 days after the expiry of the last defects liability period, the Contractor shall give the Superintendent a written final payment claim endorsed ‘Final Payment Claim’ being a progress claim together with all other claims whatsoever in connection with the subject matter of the Contract.

Within 42 days after the expiry of the last defects liability period, the Superintendent shall issue to both the Contractor and the Principal a final certificate evidencing the moneys finally due and payable between the Contractor and Principal on any account whatsoever in connection with the subject matter of the Contract.

Those moneys certified as due and payable shall be paid by the Principal or the Contractor, as case may be, within 7 days after the debtor receives the final certificate.

The final certificate shall be conclusive evidence of accord and satisfaction, and in discharge of each party’s obligations in connection with the subject matter of the Contract except for:

...

d) unresolved issues the subject of any notice of dispute pursuant to clause 42, served before the 7th day after the issue of the final

³³ CB 14.105B
³⁴ CB 14. 108

certificate.”

180 Both parties issued Notices of Dispute under clause 42.1 of the Contract which prevented the “conclusive evidence” clause taking effect in respect of the final certificate.

181 Sterling Enterprises’ claim was for damages for costs incurred and to be incurred because of the condition of the floor and for liquidated damages, rather than for the sum certified in the Final Certificate.

182 However, there was much argument about the effect of the Final Certificate and I will state my conclusions on the issues argued.

183 Watpac contended that the final certificate was procured by the fraud, alternatively misrepresentation and non-disclosure, of Sterling Enterprises’ and therefore that Watpac could go behind the certificate.³⁵ Sterling Enterprises had not told the Superintendent that the payment, rather than being paid to Watpac, had been paid to its solicitors to be held on trust “pending the final resolution of matters in dispute between the parties”. By failing to provide to Watpac the email and letter of 19 June 2012 to the Superintendent, Sterling Enterprises had breached clause 20 of the Contract and the final certificate was liable to be set aside.³⁶ The relevant part of Clause 20 states:

“20 Superintendent

The *Principal* shall ensure that all times there is a *Superintendent*, and that the *Superintendent* fulfils the role and function of independent certifier, valuer or assessor reasonably and in good faith.”

184 In cross-examination, Mr Pavlovic did not make any allegation of fraud, but described Sterling Enterprises’ conduct as “sneaky” to say that money had been paid in respect of that particular issue.³⁷

³⁵ Brooking on Building Contracts 4th ed p121, *Young v Ballarat and Ballarat East Water Commissioners* (1879) 5 VLR (L) 503 at 504

³⁶ *Kane Constructions Pty Ltd v Sopov* (2006) 22 BCL 92; [2005] VSC 237 at [623]-[626]

³⁷ T543,546 and 560

185 Sterling Enterprises argued that the Superintendent would have been required to take into account the amount paid by Sterling Enterprises, even though it was paid into trust and not to Watpac. It argued that Watpac deliberately did not submit a Final Claim.

186 Mr Sterling gave evidence that he considered that the money was paid.³⁸ While the Superintendent was misinformed about the details of the payment, there was no fraud involved.

Conclusion

187 I agree with Sterling Enterprises' submission. Sterling Enterprises had paid the amount. It was a provisional payment and was subject to the outcome of this litigation, even though it was the subject of a judgment of the Court. The Superintendent had to take into account the payment, whether it was paid to Watpac or into a trust account, pending the outcome of this litigation.

The role played by the Superintendent

188 Watpac argued that Sterling Enterprises had interfered with the Superintendent's performance of his duties and sought to influence him in his decision making. Watpac relied on the opening paragraph of clause 20 of the Contract, which states:

"The Principal shall ensure that at all times there is a Superintendent, and that the Superintendent fulfils the role and functions of independent certifier, valuer or assessor reasonably and in good faith."

189 Watpac referred to the discussion in *Kane Constructions Pty Ltd v Sopov*³⁹ of the independent manner in which the Superintendent must act. It drew attention to actions by Sterling Enterprises taken with the aim of advancing its case. It also referred to acts by Mr Vincent himself.

190 Thus on 15 September 2009, Mr Vincent emailed Mr Moleta asking for his

³⁸ T310

³⁹ (2006) 22 BCL 92; [2005] VSC 237 at [623] –[626]

view on Watpac's seeking the balance of unclaimed amounts. Mr Vincent stated that Watpac was clearly "due for a payment", but referred to issues including "the floor problem", which he said could be "a reasonable financial issue". He ended the email by asking Mr Moleta:

"How do you suggest we hold money without getting into a full on stoush/
We of course still hold the defects period BG for about &110K."⁴⁰

191 There was then an email by Mr Sterling to Mr Walsh of APC of the following day concerning "Westaflex floor levels" which stated in part:

" I am going to take the builder to task over this issue and ask you if possible to embellish be (sic) a bit more in your take on my job.

If you could mention your company sees a lot of existing and new factory Floors and our one is far from good, and that in several areas significant amounts of packers were used to level racking.

...⁴¹

192 Reference was also made to an email by Mr Sterling to Mr Moleta suggesting matters that he might put in his statement.⁴²

193 Mr Sterling agreed in cross-examination that he was trying to put his claims in as strong a fashion as possible, to weaken the other side and strengthen his side, because that was the way things worked in a commercial negotiation.⁴³

194 Watpac referred to other communications between Mr Sterling and Mr Vincent which it said showed a "unified approach" between him and the Superintendent and Mr Moleta "to put up this bargaining and negotiating position".⁴⁴

Conclusion

195 It is not unusual that a commercial undertaking such as Sterling Enterprises

40 CB 6.023A
41 CB 6.026
42 CB6.043A
43 T291
44 T292

would seek to present its claim as strongly as possible. I have considered Mr Sterling's evidence and the evidence of all witnesses, in the context of the role that they played in connection with the Contract and the building dispute that developed. I do not consider that any action by Mr Sterling unfairly affected the outcome of the proceeding.

196 Nor is there sufficient evidence to suggest that Mr Vincent jeopardised the independence that he was required to maintain by attempting to assist Sterling Enterprises. I am conscious that I have not heard Mr Vincent's account of these matters. I see no evidence that Mr Vincent's actions in issuing the final certificate and determining the extension of time claims were influenced by any improper association with Sterling Enterprises.

197 I refer in parts of the judgment to the significance of the fact that Mr Vincent was not called as a witness.⁴⁵ That matter is best dealt with in respect of particular issues.

Section B – Sterling Enterprises' Allegations of Watpac's Breach of Contract

198 Before dealing with the allegations of breach of contract, it is appropriate, because of arguments that were advanced, to set out the principles relating to the admissibility of expert evidence.

199 Section 76 of the *Evidence Act* 2008 provides that opinion evidence is not admissible to prove the existence of a fact about the existence of which the opinion was expressed. Section 79(1) provides an exception in the following terms:

“If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that opinion.”

200 The majority of the High Court in *Dasreef Pty Ltd v Hawchar* stated that:

⁴⁵ Cf *Jones v Dunkel* (1959) 101 CLR 298

“To be admissible under s79(1) the evidence that is tendered must satisfy two criteria. The first is that the witness who gives the evidence ‘has specialised knowledge based on the person’s training, study or experience’; the second is that the opinion expressed in evidence by the witness is ‘wholly or substantially based on that knowledge’.”⁴⁶

201 In *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3)*

⁴⁷ Dixon J stated that:

“In summary, the matters that will be usually considered at both stages of the inquiry that considers whether the exception under s 79(1) renders opinion evidence admissible may conveniently be referred to as four ‘rules’ (one of which is in three parts), which are:

- (a) is the evidence relevant (or of sufficient probative value) (the relevance rule)’
- (b) has the witness properly based ‘specialised knowledge’ (the expertise rule);
- (c) is the opinion to be propounded ‘wholly or substantially’ based on specialised knowledge (the expertise basis rule);
- (d) is the opinion to be propounded ‘wholly or substantially’ based on facts assumed or observed that have been, or will be, proved, or more specifically (the factual basis rules):
 - i. are the ‘facts’ and ‘assumptions’ on which the expert’s opinion is founded disclosed (the assumption identification rule);
 - ii. is there evidence admitted, or to be admitted before the end of the tendering party’s case, capable of proving matters sufficiently similar to the assumptions made by the expert to render the opinion of value (the proof of assumption rule);
 - iii. is there a statement of the reasoning showing how the ‘facts’ and ‘assumptions’ relate to the opinion stated to reveal that that opinion is based on the expert’s specialised knowledge (the statement of reasoning rule)?”

The Expert Witnesses

202 Dr Andrew Baigent gave evidence for Sterling Enterprises and Mr Dean Armstrong for Watpac. They each provided a statement of their evidence and gave evidence concurrently. They also produced a joint report.

⁴⁶ (2011) 243 CLR 588 at 602-603

⁴⁷ [2012] VSC 99 at [98]

203 Dr Baigent is a structural engineer with more than 30 years of experience in the analysis and design of building structures, including many residential, commercial and industrial buildings. He has designed many concrete structures, including industrial floor slabs and pavements. He has completed assessments in respect of subsidence and construction tolerance issues such as flatness. However, he is not a surveyor.

204 Mr Dean Armstrong of Aurecon Australia Pty Ltd is an engineer, who has over 18 years' professional engineering experience specialising in the structural design of complex structures in Australia, New Zealand, the United Kingdom and the United States.

Issue 14 What did the contractual specification require the builder to provide in respect of the warehouse and factory slab tolerances?

205 The experts agreed that the Contract documents specify a levelness requirement (ie +5mm/-5mm over a length of 4.5m) to be achieved. The Experts agreed that this requirement was to be achieved with respect to the difference in height level between the two reference points. They agreed that an unevenness requirement was not specified in the Contract.

206 Dr Baigent gave evidence that the requirement of the contract specification was that no floor level should be more than 5mm higher or 5mm lower than any section of the floor within a radius of 4.5m.⁴⁸ He gave evidence that the variation over 4.5 metres could only be a maximum of 5mm and that a 10mm variation was outside the specification.⁴⁹

207 Mr Armstrong said that the two reference points could be either 5mm above or 5mm below the other reference point.⁵⁰

208 I consider that the proper reading of Note 10 is that only a variation of 5mm

48 CB 3.005
49 T 920
50 CB 3.115

over a distance of 4.5 metres is permitted. That variation can be either +5mm or -5mm, but not 10mm which would be a combination of those distances.

209 A meaning must also be given to the requirement that “screeding during construction [be] to an exacting standard”. The ordinary meaning of the word “exacting” is precise, rigorous (rules, orders, etc); (of person, judgement, description, report, answer, etc) accurate, strictly correct; [exact] sciences (admitting of absolute precision): *The Concise Oxford Dictionary*.

210 Sterling Enterprises argued that a requirement that a floor be screeded to an exacting standard, was a standard more stringent than the average standard. Mr Artico stated that the word ‘exacting’ required a greater standard than the average or required that you pay greater attention to the task.

211 I consider the meaning of “exacting” in the context of the contract to mean requiring close and precise application to the standard contained in Note 10.

212 The other question that arises at this point is what feature of the floor is the formula in Note 10 seeking to measure? The terms “levelness”, “flatness” and “evenness” were used by the experts at various points.

213 The expert witnesses distinguished between levelness and flatness. They said that the specification required levelness.

214 Levelness is the deviation of the entire floor from a datum point. Flatness requirements are much more localised, and they are really imperfections in the surface of the slab.⁵¹

215 Mr Armstrong said that if you drew a flat line across the tops of the surface for each of the different diagrams – for instance, at page 7 of the joint report – that flat line would define the overall levelness, or a level in the deviation of those lines. The deviation of those lines from the flat datum is the evenness

⁵¹ T 901

and that is an absolute. He also referred to unevenness as waviness. Evenness has been historically measured with a straight edge measurement, whereas levelness would require a level survey method to be used.

216 Dr Baigent stated that even though an unevenness criteria was not specified in the Contract, the levelness requirements: ie +5mm/-5mm over a 4.5 metre length, were sufficient to ensure that the warehouse floor slab was satisfactory with respect to the performance of the forklift truck and its ability to travel along the aisles and remove stored product from the rack structures. The specification of an unevenness criteria would have introduced a further, and possibly more onerous, tolerance criteria for the floor slab.

217 Mr Armstrong stated that an evenness criteria should have been specified in the Contract. This is because waviness/surface undulations occurring over a short distance can be problematic to the operation of high performance, wire guided forklifts operating at speed in high bay warehouses. Specification of levelness requirements alone (ie +5mm/-5mm over a 4.5 metre length) was insufficient to ensure that the warehouse floor slab finish would be satisfactory for operation of the supplier forklift to the full extent of the forklift manufacturer's specifications.

218 The experts agreed that an unevenness criteria is commonly specified for warehouses where high-rise racking is to be installed and where the operation of the forklift truck might be adversely affected by any unevenness, sometimes referred to as waviness, in the floor.

219 Mr Armstrong stated :

“The Contract documents require a levelness requirement with respect to a level datum. An evenness requirement is not specified in the Contract documents but is specified in the forklift manufactures requirements. Refer to exhibit 4, document market '25' for actual manufacturer's requirements for floor tolerance, measured in accordance with DIN standards.”

Issue 15 How is conformity with the contractual specification to be

measured?

- 220 Sterling Enterprises argued that conformity with the contractual specification was to be measured by any one or a combination of the use of a straight edge, a survey or visually.
- 221 Dr Baigent stated that compliance with the Contract requirement could be determined through a contoured level survey of the floor slab. If the floor level at any two points within a distance of 4.5 metres varied by more than +5 mm or -5 mm, the floor did not comply.
- 222 Watpac argued that the Contract called for a specific type of survey, which assessed whether tolerance requirements had been met. Such a survey must be carried out using spot levels at discrete points arranged at 4.5m spacing throughout the warehouse.⁵² To prove noncompliance with the specification, proof was required of the instrument, method, accuracy and error margin used. The straight edge measurement method and lay visual assessments were inappropriate.
- 223 The Contract did not specify an approved method of measurement to be used to demonstrate compliance with the specification.
- 224 Mr Armstrong gave evidence that there were a number of issues which need to be taken into account in determining whether the floor level was within the tolerance specified in the contract. It was not appropriate to measure floor level compliance by measuring distance between 5 mm level contours. That would provide a measurement of slope, which was not an appropriate method to use to demonstrate compliance with the project specification.
- 225 Mr Armstrong stated that in this case, a contour plan had been produced using instruments and methods that were not specified in the specification. In the warehouse area the contours had been determined via the measurement

⁵² Mr Armstrong's statement in Joint Expert Report CB 3.355

of spot heights at grid spacing of approximately 1.0 metre in each direction. The location of contours on a map is influenced by the location at which the spot heights are measured. As the grid setting out the location of the surveyed points became smaller, the contour survey had the ability to measure and report on surface slope over smaller distances.

226 Mr Armstrong stated that the floor tolerance levels should not apply in the North-South direction because any failure to achieve the nominated tolerance would only affect the operation of the forklifts across the width of the aisles between the rack structures. This, he said, was represented in the words of the specification that required that the contractor “minimise any discrepancy across aisle widths.”

227 Mr Armstrong also stated that the floor level tolerance should only apply to the factory warehouse, because of floor joints and floor structure.

228 Both experts referred to other standards that were available for floor construction where forklifts were to be used. Mr Armstrong stated that if the DIN standard contained in the forklift specification, or a reasonable equivalent, had been specified in the Contract documents, the finish requirements of the slab would have been clearly articulated to the builder and provided the Superintendent with an appropriate method of measurement. Diagrams of the DIN standard outline levelness and evenness concepts in a clear and unambiguous manner.

229 Mr Armstrong stated that:

”Appropriate floor tolerance specifications are not contained within the structural specification (or annotated on the structural drawings) and the only specific reference to project specific floor tolerance requirements is contained in the ‘Notes for tender and Contract’ document dated 1 August 2008. This document contains the following requirement:

[Note 10 was referred to]

Other than an indirect link to AS3600, the project specifications do not reference any relevant applicable Australian Standard, International Standard or other industry guideline containing appropriate description

of floor surface tolerance requirements appropriate to a project of this nature.

Additionally the method of measurement compliance is not provided in the project specification, nor is there any reference to a relevant applicable standard that could be used as the method of measurement to demonstrate compliance with the Contract documents.”⁵³

230 Mr Armstrong stated that, in the absence of any specific specification for floor construction tolerances, he considered that the design and construction of any project covered by the Building Code of Australia would, as a minimum, require compliance with AS 3600. He referred to the provisions of Section 19.1 of AS3600-2001 as providing a number of relevant requirements for the construction of the surface of the floor slab. Unlike the Notes for Tender and contract documents, AS 3600 provides clear and measurable guidance on floor “evenness” construction tolerances and a mechanism to measure “evenness”. However, compliance with the SAA Standards alone would not have provided sufficient tolerances for the project given the intended use of a wire guided forklift.

231 Mr Armstrong expressed the opinion that the specification had failed to address the relevant issue of surface undulations and waviness. The method used by the client to measure compliance with their specification clause failed to assess adequately surface undulations or waviness.

232 Dr Baigent said that for very many years, a very simple specification of a levelness criteria was applicable for these type of slabs. It was only in the last 15 to 20 years that there has been more concern with narrow aisle stock picker type machines and the susceptibility they have to deviations in the floor. He stated that the racks in the Sterling Enterprises factories were not particularly high compared to other installations in Australia and internationally.⁵⁴

233 The experts agreed that the requirements set out in the forklift specification

⁵³ CB 3.108
⁵⁴ T 899-900

had not been included in the Contract documents. They agreed that if they had been, the level tolerances would have been more onerous and that an evenness tolerance would have been included.

234 Mr Armstrong stated that the accuracy of the level survey will have an impact on the ability to assess whether the floor tolerances have been achieved. He had received advice from a registered surveyor that the accuracy of the survey method using a total station instrument could be of concern given the margin for error in the measurement of survey results. Mr Armstrong introduced a +/- 2.5 mm accuracy range or a margin of error into the supplied level data. He then undertook his own study to determine if there are any areas of the site that could be shown to be outside the requirements set out in the project specification. The only area that failed the criteria was in the circulation space between the factory and the warehouse, which is away from the aisles and possibly subject to differential movement that has potentially occurred between the buildings since construction.⁵⁵

235 Dr Baigent did not consider that the margin of error was as significant as Mr Armstrong. He too received advice about the reliability of the surveyor's measuring device. But the letter was from Mr Watt, the surveyor, who was not called as a witness and so the letter was not admissible.

Conclusion

236 I accept Dr Baigent's evidence that compliance with the Contract requirement could be determined through a contoured level survey of the floor slabs. Both sides commissioned surveys and relied on them. I accept that the methodology of the survey will be critical to its accuracy.

237 I accept, as Mr Armstrong said, that the accuracy of the level survey will have an impact on the ability to assess whether the floor tolerances will be

⁵⁵ CB 3.351

achieved, but that does not mean that a survey is incapable of measuring the Contract requirement. It rather means that survey results have to be considered closely before being adopted.

238 I do not accept Mr Armstrong's opinion that the floor tolerance levels should not apply to particular parts of the warehouse floors. That would involve a reading down of the words of Note 10 and that has not been justified.

Issue 20A Has Sterling Enterprises established that either the factory or warehouse slabs are defective and if so, to what extent (depth and width) and in what locations? What is the proved non-compliance with Note 10?

239 The experts could not reach agreement on whether the floors complied with the Contract specification. Dr Baigent was of the clear view that they did not, while Mr Armstrong considered that it was possible that there was not compliance. He did not express a concluded view.

240 Dr Baigent stated that:

“In summary it is evident from my review of the survey plan that the floors do not comply with the contract specification.”⁵⁶

241 However, no weight can be attached to Dr Baigent's opinion in that regard because the survey plan to which he referred was not proved in evidence.

242 Dr Baigent stated that in order to determine whether the level tolerance had been satisfied, he was provided with a plan of a level survey of the floor slab for both warehouses carried out by SRW Surveyors Pty Ltd dated 4 April 2012. It was prepared by Mr Watt, a surveyor of that firm. He stated that from his review of the drawing, it appeared that there was a total floor deviation of 33mm within the warehouse and 32mm in the factory. Attachment 5 to his statement showed “12 examples in the northern building and a further 9

⁵⁶ CB 3.007

examples in the southern building where the floors do not comply with the contract specification.”⁵⁷

243 Sterling Enterprises did not call Mr Watt as part of its case or tender the survey. On 19 October 2012, I refused Sterling Enterprises’ application, which was made during its final address, to reopen its case to call Mr Watt in order to tender his survey and to make him available for cross-examination. I gave reasons for that ruling.

244 I had previously refused an application by Watpac to call an additional expert witness, Mr Killeen, to give evidence about the condition of the floors.

245 My ruling on 19 October 2012 meant that the survey evidence on which Dr Baigent relied was not in evidence. Dr Baigent had no basis other than the survey to say that the floors did not comply with the Contract. The result is that his evidence does not establish that fact.

246 Dr Baigent had no contact with SRW until the day before he gave evidence when he spoke to Mr Watt and asked him to provide him with some information on the level of accuracy of his survey instrument to deal with the margin of error issue. He is not a licensed surveyor. He had not seen the forklift in operation.

247 Watpac made a general attack on Dr Baigent’s ability to give expert evidence on issues arising in this proceeding. It submitted that his report was inadmissible on the ground of significant material and inadequate instruction.

248 I did not form that conclusion in respect of Dr Baigent’s evidence. Most of the matters to which Watpac pointed, represented areas where he differed in approach to Mr Armstrong and not matters that demonstrated a lack of instruction or expertise. He made a detailed consideration of Note 10.

⁵⁷ CB 3.007

249 While Dr Baigent's assessment of whether the floor met the Contract tolerance requirement cannot be accepted, there were other parts of his evidence, such as the appropriate measurement of the floors and methods of rectification, which remained of probative value and relate to an area of his specialised knowledge.

250 Sterling Enterprises also called Mr Steven Shannon of Hawthorn Consulting Engineers Pty Ltd to give evidence. Mr Shannon, as has been described previously, measured the floors using a straight edge in 2009 and 2010. Sterling Enterprises' case as pleaded was based on those measurements. However, both Dr Baigent and Mr Armstrong considered that the straight edge method of measurement was inappropriate and said of the Contract specification:

"This requirement cannot be measured using a straight-edge method of measurement".⁵⁸

251 Despite this, the straight edge method of measurement is described by the Cement Concrete & Aggregates Association Datasheet, which is set out in Mr Armstrong's witness statement, as "a simple and generally satisfactory method of measurement in Australia".⁵⁹ Watpac, itself, used the straight edge to measure the floor on occasion.

252 Mr Armstrong stated that the industry standard has traditionally been to use a 3 metre straight-edge to measure a floor, by determining the extent of the departure from that edge.⁶⁰

253 However, in view of the opinion of the experts who have been relied on by the parties, the results of the straight edge surveys conducted by Mr Shannon are to be regarded as a general guide to the level of the floor, rather than being proof that the floor did not comply with the contractual requirement.

58 CB 3.352
59 CB 3.111
60 T943

254 The results of Mr Shannon's measurements of the floor in September 2009 and February 2010, have been referred to previously. In summary Mr Shannon concluded that, on 5 February 2010, the majority of the warehouse slab complied with the specification. Mr Shannon concluded that the factory slab on 12 February 2010 did not comply with the "Notes for Tender and Contract" at multiple locations. However, the table in his letter showed only two locations where the factory slab did not comply, but he said that they were not the only areas.⁶¹

Lay Evidence

255 Sterling Enterprises relied on lay evidence to prove that the factory did not comply with the specification. It relied on the evidence of Mr Sterling, who stated that both the factory and warehouse floors remain out of specification. He said that the factory has an uneven floor throughout. In the warehouse, the quality of the floor was very poor as the surface has an irregular rippled finish. He described it as like "a pock marked lunar surface due to localised grinding". The forklift still had to be set at half speed. He did not accept that the floors were within specification or of a proper and workmanlike finish. They were certainly not of the "exacting standard" that was specified.⁶²

256 Sterling Enterprises also relied on the evidence of Mr Chris Whitby, the warehouse supervisor, who provided a witness statement and gave oral evidence. He described the practical defects in the floor surface that he experienced while working on it. He operated the forklift for four to six hours on an almost daily basis. At first, the floor was so out of level that the forklift was unsafe to operate. As it went down the aisles, it swayed from side to side, almost hitting the pallet racks on each side. He would not allow the staff to use it. After the rectification works were undertaken, there was some improvement but the forklift still swayed from side to side. Even at half speed, in some

⁶¹ T373
⁶² CB 2.027

areas, the floor was so bad that he had to slow right down and, in some places, stop in order to allow the forklift to even out and start again. Otherwise, it was simply too dangerous. If the forklift hit a pot hole it would shut down, going through its emergency shut down procedures. Vibration had been an ongoing problem from day one. He was severely limited in his use of the forklift.

The View

257 Sterling Enterprises relied on the view that I conducted with the parties of the warehouse and factory floors. That view is evidence see ss 53 and 54 of the *Evidence Act* 2008. The forklift was operated during the view. I advised the parties that there appeared to me to be some movement or slight swaying of the top of the forklift when it was at height under a load.

258 Watpac submitted that lay observation of the floor and of the operation of the forklift was insufficient as proof of non compliance with the Contract. The fact that a lay observer might see some movement or slight swaying of the forklift, when at height under load, did not establish that the slabs were non-compliant with the Contract specification.

259 Watpac also criticised the manner in which the view was conducted.

260 In my opinion, neither the lay evidence nor the view establish that the floors did not comply with the Contract specification. They did not involve any process of measurement.

261 It has to be kept in mind that the Contract did not incorporate the forklift operating specification. The fact that the forklift has difficulty in operating on the floors does not, by itself, establish that the floors have not been constructed in accordance with the Contract specification.

The Survey 21 evidence

262 Sterling Enterprises sought to rely on surveys about the levels of the floors prepared on behalf of Watpac by Mr Braith McClure of Survey 21.

263 Watpac argued that Sterling Enterprises should not be able to rely on the Survey 21 documents as they were never part of its case.

264 Watpac argued that it did not understand that the Survey 21 documents were part of Sterling Enterprises' case. Its original case relied on the HCE reports and straight edge measurements. The second case that Sterling Enterprises sought to make involved reliance on the survey evidence of SRW and the interpretation of it by Dr Baigent. Finally, during final submissions, Sterling Enterprises sought to build a third case based on the Survey 21 data. If it were permitted to do so, Watpac would have been denied the opportunity of testing the user, instrument, method, accuracy or error margin of the survey.

265 Watpac argued that at least some of the Survey 21 surveys were carried out before the rectification works were completed. Any concessions by Watpac that might be based on the contents of those surveys could not assist Sterling Enterprises because they predated February 2010 and were conducted when the physical condition of the warehouse slab was in a state of change due to the rectification work.

266 Watpac's next point was that the Survey 21 evidence was only admitted as evidence that it had received the documents and not as evidence of their truth or accuracy.⁶³ Mr McClure had not been called as a witness. The surveys were not self-explanatory eg the final Survey, Ex C, contained many notes that required explanation.⁶⁴ Dr Baigent and Mr Armstrong were never asked to comment on them. No error margin was proved in respect of their contents.

267 Counsel for Sterling Enterprises argued that he had opened on the basis of

⁶³ T90 and 92, 841
⁶⁴ T1228

the Survey 21 documents.⁶⁵ The documents were business records of Watpac that could be tendered. Watpac disputed that contention. Section 69(1) of the *Evidence Act* provides:

“(1)This section applies to a document that –

(a) either –

(i) is or forms part of the records belonging to or kept by a person body or organisation in the course of, or for the purposes of, a business; or

(ii) at any time was or formed part of such a record; and

(b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.

(2)The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made –

(a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or

(b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.”

268 Mr Artico’s evidence establishes that Watpac adopted and relied on the Survey 21 documents. Mr Artico gave evidence that Watpac’s staff attending meetings with Sterling Enterprises had Survey 21 documents with them to show them what they were looking for.⁶⁶ They were referred to in his witness statement. They did not provide them to Sterling Enterprises, who obtained them as part of discovery.

269 In October 2009, Mr Artico decided to engage Survey 21 to conduct a check survey of the floors. Survey 21 described its task as:

“ we are required to confirm that a factory slab of approximately 1200sqm meets the design tolerances for levels nominated at +/- 5mm over 4.5m.

If time permits we also need to carry out the same exercise on an adjoining second factory of equal size.”⁶⁷

⁶⁵ Cf T91 and 92
⁶⁶ T768
⁶⁷ CB 15.82

270 Watpac obtained the Survey 21 documents in the course of its construction business. It relied on them, no doubt along with other matters, to assess the quality of the slabs and on the issue of rectification. They are therefore business records or documents and the representations contained in them are admissible.⁶⁸ In addition, the use that Watpac made of the surveys shows that it adopted them.

271 Watpac pointed out that there was no survey that showed the slab in its original form as the surveys had been undertaken after Civiworks had carried out grinding work.

272 The first Survey 21 document was dated 21 October 2009. Mr McClure's covering email stated:

"Please find attached survey plan for Northern & Southern Factories – As you will note there exists a number of areas in the Southern Factory that exceed the +/-5mm."⁶⁹

273 The factory building is the southern building and the warehouse is the northern building.

274 On 5 October 2009, Mr Artico wrote to Mr Vincent after referring to earlier correspondence that:

" a) We are somewhat surprised that no reference to slab tolerance is identified on any 'For Construction Drawing' or concrete specification. It is most unusual for such an important ingredient to be hidden away in the obscure location of 'Notes for tender and contract'".⁷⁰

275 In an email of 23 October 2009 to Mr Sterling, Mr Artico wrote that rectification works were completed on 19 October 2009 with all tolerances re-checked and confirmed on site using the specified 4.5m straight edge measuring the tolerance at +/- 5mm. He stated that:

"The rectification works carried out to date have in our opinion resolved

⁶⁸ Cf *Ringrow Pty Ltd v BP Australia Ltd* (2003) 130 FCR 569, *RW Miller & Co Pty Ltd v Krupp (Australia) Pty Ltd* (1991) 32 NSWLR 152, *Hansen Beverage Company v Bickfords (Australia) Pty Ltd* [2008] FCA 406 and *Australian Securities and Investment Commission v Rich* (2005) 216 ALR 320

⁶⁹ CB 15.84 T777

⁷⁰ CB 7.004

this issue & believe the floor is now ready for the final application of the epoxy finish.

If you do not believe our analysis to be correct we recommend that a meeting be coordinated at your earliest convenience.”⁷¹

276 On the same day, Mr Artico sent an email to Mr T Napoleone of Civiworks which stated in part:

“Please find attached survey plan for Northern and Southern Factories – As you will note there exists a number of areas in the Southern Factory that exceeds the +/-5mm.”⁷²

277 Again on the same day Mr Sterling emailed Mr Artico stating:

“Further to our conversation this morning, we have checked the floor as requested with both the forklift and the straight edge.

We believe a significant amount of work still needs to be done to bring it within specification, and get the floor flat.

Have you checked this floor your self as it is clearly not right.

Contrary to what we were told last Friday, that 2xlarge machines were coming in, I have been advised by my staff on site that this was not the case and that the same equipment that started the rectification work continued to be used.

Please advise your intended course of action from here, as we cannot further hold back from using the warehouse to its full capacity as this ongoing inconvenience is affecting our business.”⁷³

278 In cross-examination, Mr Artico was asked whether the Survey 21 survey of the warehouse dated 20 October 2009 showed a failure to comply with the specifications across the whole area of the warehouse floor. He answered:

“It does if – but there’s the questionable element, which was +or – two mil to his measurements.

Q. Yes, but assuming that the eight- I will just pick one, the eight. Assume that was an exaggeration by two mil and it was really six. Then the seven, though, might be a nine.

A. It could go either way, yes.”⁷⁴

279 He agreed that the Survey 21 survey showed the state of the factory floor as

71 CB7.005
72 CB 15.084
73 CB 7.001
74 T778

at 16 October 2009. No work had been performed on it since then.⁷⁵

280 Watpac charged Sterling Enterprises for the cost of the surveys. Mr Artico agreed that they should not have done so unless it was part of the rectification works.⁷⁶

281 Sterling Enterprises argued that this survey showed that as at 16 October 2009 the warehouse slab was non-compliant.

282 Survey 21 also prepared another layout of floors on the same date, 16 October 2009.⁷⁷

283 On 28 October 2009, Mr Vincent emailed Mr Artico stating that:

“ Further to my email dated 27th October, I confirm that the rectification works as carried out to date in respect of the warehouse floor have been inspected and found to be incomplete.

Whilst work completed to date has in some locations improved the situation, many areas display the need for further action.

The attached photographs, which were taken at random locations on the date of writing, clearly demonstrate a substandard floor finish.

Your statement via email on Friday 23rd October that grinding was complete is incorrect given the obvious situation which presents on the site, and as shown in the photos, where discrepancies ranging from 5 up to 11mm over short distances can be seen.

284 Mr Vincent pointed out six features of the floor. He stated:

“Without careful consideration to evening out the grinding to surrounding areas the floor will present in an extremely patched up state, which as noted previously will not be acceptable.”

285 He then stated that Sterling Enterprises had gone out of its way to provide the access that Watpac required and had held back from filling the racking with products so that Watpac’s works could be completed without the need for constant shifting of stock and risk of contamination. He added:

“The situation is now urgent as every day that passes without the

⁷⁵ T779 referring to CB 15.086-15.087

⁷⁶ T780

⁷⁷ CB 15.090

problem being concluded is having a detrimental effect on productivity and associated cost.”

286 He also referred to Watpac’s email of 23 October and stated:

“ 1 Your paragraph “A” alluding to the slab tolerances being hidden away in an obscure location is an absurd statement. Do I have to remind you that this specific information formed part of the tender and contract review, the slab tolerance was the subject of specific discussion during more than one site meeting, even to the point of your site supervisor espousing the virtues of the result which would be achieved using the intended laser screed. An RFI raised and answered specifically referred you to the requirement (pre concrete).

Irrespective of the manufacturing slab’s conformance or otherwise with required standard, it is from simple observation better than the warehouse, thus whoever took the decision to screed using different methodology in the area without careful regard to the standard which could be achieved apparently erred.”⁷⁸

287 On 29 October 2009, Mr Artico obtained a quote from the Hanlay Group Pty Ltd for completing the work by using an epoxy coating and he also provided a quote for grinding.⁷⁹

288 On 30 October, Mr Artico emailed Mr Sterling stating:

“Please be advised that slab rectification works are scheduled to commence at 7.30am Thursday 5/11.

We have engaged a concrete grinding company experienced with this type of work with access to much larger equipment.”⁸⁰

289 Hanlay’s staff performed further grinding works on the warehouse floors on a number of days in November 2009.

290 On 8 November 2009, Mr Artico emailed Mr Sterling stating that the previous day’s cleaning and sealing of the warehouse floor saw the completion of the major grinding rectification works. He said that the epoxy and filling and final epoxy paint coating were intended to commence in the warehouse on the 12/12/09 with completion by the 21/12/09.⁸¹

78 CB 7.008
79 CB 15.92-93
80 CB7.031
81 CB 8.013

291 On 9 November 2009, Mr Vincent emailed Mr Artico stating:

“ On another note, Paul has passed on comments from the contractors rectifying the warehouse floor, such that they await instruction from Watpac in relation to filling the defective low areas where needed.

It appears they are unaccepting of the product previously laid to various areas by the concreter.

Can you please sort this out so that their progress is not delayed.

From feedback given to me by Paul, further work to the Northern aisle as discussed on Friday has improved the outcome, with exception to low areas. ”⁸²

292 Mr Artico said that this problem was caused by the product being feathered out too thinly at the edges.⁸³

293 A project review meeting was held on 11 and 12 November 2009. Under the heading “Westaflex”, the minutes record:

“ Resolve variations with the client.

Defect rectification to the concrete should be deducted from the Subcontractor.

294 Defect rectification expected to be totally completed by 19th November.”⁸⁴

295 On 10 December 2009, Mr Pavlovic telephoned Mr Imperatori, Watpac’s Site Manager/Foreman, and instructed him to “make the floor perfect, give them what they want”.⁸⁵

296 On 15 December 2009, Mr Artico instructed Hanlays to proceed with localised hand grinding around base plates of the racking. Works were to commence on 17 December and take approximately three days.⁸⁶

297 The third survey by Survey 21 was conducted on 16 and 17 December 2009. It still showed depressions on the floor.⁸⁷ On 17 December 2009, he sent the

82 CB8.005
83 T815
84 Ex L
85 T831
86 CB15.97
87 T832 and CB15.98

survey levels to Sure Level, a firm that applied epoxy coatings to floors and sought their recommendation on the use of an epoxy to achieve the standard of floor finish that the client required.

298 On 18 December 2009, Mr McClure emailed Mr Artico in respect of the latest survey stating:

“The plan yesterday takes a while to understand. It looks to me like the back of the building is the worst. Those numbers are all based on the highest point being held at zero. I'm going to re-run the data this morning holding the median (similar to average) as the start point and then showing the highs and lows. We can also run it with the mark at the front as the base height for measurement.

The mark we were told is OK shows on our plan as about 7mm low. So we can block shift the data, this will lessen the numbers at the rear of the building. However, there will be some that are now considered too high. It depends on your criteria. If you accept up to 7 high then the numbers in the 20's will come back to around 15mm low. It will balance cut and fill rather than a plan that requires all fill.”⁸⁸

299 Later that day, Mr McClure sent his revised version of this data to Mr Artico accompanied with an email stating that:

“Adrian. This plan looks better. Blue and Green are within 5mm of median. Yellow is too high (more than 5mm-above median) and red is too low.

The system balances your cut a fill better. It depends on how much grinding and how much fill you want to do and what is considered acceptable differences....”⁸⁹

300 On 13 January 2010, Sterling Enterprises emailed Watpac stating:

“As arranged prior to Christmas our warehouse is clear and has been handed over to you to conduct your rectification works. It is imperative that further delay does not occur due to the many compounding detrimental effects that this situation is causing our business.

Please confirm the details of the rectification, with a direct copy to Steve Shannon of Hawthorn Consulting for our information.”⁹⁰

301 On the same day, representatives of Sterling Enterprises and Watpac met and agreed accepted outcomes regarding the “warehouse floor rework”. They

⁸⁸ CB9.025
⁸⁹ CB9.024
⁹⁰ CB9.329

agreed that a screed would be applied to the warehouse floor. The notes of the meeting included:

“9. The screeding contractor has inspected the site and confirms that the product and application is suitable for the type of forklift traffic specific to this project.”⁹¹

302 On 18 January 2010, Mr Sterling sought confirmation that the screed product would afford long term performance consistent with the concrete slab it was bonded to. He also stated his assumption that the rectification put forward provided the standard of floor called for by the Contract.⁹²

303 On 19 January 2010, Mr Artico sent an email to Mr Sterling, which included the following statement:

“6. The application of the levelling screed will meet the design tolerance of +/- 5mm over 4.5m.”⁹³

304 Mr Artico agreed in cross-examination that the works described in Item 6 were being performed to bring the floor to the tolerance of +/- over 4.5m. He also agreed that at that stage the works were still not compliant with the contract tolerance of +/- over 4.5 metres.⁹⁴

305 Mr Artico gave the following answer to a question in cross-examination as to the position at that time:

“ Q And at this stage the works were still not compliant with the contract tolerance of plus or minus five mil over 4.5 metres, were they?

A. No.⁹⁵

306 Watpac placed a purchase order with Sure Tech for the screed for \$102,600.⁹⁶ But that purchase and work was cancelled on 25 January 2010 and the screed was never applied. It appeared that the 3mm screed was too thin to

91 CB 9.336
92 CB 9.344A.
93 CB 9.346
94 T839
95 T839
96 CB 9.351

work and the levelling works using the screed were suspended.⁹⁷

307 On 28 January 2010, Mr McIlvena wrote to Mr Sterling in terms which have been set out in more detail previously and which included that:

- Significant improvements had been made and the flooring contractor recommended that further localised grinding and filling are now the most appropriate method to rectify the floor.
- We agree that the whole floor does not currently conform with the specified tolerances as our rectification works are not completed.⁹⁸

308 Further grinding was performed on the factory floor and was completed by 30 January 2010.⁹⁹

309 On 1 February 2010, Survey 21 performed a further check survey.¹⁰⁰ Watpac argued that it could only be admitted to prove that Mr Artico received it.¹⁰¹ I accept that proposition. There was no evidence given about its significance, although counsel for Sterling Enterprises submitted that it still showed non-conformance.

310 In September 2010, Watpac commissioned Survey 21, under the new name of Vekta,¹⁰² to prepare the “Level Offset Best Fit Plane.”¹⁰³ Sterling Enterprises argued that it showed in dramatic form the areas which were too high and those that were too low. However, there was no evidence that confirmed that to be the case. A Court cannot be certain of reliably reading a technical document such as a survey without the assistance of appropriate expert evidence. The author of the document was not called as a witness.

311 Watpac argued that the some of the survey material of Survey 21 should be excluded under the Court’s general discretion under s 135 of the *Evidence Act*

97 CB 9.349
98 CB9.367
99 T840
100 Exhibit C, T840
101 T841
102 T846
103 CB10.028A

2008. It submitted that even if the survey evidence was admitted it could not be acted on in the absence of proof of an appropriate error margin.

312 I do not accept that submission. The Survey 21 evidence was relied on by Watpac as relevant to the condition of the floor and in determining the course it took. It therefore does have probative value.

313 Sterling Enterprises also relied on the rectification that was carried out on the warehouse floor by Watpac as showing that the floor did not meet the Contract specification. The evidence concerning the rectification undertaken between September 2009 and January 2010 has been set out previously.

314 There was evidence that on 14 January 2010 Mr Artico obtained from Hanlay, the specialist floor contractor engaged by Watpac to rectify the floor, a cross-section of the floor level variances.¹⁰⁴ Sterling Enterprises argued that this showed that the levels were all over the place. But there was no expert evidence of its meaning or the margin of error that had been adopted.

315 Secondly, Sterling Enterprises relied on the fact that in January 2010, Watpac was proposing to have SureTech install a levelling screed to meet the design tolerance level. However, that work was never performed.

316 Sterling Enterprises also relied on a number of matters concerning Civiworks, the concreter sub-contractor, to support its case that the slabs were poorly constructed and did not meet the Contract specification. These included that the Contract specification was not included in the concreting subcontract. It argued that the Civiworks' supervisor lacked qualifications and Civiworks did not have a quality assurance system. Watpac looked to recover the rectification costs from Civiworks and withheld retention money from it. On 3 March 2010, Watpac entered into a Deed of Release with Civiworks under which Civiworks acknowledged receiving payment of \$733,233.05 and gave

¹⁰⁴ CB 9.332A

up any right to any further payment.¹⁰⁵

317 Sterling Enterprises also relied on the fact that Mr G McKimm, Watpac's site supervisor, did not formally test the slabs for compliance, but carried out straight edge measurement. Sterling Enterprises relied on the fact that he was not called to give evidence to show that Watpac's quality assurance system had been followed, or to give evidence about the project generally.

318 Watpac argued that the warehouse floor rectification program had been completed to the very substantial, if not complete, satisfaction of the Superintendent, Sterling Enterprises and HCE. The forklift was re-commissioned in early February 2010. Watpac was not advised that there was any issue with the re-commissioning. Mr Vincent was not called to establish any problems with the floor. The failure to call Mr Vincent was significant because it appeared that he was the author of Note 10.

319 Watpac argued that Sterling Enterprises' demands kept changing and expanding. The work that it performed on the floor, particularly in late 2009 and in January 2010, went beyond what was required by the Contract. The failure to include the forklift specification as a requirement of the Contract was the cause of Sterling Enterprises' problems. The design deficiencies in Note 10 had very important consequences. Even if the contractual specifications had been achieved, the Jungheinrich forklift would not be able to operate at any proper capacity on the warehouse slab.

320 Watpac also relied on an email of 23 June 2010 that Mr Sterling sent to Mr Pavlovic and which has been set out previously.¹⁰⁶

321 Watpac argued that because the Contract contained fine tolerances measurements, Sterling Enterprises had to prove its case by expert evidence or not at all.

¹⁰⁵ EX M
¹⁰⁶ CB 13.257

Conclusion - the warehouse floor

322 Sterling Enterprises can rely on the Survey 21 surveys because Watpac relied on them. However, the reliance that can be placed on them is limited to the use that Watpac made of them. Sterling Enterprises can also rely on express or implied concessions that Watpac made about the condition of the slabs, after it had considered the surveys prepared by Survey 21.

323 The Survey 21 surveys were not proved by expert evidence called on behalf of Sterling Enterprises. There was no evidence of any margin of error that had been used in undertaking them. No witness statement was filed by either party proving or explaining those surveys.

324 It is true that Sterling Enterprises never pleaded or particularised that it was relying on the Survey 21 material or on concessions by Watpac that the floors did not meet the Contract specification. But evidence is not to be pleaded. The parties, pursuant to the directions of the Court, filed witness statements. Mr Artico's statement referred to the receipt of surveys. Watpac's commissioning and use of the surveys formed part of the evidence of the case. They were Watpac's documents. It is not unfair for Sterling Enterprises to rely on them. Parties are entitled to rely on the whole of the evidence in the proceeding.

325 Once Dr Baigent's report is put to one side, the only oral evidence that Sterling Enterprises presented, that showed that the floors did not comply with the contract specification, was from Mr Shannon.

326 As Watpac submitted, a case seeking to prove noncompliance with a tolerance measurement would ordinarily depend on expert evidence. But that is not essential, if the builder, having made proper inquiries and received expert advice, in effect concedes that the floor does not comply with the Contract.

327 I consider that the condition of the floor requires consideration at two points.

The first is during the performance of the rectification works between October 2009 and the end of January 2010. Sterling Enterprises' first damages claim relates to that period. I consider that Sterling Enterprises has proved that the warehouse floor did not comply with the Contract specification during that period.

328 I base that finding on the following matters. Between October 2009 and the end of January 2010, Watpac performed extensive rectification work to many sections of the warehouse floor. It did so after receiving the Survey 21 surveys. The project review meeting of 11 and 12 November 2009 showed that there were still rectification works to be performed. The extensive rectification works that Watpac arranged, in the first instance by Civiworks and then by Hanlays, demonstrate that Watpac regarded the floor as not meeting the requirements of the Contract. The evidence suggests that Watpac considered that there was a problem of non-compliance with the Contract to be fixed. Mr Shannon's evidence also provides support for the conclusion that there were significant undulations in the warehouse floor.

329 The evidence does not permit a finding of the precise areas of the warehouse slab which were non-compliant. However, the extent of the rectification work undertaken suggests that it was widespread. The rectification work was carried out over extensive parts of the floor.

330 It follows from that finding that at October 2009, the warehouse slab was not screeded to an exacting standard. As I have stated previously, Sterling Enterprises agreed that that standard was no higher than the requirement contained in Note 10.

The warehouse floor at February 2010

331 By February 2010 after the rectification works had been completed.

332 On 28 January 2010, Mr McIlvena stated:

“Significant improvements had been made and the flooring contractor recommended that further localised grinding and filling was now the most appropriate method to rectify the floor.

We agree that the whole floor does not currently conform with the specified tolerances as our rectification works are not completed.”

333 The measurements that Mr Imperatori undertook in January 2010 provide some support for the view that the floor was substantially compliant with the Contract.

334 Mr Shannon reported that the surface undulation had been reduced significantly. Mr Vincent did not give evidence.

335 The Survey 21 surveys for January 2010 were not explained by the evidence and therefore cannot be relied on by Sterling Enterprises. Mr Artico did give the evidence, referred to above, which, in effect, agreed with the proposition that the warehouse floor still did not still meet the Contract specification in January 2010.

336 Watpac proposed to cover the floor with an epoxy screed. On 13 January 2010, Mr Pavlovic informed Mr Sterling that Watpac would perform some more grinding and use an epoxy “to give you what you need for the forklift”.

337 I take into account that Watpac contends that it was being asked to do more than the Contract required. Watpac suggested that it wished to maintain good faith with Sterling Enterprises.

338 Mr Armstrong’s evidence concerning his measurement of the slab, which applied a significant margin of error, did not reveal non-compliance with the Contract specification.

339 It would be wrong to view the condition of the floor as at February 2010 in isolation. Watpac had undertaken a process of rectification, but there was still further work of grinding and the application of a screed that it considered were appropriate to complete the rectification.

340 Watpac acknowledged that further localised grinding and the application of a screed to the floor was appropriate. The screed was to cost \$102,600. The application of the screed was called off because of doubts about its suitability. But the evidence does establish that at January 2010, Watpac agreed to carry out localised grinding and to apply the screed. That possible method of rectification had been raised during the earlier rectification works. Viewed in that way, the further works including the application of the screed, are to be seen as part of a continuum of rectification works.

341 The fact is that Watpac was willing to carry out further localised grinding work and apply an epoxy flood coat to the warehouse floor. This suggests that it considered that at least parts of that floor did not comply with the Contract as at the end of January 2010.

342 I find that on the balance of probabilities that the actions of further grinding and applying a screed to the floor were required because the floor did not comply with the Contract specification at January 2010. I consider that this finding can be made, even though there is no survey evidence to establish the detail of the non-compliance. The warehouse floor still required the application of a screed and localised grinding to attempt to bring it into conformity with the requirements of the Contract.

The factory floor slab

343 The conclusion to be reached in respect of the factory floor slab is quite different. Sterling Enterprises has made no request for rectification work to be performed in respect of that floor. Mr Sterling gave evidence of the operational requirements for the factory. The Survey 21 documents included surveys of the factory floor and they provide some support for the conclusion that it did not meet the contract specification.

344 However, as previously stated, Mr McClure, who undertook the Survey 21

survey, was not called to give evidence and the Court cannot be expected to act on the survey in those circumstances. There is little evidence of what use Watpac made of the survey.

345 Mr Shannon's survey, by itself, does not establish Sterling Enterprises' case in respect of the factory floor. He undertook his survey using a straight edge to take measurements. The experts did not accept that as appropriate. In any event, Mr Shannon's factory slab survey of 12 February 2010, showed only two locations where the tolerance measurement was not met.

Conclusion

346 Sterling Enterprises has not established that Watpac's construction of the factory floor breached the Contract.

Rectification issues

Issue 16 Were the instructions to the builder in respect of the warehouse slab, between September 2009 and late January 2010, a direction pursuant to clause 8.1?

Issue 17 Was Watpac directed by the Superintendent to rectify the Slab Defects on:

- (1) on 28 September 2009;
- (2) on 28 October 2009;
- (3) on 8 December 2009

347 Issues 16 and 17 became unnecessary to determine because Watpac did not pursue its variation claims in respect of the directions.

348 I find that Watpac did make unsuccessful attempts to rectify the warehouse slab from October 2009.

Issue 20B Has Sterling Enterprises established the appropriate method of rectification by admissible evidence and if so what is it?

Issue 21 What is the appropriate method of rectification for the defects which are proved to exist in the warehouse and/or factory slab?

349 Dr Baigent and Mr Armstrong in their joint report agreed that if the floor did not meet the contract specification, it could be rectified to do so. The most appropriate means of rectifying was to apply a topping such as a self-levelling epoxy mortar.

350 Dr Baigent considered that the only feasible option for the floor rectification was to raise the floor, by applying an epoxy floor levelling mortar, such as "Sikafloor -156" to the existing floor surface. Sikafloor is a 2 part epoxy primer, levelling mortar and mortar screed. Preparation of the substrate must be undertaken before it is applied.

351 Dr Baigent did not recommend further grinding because of the impact that it might have on the structural strength of the concrete slab supporting the rack structures and stock picker.

352 However, some grinding would be necessary. There were some isolated high spots shown in the SRW contour plan that could be removed by grinding and that would remove the need to apply a thicker and more expensive layer of the epoxy mortar.¹⁰⁷

353 Mr Armstrong stated that the rectification works needed to be appropriately specified with due consideration being made of forklift traffic within the warehouse, particularly at the location of the existing floor joints.¹⁰⁸

¹⁰⁷ T933
¹⁰⁸ CB3.352

354 Mr Armstrong gave evidence that he considered that a self-levelling epoxy surface would be an appropriate manner to achieve a level surface. But, when he had joined in that part of the joint report, recording that opinion, he was not sufficiently aware that 70mm of cover to the concrete remained. He had become aware of that fact by the time that he gave evidence and said that he would “probably relax [his] position on grinding”.¹⁰⁹

355 Watpac submitted that Dr Baigent’s views about the problems that grinding caused were inaccurate. He was unaware of the thickness of the slab, of how much had been ground off and that 70mm of cover remained. He also incorrectly assumed that further grinding of about 25mm was required, when the correct figure was only 15mm. Watpac argued that there was no evidence that the structural integrity of the warehouse slab would be compromised by further grinding of 15mm, when it had a residual thickness of 260mm.

356 Watpac was about to arrange for SureTech to apply “Parchem Durafloor XD” or a similar product to the floor in January 2010. Hanlay had provided a quotation for that product at between \$89,000 and \$98,000 depending on the materials used.¹¹⁰

357 Sterling Enterprises argued that it was entitled to the floors as specified in the Contract. The Contract contained an indemnity in wide terms. The current state of the floor in the warehouse was hindering the efficient operation of the forklift and affected productivity. The building was specially designed to be separated so that the factory could be used as a warehouse, either by Westaflex or leased or sold to another party. Its use as a warehouse would be limited if the floor was not rectified to allow the use of a narrow forklift.

358 Sterling Enterprises submitted that the appropriate method of rectification was to apply a screed to the floor, like Sikafloor, as outlined in Dr Baigent’s

¹⁰⁹ T941
¹¹⁰ CB 9.330

report.¹¹¹ This was best and most efficiently applied to a cleared floor. The joint experts agreed on this point. Grinding was not an appropriate option. Laser screeding should have been possible in the warehouse.

359 Watpac submitted that Sterling Enterprises had not established breaches of contract. Hence it was not possible to assess what the appropriate rectification methodology might be, nor had any method been proved by admissible evidence. Because the SRW material has not been proved, the expert evidence of Dr Baigent was inadmissible, at least on the issues of establishing defects, the extent of defects and the appropriate method of rectification.

360 Watpac argued that the reasonable method of rectification was spot grinding of any affected areas shown on the SRW survey. With the use of that method, the factory plant and equipment did not need to be removed, stored or reinstated.

361 Sterling Enterprises had not shown that the steps proposed for rectification were reasonable and necessary for appropriate rectification.

Conclusion

362 Watpac arranged for substantial grinding work to be performed on the warehouse slab and suggested that further localised grinding was required.

363 Both Dr Baigent and Mr Armstrong supported the application of an epoxy leveller like "Sikafloor", although in evidence Mr Armstrong lessened his opposition to further grinding being attempted. Watpac's submissions suggested that Dr Baigent may have overstated the danger to the floor likely to be caused by further grinding.

364 I find that the application of a screed such as "Sikafloor" was required to rectify

¹¹¹ CB 3.039-3.044

the warehouse floor.

Section C – Damages

Issue 29 Is Watpac liable to indemnify Sterling Enterprises pursuant to clause 2.8 of the General Conditions of Contract for the loss and damage?

Issue 30 In the alternative, is by reason of Watpac's breaches of the Contract set out above, it liable to Sterling Enterprises for the loss and damage?

365 Sterling Enterprises sues on the indemnity given by Watpac in clause 2.8 of the Contract. It provides:

“The *Contractor* indemnifies the *Principal* and its employees, agents and consultants (Indemnified Parties) to the maximum extent permitted by law from and against all losses (including consequential losses), damages, liabilities, actions, suits, claims, demands, costs and expenses (including legal fees on a full indemnity basis) which the Indemnified Parties may suffer, sustain or incur as a result of any:

- (a) breach by the Contractor of its obligations under the *Contract*;
- (b) injury to person, death or damage to property in connection with the undertaking of the work under the *Contract* by the *Contractor*;
- (c) fraudulent, unlawful, negligent or wrongful conduct, act or omission on the part of the *Contractor* in connection with the undertaking of the work under the *Contract*; and
- (d) difference between the amount the *Principal* would have been entitled to recover from the *Contractor* but for Part 1VAA of the *Wrongs Act 1958 (Vic)* and the amount of damages which a court determines the *Contractor* must pay to the *Principal* arising out of or in connection with the *Contract* or the *Works*, including as a result of the insolvency or incapacity of a concurrent wrongdoer to pay any damages awarded to the *Principal*.”

366 Consequential loss can include losses extending beyond the normal measure of damages such as profits lost or expenses incurred through the breach of

contract.¹¹²

367 Sterling Enterprises is entitled to be placed in the position with respect to damages as it would have been if Watpac had performed its obligations under the contract.¹¹³

General basis of Sterling Enterprises' damages claim

368 Sterling Enterprises relied on the evidence of Mr Paul Sterling and Mr Peter Clack, who is a quantity surveyor, to prove its damages.

369 Watpac did not call witnesses in respect of damages.

370 Sterling Enterprises also relied on the general proposition that while the plaintiff has the onus of showing loss caused by the breach, if the loss in question is the apparent or likely result of the breach, the onus shifts to the contract- breaker to prove that it was not.¹¹⁴

371 Mr Sterling gave evidence that he spent weeks preparing the information in respect of the claim with the assistance from Mr Victor Ho, Westaflex's accountant and Ms J Rousell, who was Westaflex's pay officer.

372 Sterling Enterprises sought to establish two broad areas in which it had suffered loss. First, that it had obtained a building with a floor that did not meet the Contract specification. This restricted the future uses to which the building might be put.

373 Sterling Enterprises argued that it always intended that the building would be built to a high standard and so as to be able to be converted into two separate warehouses, if manufacturing became so unprofitable as to require a change in business direction.

¹¹² *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd* [2008] VSCA 26 [93]

¹¹³ *The Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80

¹¹⁴ *Haviv Holdings Ltd v Howards Storage World Pty Ltd* [2009] FCA 242 at [27]

374 The second broad area concerned the obligations Sterling Enterprises had to its tenant Westaflex in respect of its covenant of quiet enjoyment. Sterling Enterprises' claims for economic loss, that are discussed below, are nearly all claims in respect of amounts for which it says it may be liable to Westaflex.

375 The parties formulated a number of issues in respect of damages. Although, they are not all interconnected, it is convenient to set out a number of them at this point.

Issue 23A Does Sterling Enterprises have any legal liability to Westaflex for claims made in the proceeding?

Issue 24 Has, as a result of the Watpac's wrongful failure and/or refusal to rectify the Slab Defects, Sterling Enterprises suffered loss and damage as follows:

- (1) liability to its tenant Westaflex for additional costs incurred arising from the Slab Defects?**
- (2) the costs of rectifying the Slab Defects?**

376 I will first consider the issue of Sterling Enterprises' liability to Westaflex.

377 Clause 6.1 of Sterling Enterprises' lease of the warehouse and factory buildings to Westaflex required that it give quiet possession of the premises without interruption.

378 Sterling Enterprises' claim is that it breached its obligation to provide quiet enjoyment to Westaflex due to the disruption caused by Watpac's attempted rectification works in the period between September 2009 and early February 2010. It alleges that Watpac's unsuccessful attempts to rectify the floors caused Sterling Enterprises to become liable to Westaflex for breach of the quiet enjoyment covenant.

379 Sterling Enterprises argued that Watpac's attempted rectification works for nearly four months prevented Westaflex having full uninterrupted use of the warehouse. It alleges that the warehouse slab was defective, that there were directions given to Watpac to rectify it and that it made unsuccessful rectification works. Watpac's unsuccessful attempts to rectify caused Sterling Enterprises to become liable to Westaflex for breach of the quiet enjoyment obligation.

380 Westaflex had to vacate the areas of the warehouse floor which were being rectified and relocate and protect its stock and equipment from dust created by the rectification attempts. It had incurred costs in doing this and it could recover them from Sterling Enterprises as damages for breach of the quiet enjoyment covenant.

381 Watpac argued that Sterling Enterprises had not suffered loss and was not liable to Westaflex. There had been no formulation of these claims and no inquiry about them by Sterling Enterprises. Sterling Enterprises must establish that it has a legal liability to Westaflex, or that Westaflex has legally compensable claims against it. Sterling Enterprises has not paid or agreed to pay any sum of money to Westaflex, which has continued to pay rent to Sterling Enterprises throughout the period.

382 Watpac argued that there was no obligation on Sterling Enterprises to provide a floor that was flat or level or fit for the operation of a Jungheinrich forklift. That proposition appears to be correct,¹¹⁵ but it was not the basis of Sterling Enterprises' claim. Rather, it relied on its liability to Westaflex for the disruption caused to it during the past and, possibly, future rectification works.¹¹⁶

383 The disruption of the use of a building, that is leased to a tenant, that is

¹¹⁵ WD Duncan, *Commercial Leases in Australia* 5th ed p 41 and *Bradford House Pty Ltd v Leroy Fashion Group Pty Ltd* (1983) 68 FLR 1,8-9 and on appeal (1983) ATPR 40-387

¹¹⁶ T251

caused by works to rectify a building floor is a breach of the tenant's quiet enjoyment. The tenant is entitled to the exercise, use and full benefit of the right to possession of the building under the quiet enjoyment covenant.¹¹⁷ There was ample evidence from Mr Sterling of the disruption caused to Westaflex's business, by the rectification works.

384 The measure of the tenant's damages for the breach of the covenant of quiet enjoyment is the amount of damages sustained that were in the contemplation of the parties, in the event of a breach, as at the date of the lease.¹¹⁸

385 Sterling Enterprises argued that Watpac was attempting to avoid liability for the loss and damages caused by the defective work because both Sterling Enterprises and its tenant, Westaflex, were owned and operated by the Sterling family. Because the tenant and landlord were related corporations and different parts of the Sterling family businesses, Westaflex could not be expected to make formal claims against Sterling Enterprises. The family business has suffered, and will suffer loss. Westaflex has legitimate claims against Sterling Enterprises for breaches of the quiet enjoyment covenant in the lease due to the past and future works that attempted to rectify the floors.

Conclusion

386 Sterling Enterprises claims for losses suffered by the tenant, Westaflex, under the Indemnity contained in clause 2.8 of the Contract. Although indemnities generally have to be construed strictly, this indemnity is widely expressed. It refers to claims or liabilities that Sterling Enterprises may suffer. Its wording is wide enough to cover potential claims by Westaflex against Sterling Enterprises. When companies are part of a family group, it would be unrealistic to expect that there be a formal written claim by one family company against another. However, any claim must still be proved as liability

¹¹⁷ WD Duncan, *Commercial Leases in Australia*, (Supra), p231

¹¹⁸ WD Duncan, *Commercial Leases in Australia*, (Supra), p248

that Sterling Enterprises will probably suffer.

387 Generally, a person who is not a party to the contract cannot enforce it.¹¹⁹

However, Sterling Enterprises relied on a relatively recent development in contract law that in a small number of circumstances, a person is entitled to make a claim for damages on behalf of another. This might include a situation in which the plaintiff was part of a family group and the action concerned their domestic affairs or in respect of the commercial affairs of a group of companies, where the plaintiff was one of the companies. The exceptions were directed at ensuring that the damages did not fall into a “black hole”. This principle was developed in *Alfred McAlpine Construction Ltd v Panatown Ltd*.

¹²⁰ Lord Clyde stated:

“The solution is required where the law will not tolerate a loss caused by a breach of contract to go uncompensated through an absence of privity between the party suffering the loss and the party causing it. In such a case, to avoid the legal black hole, the law will deem the innocent party to be claiming on behalf of himself and any others who have suffered loss. It does not matter that he is not the owner of the property affected, nor that he has not himself suffered any economic loss, he sues for all the loss which has been sustained and is accountable to the others to the extent of their particular losses.

...

The problem which has arisen in the present case is one which is most likely to arise in the context of the domestic affairs of a family group or the commercial affairs of a group of companies. How the members of such a group choose to arrange their own affairs among themselves should not be a matter of necessary concern to a third party who has undertaken to one of their number to perform services in which they all have some interest. It should not be a ground of escaping liability that the party who instructed the work should not be the one who sustained the loss or all of the loss which in whole or in part has fallen on another member or members of the group. But the resolution of the problem in any particular case has to be reached in light of its own circumstances.”¹²¹

388 The only Australian authority of superior Court that appears to have given any consideration to the *McAlpine* decision is the judgment of Hansen J in *Roman*

¹¹⁹ See *Beswick v Beswick* [1968] AC 58, and *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107

¹²⁰ [2001] 1 AC 518 at 545-546; cf *Linden Gardens Trust Ltd v Lenestra Sludge Disposals Ltd* [1994] 1 AC 85

¹²¹ (supra) at p536

*Catholic Trusts Corporation v Van Driel Ltd.*¹²² His Honour appeared to approve the approach in *McAlpine*, but was dealing with a different fact situation.

389 Sterling Enterprises did not cite any Australian authority applying the *McAlpine* decision in a case like the present.¹²³

390 Watpac disputed that the *McAlpine* decision assisted Sterling Enterprises in this case.

391 However, this case does not primarily raise for consideration the question whether Sterling Enterprises can rely on the reasoning in *McAlpine's Case*. Rather, Sterling Enterprises relies on the indemnity to recover damages for breach of its obligations of quiet enjoyment. In that way, most of the claims in this case, are not ones that would fall into a "black hole".

392 In any event, I do not read *McAlpine's Case* as enabling the award of consequential damages suffered by a person, who is not a party to a contract, when that person has a separate right to sue. Westaflex, in this instance, has a separate right of action against Sterling Enterprises under the quiet enjoyment covenant. In turn, Sterling Enterprises could bring its own action against Watpac under the Indemnity in the building Contract, as it has done.

Issue 20 Did Watpac fail and/or refuse to rectify the Warehouse Slab Defects?

Issue 19 Did Watpac's unsuccessful attempts to rectify the slab defects cause Sterling Enterprises to become liable to Westaflex for the breach of its obligations under the Lease to provide quiet enjoyment of the site?

393 As previously stated, Sterling Enterprises argued that Watpac spent nearly

¹²² [2001] VSC 310 at [108]

¹²³ Cf Seddon, Bigwood and Ellinghaus, *Cheshire & Fifoot Law of Contract*, 10th Australian edition, p298

four months in the warehouse, following practical completion, undertaking localised grinding and filling works on the warehouse floor attempting to bring it within the Contract specification.

394 Sterling Enterprises argued that consistently from about December 2009, when Watpac realised that the problem was much bigger than first anticipated, it attempted to have the Superintendent require it to comply with the Jungheinrich specification. That would have created a justification for a variation to the Contract. The Superintendent did not specify or direct any works to be carried out to achieve conformity with the forklift specification, but consistently directed that rectification be performed to the requirements of the Contract.

395 Watpac disputed this contention and argued that Sterling Enterprises had failed to establish the fact and/or extent of breach and any method of rectification. The contractual specification did not meet the requirements for the forklift as set out in the forklift specification. Further the factory and the warehouse slabs were not of the “same design”, so as to permit the factory to be converted into another warehouse.

Conclusion

396 The evidence establishes that Watpac did attempt to rectify the warehouse slab, but that it had not been able to do so by the time that it left the site in 2010.

397 The attempts at rectification did result in Sterling Enterprises breaching its obligation of quiet enjoyment to Westaflex. No defence to a claim by Westaflex for damages for breach of the covenant was suggested by Watpac, or is apparent. Sterling Enterprise’s claim for Westaflex’s losses for the disruptions that it has suffered are economic and consequential damages claims, which are considered later in this judgment.

Sterling Enterprises' damages claims

398 In respect of each of Sterling Enterprises' damages claims, that concern economic loss claims for losses suffered by Westaflex, it is necessary to consider whether those losses would be recoverable by Westaflex from Sterling Enterprises as losses flowing from the breach of the quiet enjoyment covenant.

399 The general issues that were argued in respect of damages for the warehouse slab were:

Issue 25 Have the defects that are found to exist in the warehouse slab caused Sterling Enterprises to suffer loss and damage of the following kinds

- (1) the alleged legal liability of Sterling Enterprises to Westaflex under the lease for (using round sums) additional labour (\$66,000), additional cost of purchases (\$108,000), additional rent (\$62,000), additional consultant's fees (\$26,000) and additional interest costs (\$41,000);
- (2) rectification costs of \$93,000;
- (3) removal and reinstatement of racking costs of \$147,000;
- (4) additional rental costs of \$161,000;
- (5) additional consultants' costs of \$75,000 (factory included).

Issue 28 Has the plaintiff proved in respect of each head of damage claimed:

- (1) that the loss has been suffered by it?
- (2) the amount of the loss?

A. COSTS ALREADY INCURRED – the warehouse

Introductory matters

400 Mr Sterling gave evidence that the attempts by Watpac to rectify the floor had disrupted Westaflex's business. These matters have been discussed above. These actions by Watpac were the cause of Sterling Enterprises breaching the quiet enjoyment covenant that it owed to Westaflex.

401 Mr Sterling with the assistance of Mr V Ho, Sterling Enterprises' accountant, prepared spreadsheets showing the calculation of these costs. Mr Ho was not called to give evidence. This weakened the weight that could be given to Mr Sterling's evidence in respect of some of Sterling Enterprises' claims. However, Mr Sterling was actively involved in the family businesses and was able to give general evidence about the costs of the business.

402 Sterling Enterprises argued that it could calculate its damages by using an increased cost of production method. Mr Sterling said that there had been a down turn in profitability of the family businesses in recent years and Sterling Enterprises and Westaflex had made losses in 2010 and 2011. Sterling Enterprises decided not to undertake a loss of profit analysis, because this was, in their experience of their fire insurance claim, a time consuming process. However, Mr Sterling did not produce Westaflex's financial figures for the 2009-2010 year in which the losses were alleged to have occurred. He stated that he did not know the profit of Westaflex, or its yearly revenue, save that it did not make a profit in the last two financial years.¹²⁴

403 Watpac argued that Mr Sterling was relying on rough estimates of costs

¹²⁴ T172 and 144

without providing a factual basis for them. It contended that the critical question was whether Sterling Enterprises has suffered any downturn in profitability. If Sterling Enterprises' or Westaflex's profits stayed the same, Westaflex had not suffered any loss. Sterling Enterprises had not provided its financial figures for 2010 and 2011 and therefore it was speculation whether Sterling Enterprises or Westaflex had suffered loss of profit.

404 I do not accept Watpac's submission as a general proposition. In *Commonwealth of Australia v Amann Aviation Pty Ltd*,¹²⁵ Mason CJ and Dawson J rejected the proposition that damages could not be recovered if no net profit would have been achieved in the performance of the contract. They stated:

"If the performance of a contract would have resulted in a plaintiff, while not making a profit, nevertheless recovering costs incurred in the course of performing contractual obligations, then that plaintiff is entitled to recover damages in an amount equal to those costs in accordance with *Robinson v Harman*, as those costs would have been recovered had the contract been fully performed. Similarly, where it is not possible for a plaintiff to demonstrate whether or to what extent the performance of a contract would have resulted in a profit for the plaintiff, it will be open to a plaintiff to seek to recoup expenses incurred, damages in such a case being described as reliance damages or damages for wasted expenditure."

405 However, as Sterling Enterprises is not basing its claims on a loss of profit by Westaflex, it must establish the costs that, either it, or Westaflex, incurred. In determining whether it has done so I apply the statement of principle.

406 The plaintiff bears the burden of proving that it has suffered damages as a result of the defendant's breach of contract, and also the amount of the loss that it sustained. It has to prove these matters on the balance or probabilities and with as much precision as the subject matter reasonably permits. In *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd*¹²⁶ Hayne J said:

"It may be that, in at least some cases, it is necessary or desirable to

¹²⁵ (1991) 174 CLR 64 at 81

¹²⁶ (2003) 196 ALR 257 at 266 [38] and *The Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80,83-84

distinguish between a case where a plaintiff *cannot* adduce precise evidence of what has been lost and a case where, although apparently able to do so, the plaintiff *has not* adduced such evidence. In the former kind of case it may be that estimation, if not guesswork, may be necessary in assessing the damages to be allowed. References to mere difficulty in estimating damages not relieving a court from the responsibility of estimating them as best it can may find their most apt application in cases of the former rather than the latter kind. “

407 The method of calculating damages is not inflexible. As Callinan J said in *Placer*:

“Fifthly, in assessing damages a court does the best it can. A judge relies on predictions and possibilities. Precision will rarely be possible with respect to future costs and profits, particularly when deceit by one party obscures the true position.”¹²⁷

408 I make three general observations about Sterling Enterprises’ damages claim. First, in almost all instances, there appeared to be other and more precise evidence that could have been presented to prove the quantum, but was not presented. This appeared to have occurred because of Sterling Enterprises’ decision not to engage in a time consuming exercise like it had with its insurance claim. However, the consequence of that decision was that many of the claims, including a number for large sums of money, were not properly proved.

409 Secondly, to recover damages in respect of most of the economic damages claims, Sterling Enterprises had to establish that Westaflex had a claim against it. That was not a straightforward task.

410 Thirdly, a number of the losses that Sterling Enterprises claimed had not been suffered by it, or by Westaflex, but by Uniflex that had no possible legal claim against Sterling Enterprises.

411 I will now consider Sterling Enterprises’ claims for damages in respect of costs that it says have already been incurred.

(a) Westaflex’s additional labour during attempts to rectify the

¹²⁷ (supra) at 277 [72]

warehouse floor: \$66,027.76

412 Mr Sterling gave evidence that Westaflex incurred additional labour costs during and caused by Watpac's attempts to rectify the warehouse floor. It had to operate out of three warehouses instead of one, incurring additional wages for staff involved in coordination, authorising access, supervision, forklift and truck transport and handling of products. He and Mr Ho had prepared the calculations for this claim with assistance from Ms J Rousell, the wages clerk.

413 Mr Sterling said that he knew how long the employees spent on the tasks caused by the disruption to Westaflex's business, as he worked with them and directed them.¹²⁸ He also used his diary and Tony Sacciavelli's worksheets.¹²⁹ Watpac pointed out that his diary was not in evidence and there were only work sheets for 6 weeks between September 2009 and February 2010.¹³⁰

414 With one exception, the workers, whose labour costs were the subject of the claim were employed or engaged by Uniflex Pty Ltd, which is the distribution arm of the business.¹³¹ Uniflex has not claimed these labour costs from Westaflex.

415 Westaflex sells components and other products to Uniflex at a marked up price and Uniflex sells them to customers. Uniflex also purchases products from sources other than Westaflex.¹³²

416 Sterling Enterprises argued that Westaflex lost the benefit of the work which the workers would have otherwise undertaken for it.

417 I will consider the evidence in respect of each of the workers.

418 **Tony Sacciavelli** is an independent contractor whose company Formula

128 T 215
129 CB 2.040
130 T212
131 T212-215
132 T141-142

Finish Pty Ltd provides his services as a general hand. Sterling Enterprises claimed the cost of 88 hours at \$40 per hour plus GST or \$3,520 for the work that he performed. He undertook a series of tasks to accommodate Watpac's rectification works. These included driving the forklift up and down the warehouse aisles at Watpac's request and direction, relocating stock, preparing the warehouse for Watpac prior to Christmas 2009, reorganizing the Culverland Road factory, the manufacturing plant and the main plant to provide additional storage and organizing dies/moulds and raw materials to give access to Watpac to carry out rectification works. Formula Finish's invoices were sent to Westaflex. Some of them have no obvious connection with work required by any disruption caused by the rectification work. Mr Sterling's calculations sheets attached to his witness statements appear to show 35 hours allocated to work connected to the disruption.

419 The claim for 88 hours was not properly explained. I accept Mr Sterling's evidence about the work that Mr Sacciavelli performed. I award Sterling Enterprises the sum of \$1540 being 35 hours at \$40 per hour, plus GST. It is a sum that Westaflex probably could recover from Sterling Enterprises for breach of the quiet enjoyment covenant and therefore is a sum that Sterling Enterprises could recover under the Indemnity.

420 **Bill Gilgorovki.** Sterling Enterprises claims the amount of \$285.34, which Mr Sterling said represented a small fraction of the time that he actually spent doing jobs working around the rectification works undertaken by Watpac. He was employed by Uniflex.

421 **Doug Fernie,** was the factory manager and was about to retire. Westaflex had already employed his replacement. However, he was kept on to oversee the assembly of plastic products at a separate facility, which was used for that purpose, because the warehouse could not be used. His wages during that period amounted to \$31,154.28. He was employed by Uniflex.

422 **Michael Sterling** is the brother of Mr Paul Sterling and performs managerial and other duties for the family business. He performed various tasks arising from the disruption of Westaflex's business. The claim is for \$3,243.28. Mr Paul Sterling gave evidence that he saw his brother driving forklifts. He showed him the claim calculations and he agreed with them. Mr Paul Sterling said that the claim was an underestimation.¹³³ Mr Michael Sterling was employed by Uniflex.

423 **Peter Moran** is the Interstate Despatch Manager at the factory at 140 Bamfield Road. He transported stock from 157 Bamfield Road to 147 Bamfield Road and vice versa. The claim is for 4 hours being \$114.64.

424 **Chris Whitby**, is the warehouse supervisor at 51 Bamfield Road and performed various jobs caused by the disruption. He was moving goods to other locations including to Culverlands Road. The amount claimed is \$5,297.31. Mr Whitby gave evidence. He agreed that Mr Sterling did not ask him what tasks he performed or what hours he spent performing them. In cross-examination he was asked whether Mr Sterling had asked him about the disruption to his normal duties caused by having to perform additional duties. He said in respect of the claim for his hours:

" Well, I've never seen this. This is the first time I'm looking at it, but there were a lot of stock transfers and interruptions during the period.

Q. But I am safe in saying this: that at no stage has either Paul Sterling or Doug Fernie or anybody else come to you and asked you to estimate the amount of time you spent on those tasks?

A. I would say, but given four hours is probably a good estimate."¹³⁴

425 **Paul Sterling** claims \$9,877.28 for additional duties that he performed during attempts to repair the warehouse floor. He too was employed by Uniflex.

426 Watpac argued that Sterling Enterprises did not have any obligation to pay Westaflex in respect of these workers. They were employed by Uniflex. They

133 T219
134 T401

were paid week in week out and there was no evidence of the work that they would usually have been doing.

427 Watpac relied on the fact that Mr Sterling prepared his schedule of additional labour costs in April 2010 approximately seven months after the additional work was alleged to have been undertaken and without consultation with the employees. There were no time sheets supplied.

The additional labour claim for Messrs Sterling, Sacciavelli and Whitby

428 Sterling Enterprises also claimed \$12,553.64 for the cost of the additional labour of Mr Sterling, Mr Sacciavelli and Mr Whitby for the moving of imported products and raw materials, which would have been stored in the warehouse that was being rectified, into other warehouses. After February 2010, those goods had to be relocated into the warehouse at 140-152 Bamfield Road, where they should have been in the first place.

429 Mr Sterling said that there were 16 container loads of such goods and raw materials, of which 70 per cent had been relocated. Three workers took eight hours to unload and store each container and this amounted to 128 hours per worker. These workers were taken away from their usual work.

430 Watpac argued that Mr Sterling had based the claim on an assumption that it took 3 people 8 hours each to unload a container, that 15 containers arrived prior to the new warehouse being ready to take deliveries and that 70 per cent of the goods in the containers had not been sold at the date the goods were transferred to the new warehouse. Watpac argued that there was no evidence of when the goods arrived. The documentation for the containers was not in evidence. Watpac also argued that the workers were employees of Uniflex and not Westaflex and Sterling Enterprises did not have any obligation in respect of them.

Conclusion

431 In determining whether a claim for damages by a business has been established, the Court should adopt a realistic approach to the proof that it should require. The extent of the evidence that the plaintiff could have provided has to be kept in mind. This point is made in the following statement:

“(a) The fact and, if so, the extent of the diversion of staff time have to be properly established and, if in that regard evidence which it would have been reasonable to adduce is not adduced, he is at risk of a finding that they have not been established.

(b) The claimant also has to establish that the diversion caused significant disruption to its business.

(c) Even though, it may well be that strictly the claim should be cast in terms of a loss of revenue attributable to the diversion of staff time, nevertheless in the ordinary case and unless the defendant can establish the contrary, it is reasonable for the court to infer from the disruption that, had their time not been thus diverted, staff would have applied it to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time.”¹³⁵

432 I do not consider that Sterling Enterprises has established an entitlement to recover these amounts. They are not amounts covered by the indemnity because, with the possible exception of the Formula Finish costs, they are not amounts that could be claimed by Westaflex for breach of the quiet enjoyment covenant. Uniflex employed the workers and has suffered any loss that may have occurred. There was no proof of any such loss. With the exception of Mr Fernie, Uniflex was obliged to pay the employees in any event. Their wages were an existing expense of the business.

433 In addition, the amounts claimed have not been properly proved. Mr Ho made the calculations and he has not been called as a witness.

434 The only amount that I consider has been proved and is recoverable is the \$1540 in respect of Formula Finishes for Mr Sacciavelli. That is a sum that Westaflex could recover from Sterling Enterprises.

¹³⁵ Wilson LJ in *Aerospace Publishing Ltd v Thomas Water Utilities Ltd* [2007] EWCA Civ 3 at [86] referred to in Darter and Sharkey, *Building and Construction Contracts in Australia Law and Practice* p728

435 I do not consider that the claims for the additional costs of Messrs Sterling, Sacciavelli and Whitby, have been established. There is no evidence that Sterling Enterprises will be liable for the amounts claimed. I also accept Watpac's submissions that these amounts have not been properly proved. There was very little evidence about when this work was done or of any record of the time spent.

(b) Additional cost for purchases from domestic suppliers during attempts to rectify the warehouse floor: \$108,317

436 Mr Sterling gave evidence that he planned that, after the completion of the warehouse in September 2009, to import products in large quantities from China. He was prevented from doing so because Watpac's attempted rectification works limited the storage area available. Instead Westaflex had to purchase products at higher prices from domestic suppliers of Chinese products: namely Zabdew Pty Ltd and Quality Air Pty Ltd.

437 The new warehouse had approximately 1,500 pallet spaces. The temporary storage facility used had about 500 pallet places. Mr Sterling gave evidence that Westaflex paid 50 per cent more for these products than if it had been able to import them directly in bulk. He relied on copies of invoices showing purchases of product from a middleman in Australia at what he described as inflated prices.¹³⁶

438 Mr Sterling's calculations were based on an average weekly additional costs, and not on the total of invoices.¹³⁷ For the 26 week period of disruption, which appeared to be from September 2009 to March 2010, the weekly averages totalled \$108,317.88. Mr Sterling's calculations were based on sample invoices for four months from October 2009 to January 2010, but he said that

¹³⁶ T219
¹³⁷ See Appendix 2 to Schedule A

the calculations were averages of six months purchases.¹³⁸

439 Watpac argued that Sterling Enterprises had not proved this claim because it had not proved the larger quantity of goods that Westaflex planned to purchase. Without evidence of the programmed or forecast purchases, the prices which might have been paid had Westaflex imported goods and of the containers and transportation costs, it was not possible to verify whether Westaflex had incurred any additional costs.

440 Westaflex conducted eleven warehouses and/or distribution facilities across Australia. The evidence to support this claim was a large number of invoices from Zabdew Pty Ltd and Quality Air Equipment Pty Ltd and Mr Sterling's evidence about increased costs of purchase. It was unclear whether Westaflex or Uniflex had purchased the goods and the invoices included products purchased both before and after September 2009.

441 Sterling Enterprises argued that Mr Sterling could not provide forecasts, as it was a family business and did not operate like a large corporation. However, the number of pallet spaces that were provided in the warehouse indicated the quantities of goods that Westaflex intended to import.

Conclusion

442 In principle, Sterling Enterprises' breach of the quiet enjoyment covenant caused by the rectification work, could entitle Westaflex to claim its increased cost of purchases as damages from Sterling Enterprises. In that event, Sterling Enterprises would be entitled to claim those costs under the Indemnity.

443 There was very little detailed analysis undertaken to support this claim. A table of 9 pages listing invoices said to represent "purchases from outside suppliers to fulfil requirements" was provided. Some invoices on the table had entries

¹³⁸ T307

against them which were unexplained. These invoices were sent to Westaflex. Mr Sterling's stated that "on average we paid 50% more for these products than if we had been able to purchase in bulk." There was no evidence of the previous averages.

444 I consider that there was insufficient evidence produced to establish this claim.

(c) Westaflex's rent of alternative storage facilities during attempts to rectify the warehouse floor: \$62,927.18

445 Mr Sterling gave evidence that, because Westaflex could not have full and proper access to the warehouse, in order to minimise its loss, it had to arrange for rental or alternative storage in other local premises owned by Sterling Enterprises. The additional premises were being used for other business purposes and thereafter could not be used by Westaflex for their original or intended purpose. The rent claimed is \$62, 927.18.

446 The claim included the rent that Westalex paid Sterling Enterprises for the premises at 156-160 Bamfield Road, 140-144 Bamfield Road and 22 Culverland Road.¹³⁹ In more detail, the claim was based on the monthly rental allocated to at least part of those three premises for six months. The amount of \$47,509.50 was claimed for the use of 156-160 Bamfield Road on the basis of a requirement for 100% use of those premises. In the case of 140-144 Bamfield Road, the amount of \$7,287.50 was claimed based on 5% usage. In the case of 22 Culverland Road the amount claimed was \$8,129.88 based on 50% usage.

447 Watpac argued that each of these locations was leased by Sterling Enterprises to Westaflex under a lease made prior to any alleged breach or carrying out of rectification work. Westaflex had made no claim against Sterling Enterprises for repayment of rent, nor had it stopped paying rent.

¹³⁹ T222 Appendix 3 of Mr Sterling's statement

448 Westpac also argued that there was no evidence that Westaflex's use of the three premises was interrupted or inconvenienced. All that happened, was that Westaflex had used other warehouse space, which it had available under existing leases. There was no evidence of whether those other premises were fully used, or otherwise would have been fully used, or whether there was space available that was not being used.

Conclusion

449 Additional rental paid by a principal because a building cannot be occupied, as a result of breaches of a contract by a builder, can be recovered as damages from the builder.¹⁴⁰

450 However, in this case, Sterling Enterprises has not established that Westaflex incurred any additional rental. While all of the premises were required for six months, there is no evidence of the existing use of those premises. There is no evidence of a possibility that Westaflex might successfully sue Sterling Enterprises for breach of the quiet enjoyment covenant, because it incurred the cost of additional rent, or suffered loss because it did not have access to the premises for other purposes.

(d) Additional consultants' fees: Sterling Enterprises claimed the sum of \$26,614.50 for additional consultants' fees incurred because of Watpac's breach of contract.

451 Sterling Enterprises claimed that the cost of additional consultants' fees charged by APC for Mr Vincent, by Hawthorn Consulting Engineering for Mr Shannon, and Rider Levett Bucknall for Mr Moleta.

452 Associated Project Control billed Sterling Enterprises \$18,892.50, Hawthorn Consulting billed Westaflex amounts totalling \$2,771 and Rider Levett

¹⁴⁰ See authorities discussed in Dorte and Sharkey, *Building and Construction Contracts in Australia*, Law and Practice p729

Bucknall billed Associated Project Control for amounts totalling \$4,950.00.

453 Associated Project Control Pty Ltd sent an invoice dated March 2010 to E & E Superannuation Fund Pty Ltd for the sum of \$18,892.50 for work done by Mr Vincent in the period October 2009 to March 2010. The invoice stated:

“Admin & site works as required in regard to ongoing problems associated with facilitating the builder’s attendance in respect of defects in the main, being floor rectification.”¹⁴¹

454 Sterling Enterprises argued that at the point these costs were incurred, Mr Vincent should have had minimal involvement in the project. Instead the majority of his time was spent dealing with issues arising from the deficiency of the floor.

455 Watpac contested the claim and relied on the fact that Mr Vincent had not been called to give evidence.

Conclusion

456 I accept Mr Sterling’s evidence that Sterling Enterprises incurred additional fees to Mr Vincent because of the rectification issues and because of Watpac’s breaches of the Contract. I have taken into account the significance of the fact that Mr Vincent was not called to give evidence. However, there is other evidence that he was playing a role for Sterling Enterprises in connection with the floor rectification issues. The Invoice suggests that he was undertaking other duties as well.

457 I award Sterling Enterprises two thirds of the Invoice, which amounts to \$12,595.00.

458 The next issue concerns the two invoices for the services of Mr Shannon of Hawthorn Consulting Engineers totalling \$2,772 for services relating to the floors. The first invoice was dated 20 October 2009 and was addressed to

¹⁴¹ CB10.238

Westaflex. It was for work carried out between 27 August 2009 and 16 October 2009 in the amount of \$616.00. The work was described as "Site inspection regarding north building floor finish levels' preparation of engineer's letter and liaison with clients' representative".

459 The second invoice was dated 1 February 2010 and was addressed to Westaflex, Uniflex Pty Ltd c/- Associated Project Control Pty Ltd. It was for work carried out 22 January 2010 to 12 February 2010 for a number of site inspections and meetings and for liaising with the builder, the client and preparation of an engineer's report and letter. The amount claimed was \$2,156.00.

460 Mr Sterling did not know Mr Shannon's hourly rate. Sterling Enterprises called Mr Shannon as a witness, but he was not asked to verify these invoices.

461 The claim in respect of Mr Shannon's additional costs has not been proved.

462 The third amount claimed of \$4,950.00 was for Rider Levett Bucknall, for whom Mr Moleta, the quantity surveyor worked. He had an ongoing role to negotiate a settlement of the dispute, but Sterling Enterprises argued his work would not have been required had the builder provided the floor in accordance with the contract. The invoices are for the period of Watpac's attempted rectification works. The invoices only stated that they were "fee account for additional quantity surveying services carried out at the above project" ie the Westaflex Warehouse and Manufacturing complex.

463 Watpac relied on the fact that the Rider Levett Bucknall invoices were issued to Associated Project Control, Mr Vincent's company and not to Sterling Enterprises, Westaflex or Uniflex. It also argued that Mr Sterling had not identified which work for which charges were made in the invoice which related to issues arising from the condition of the floor. Rider Levett Bucknall was undertaking other tasks for Sterling Enterprises unrelated to the condition

of the floor. The invoices did not identify the hours claimed or the works performed and whether they related to defects or rectification, or the rate charged or when the work was performed.

Conclusion

464 Save in respect of Mr Vincent's claims, these items have not been established. The invoices were uninformative. The actual work done by the other consultants was not identified. Mr Moleta was not called to give evidence.

Additional interest costs

465 Sterling Enterprises claimed the sum of \$41,750.13 for additional interest costs that it said that Westaflex had incurred during attempts to rectify the warehouse floor. These interest costs are 6.5 per cent on the sum of \$263,887.32, which was said to be additional labour costs, external purchases, additional rent of three properties and consultants fees for the period August 2009 to February 2010 and consultants' fees September 2009 to April 2010.

Conclusion

466 I have not allowed most of the amounts, which comprise the sum of \$263,887.32, and so Sterling Enterprises is not entitled to claim these amounts as damages. In any event, it is entitled to interest on any sum that it recovers as a judgment, but not other interest on those amounts.

Liquidated claims for delay

Issue 9 On 18 November 2010, did the Superintendent issue a certificate pursuant to General Condition 37 of the Contract certifying:

(a) That Watpac owed Sterling Enterprises \$42,142.00 in liquidated

damages; and

(b) That Sterling Enterprises owed nil?

467 On 18 November 2010, Mr Vincent, the Superintendent, certified this amount
under clause 37(2)(a) in the sum of \$42,142.¹⁴²

468 For reasons given below in determining Watpac's counterclaim, I have refused
Watpac's extension of time claims. Sterling Enterprises is therefore entitled to
recover the sum of \$42,142 as liquidated damages.

B. STERLING ENTERPRISES' CLAIMS FOR FUTURE COSTS

469 I have found that Sterling Enterprises has established that Watpac breached
the building Contract because the warehouse floor did not comply with the
Contract specification. I proceed to consider the damages that Sterling
Enterprises claims in connection with the rectification of the warehouse floor.

The Warehouse

**Issue 22 Is the claim for rectification a reasonable and necessary course
to adopt in the circumstances regarding**

(a) the warehouse slab;

(b) the factory slab?

**Issue 22A Has Sterling Enterprises established, by admissible evidence,
and if so what evidence, the cost of rectification works by reference to:**

(a) proved defects;

(b) Proved rectification methodology?

Issue 23 What is the cost of rectification works which are determined to

¹⁴² CB11.158

be appropriate?

Legal principle concerning rectification damages

470 Watpac relied on the High Court decision in *Bellgrove v Eldridge*¹⁴³ for the proposition that the actions taken to remedy the loss and damage suffered must be reasonable and necessary.

471 Watpac argued that factors, which should be taken into account in assessing whether rectification work performed on the warehouse floor was a reasonable and necessary course to adopt were:

- (a) The intention of the plaintiff to carry out the rectification work;
- (b) whether the plaintiff's use and occupation of the premises has been adversely affected by the defect;
- (c) whether the cost of the rectification is disproportionate to the end to be attained;
- (d) the cost of such work.

472 There is some authority that suggests that it is appropriate to have regard to whether the plaintiff will carry out the work for which damages are sought, as part of the process of arriving at the plaintiff's compensable loss. However, once there is compensable loss, the Court is not concerned with the plaintiff's use of the compensation.¹⁴⁴

473 In *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*¹⁴⁵ the High Court stated:

"The 'ruling principle' confirmed in this court on numerous occasions, with respect to damages at common law for breach of contract is that stated by Parke B in *Robinson v Harman*:

¹⁴³ (1954) 90 CLR 613

¹⁴⁴ *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253 at [59] and *Central Coast Leagues Club v Gosford City Council*, Giles CJ, 9 June 1998, unreported at [215]-[218]

¹⁴⁵ (2009) 236 CLR 272

'The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.'¹⁴⁶

474 The High Court suggested that the qualification of "unreasonableness" in the *Bellgrove* decision might only apply in "fairly exceptional circumstances". They referred with apparent approval to an English decision to the effect that the unreasonableness qualification would only apply where the innocent party is merely using a technical breach to secure an uncovenanted profit.¹⁴⁷

475 In *Willshee v Westcourt Ltd*,¹⁴⁸ the Western Australian Court of Appeal decided that a plaintiff was entitled to recover the cost of the entire external limestone cladding of the plaintiff's house although only about 50 per cent of the cladding had pitted, spalled and crumbled to an extent that was excessive for its age. The plaintiff was entitled to the amount of money required to put him in the position in which he would have been had his house been constructed using only the limestone of high quality. It could not be concluded that the plaintiff was relying on a technical breach of contract to obtain for himself a profit, which was outside the terms of the building contract. Accordingly, the trial judge erred in concluding that the case came within the qualification of 'unreasonableness' referred to in *Bellgrove*.¹⁴⁹

476 I apply the general proposition that Sterling Enterprises was entitled to be awarded damages in order to place it in the same position as if the contract had been performed. The only possible qualification that might apply to that general proposition, is if Watpac established that the rectification work was unreasonable.

(a) Removal & reinstatement of racking in the warehouse: \$147,000

477 Mr Sterling gave evidence that this claim was based on the costs which would

¹⁴⁶ (Supra) at 286
¹⁴⁷ (Supra) at 288
¹⁴⁸ [2009] WASCA 87
¹⁴⁹ (supra) at [76] per Martin CJ

be incurred to clear the warehouse in order to allow access to the floor so that it could be rectified. There would then be the cost of reinstating the warehouse. All existing racking would have to be dismantled, relocated and stored. 1500 temporary pallet spaces for short term warehousing will be required. Reinstating the warehouse will involve re-installing the dismantled racking, dismantling the short term warehousing racking and trading-in the used racking at the market price.

478 The claim is based on a price of \$147,000 quoted by Mr Anthony Walsh of the APC Group on 11 March 2011.¹⁵⁰ Mr Walsh had designed the racking in the warehouse and been to the site on many occasions.¹⁵¹

479 Mr Walsh was not called to give evidence.

480 The other evidence relied on by Sterling Enterprises in respect of damages was given by Mr Peter Clack, who is a quantity surveyor. He gave evidence about both the cost of the factory and warehouse floor rectification. He has over 30 years experience as a Quantity Surveyor, a Project Manager and a Cost Manager, much of it in connection with the building and construction industry. He has the specialised knowledge to give expert evidence about building and construction costs.

481 Watpac objected to the admissibility of Mr Clack's evidence on a number of grounds. I considered that the terms of Mr Clack's witness statement satisfied the requirements of s 79 of the *Evidence Act* 2008 subject to any challenges that might emerge in cross-examination. Watpac renewed its objection to his evidence in final submissions, arguing that his evidence was inadmissible, or should be excluded under s135 of the *Evidence Act* 2008, or should be given no appreciable weight.

482 Mr Clack based his costs estimates on Dr Baigent's opinions concerning the

¹⁵⁰ CB 14.047
¹⁵¹ T288

work that had to be performed. Although, I consider that Dr Baigent's opinion about whether the floor complied with the contract specification was inadmissible, based as it was on the SRW survey, I do not consider that that made the rest of his statement inadmissible, including those sections that concern the action that he considered would be required to rectify a floor which did not comply with the contract. Mr Armstrong also provided opinions on this issue, although he did not find that the floor failed to comply with the Contract.

483 Mr Clack stated that he had been advised, and agreed, that all racking and equipment would need to be removed from the warehouse and factory to ensure that the preparation works and the installation of the new product could be delivered in a way that achieved the original specified floor finish across the whole of the effected areas. Mr Clack assumed that the racking was to be removed in order to apply the Sikaflex in the most efficient manner.

484 Ms Li, who is also a quantity surveyor, with Mr Clack's firm, and who works in an open plan office at a desk near Mr Clack's, spoke with Mr Walsh and sought confirmation of the details of the costs.

485 Mr Clack gave evidence that he reviewed and assessed the "build up" or "breakdown" of the quote and believed that it was a reasonable price for the scope of the works.¹⁵²

486 Mr Sterling was far from certain in his evidence that Sterling Enterprises would remove all the racking if it flood coated the warehouse floor. This was because of the damage to the floor that the removal may cause. Watpac relied on Mr Sterling's statement that removing the racking would have damaged the warehouse floor further and would have been more disruptive to his business than the rectification work. He said that:

" When Watpac personnel and I had discussed flood coating, I had

¹⁵² CB 3.051, 3.087, T 432

agreed to make sheet metal covers to go around the racking feet, so that when the flood coat was applied we did not flood coat the rack legs to the floor.”¹⁵³

487 Mr Sterling went no further than saying that if the floor was to be flood coated, he would consider removing the racking. He said that he would consider it on a productivity basis.¹⁵⁴

488 In his witness statement in reply, Mr Sterling said:

“ I did not consider either option ideal as with the racking removed it would have left me with hundreds of holes, approximately 150mm wide by 125mm long, in the floor that I would then have to repair/fill should I ever rent out the warehouse to another tenant or sell the building. However, not removing the racking was far less disruptive to my business and I had considered it an option in respect of a commercial settlement with Watpac, which would have included a discount in the Contract price.”¹⁵⁵

489 Mr Sterling’s evidence in this regard appears connected to his evidence that he is yet to see a product that can provide the tolerance or strength required to withstand the weights of the pallet rackings and the forklifts.

Conclusion

490 I accept that Sterling Enterprises has proved the cost of removing the racking. I consider that Mr Clack’s evidence establishes that Mr Walsh’s quote was a reasonable price for the work. I accept Mr Clack as a quantity surveyor with the training and experience to give an opinion on the issue, even though Mr Walsh was not called to give evidence.

491 However, I am not satisfied that Sterling Enterprises would ever remove the racking. If the floor was to be flood coated, it may well adopt the other course of installing sheet metals covers of the racking feet. There was no evidence of the cost that would involve.

492 This claim has not been proved.

153 CB 2.080
154 T287
155 CB 2.080

(ii) Rectification of warehouse floor

493 Mr Clack's estimate of the rectification cost for both the warehouse and factory floors was \$293,800. Mr Clack included the cost of preparing the surface of \$22,600 and the cost of the application of a two coat screed calculated at \$271,200.00. The Sikafloor specification states that the surface needs to be prepared, before it is applied. Mr Clack used his experience to calculate the cost of the preparation.¹⁵⁶ I accept his evidence about the cost of that preparation.

494 Mr Clack expressed the opinion that the costs that would be incurred in applying Sikafloor to the slabs of the factory and warehouse were:

| | |
|--|---|
| (a) Preparation of surface | \$22,600 |
| (b) 2 coat screed | \$271,200.00 |
| (c) Relocation of racking system and temporary pallets | \$147,000 (this was a warehouse expense, which I have discussed above.) |
| (d) Removal and reinstatement of factory equipment | \$93,000.00 |
| Total | \$533,800 |

495 The 2 coat screed cost comprised the cost of Sikafloor -156, primer and average 15mm screed coat (mix 1 part 156, 8parts sand) 2,260m2@\$95/m2 - \$214,700. Mr Clack said in his statement:

" Please note, we have been advised by one subcontractor a further top coat would be required to provide a smooth polished surface. Cost of installation of 'RhinoFloor SF Premium' two pack epoxy product as per the original specification 2,260m2@\$25/m2 -\$56,500."¹⁵⁷

496 The subcontractor who gave Mr Clack that advice was not called as a witness. There was no other evidence suggesting that this additional coating was

¹⁵⁶ T 421
¹⁵⁷ CB3.051

required and I am not satisfied that the cost of it, or the need for it, have been proved. Mr Clack conceded that the Rhinofloor application was not necessary to make the works conform to the contract.¹⁵⁸

497 Once the cost of the Rhinofloor is removed and the cost of floor preparation added, the cost of applying "Sikafloor", including preparation, is \$118,650 for each floor.

498 Watpac objected to Mr Clack's evidence on the basis that he had no knowledge of the cost of the Sikafloor application, but was relying on information obtained by his assistant, Ms Li, from subcontractors, whom she had contacted.

499 Mr Clack gave evidence of the cost of the rectification specified by Dr Baigent, based on a square metre basis. The affected area of the two floors measured 2,260 square metres. He did not have the expertise to say what the cost of rectification was,¹⁵⁹ but relied on discussions about prices that his assistant Ms Li, who was a quantity surveyor, had had with various sub contractors. He described the task that he gave to Ms Li in the following terms:

"Yes. I said to Angela., ' particular product has been specified. In my opinion, I think, you know, this product should be worth in the order of 80 to \$120 a square metre. Can you please ring around some various subcontractors so we can confirm what the subcontractors believe that this product is worth to install."¹⁶⁰

500 Attached to his statement were typed notes of conversations that Ms Li had at his request with four flooring sub contractors about the cost of Sikafloor and Rhinofloor.¹⁶¹ He said that his desk was next to Ms Li's and that he could hear the conversations, but he could not hear what the subcontractors were saying to her.¹⁶² They did not provide written quotes and the purpose of the phone

158 T437
159 T421
160 T430
161 CB 3.069
162 T438

conversations was to obtain background information.¹⁶³

501 Watpac argued that Mr Clack's statement did no more than reproduce the contents of selected verbal discussions held by Ms Li with contractors who had not provided a quotation. There was no path of reasoning provided as to how he reached the figures on which he relied. It was not an expert report.

502 Watpac submitted that Sterling Enterprises had failed to prove the costs on which his opinion was based. Mr Clack went beyond Dr Baigent's report in providing the cost of the Rhinofloor application. He did not reveal until cross-examination that he had not obtained the costs. He had overstated the acceptance of his evidence in earlier litigation. He did not provide a scope of works or obtain quotations. There was no certainty that the floor would ever be rectified.

Conclusion

503 I accept Watpac's submission that Sterling Enterprises has not proved the cost of applying "Sikafloor" to the warehouse floor.

504 However, "Sikafloor" may not be the application that is used. Mr Sterling was far from definite about that matter. The Court can assess the likely cost of applying an epoxy leveller or screed to the warehouse floor from other evidence that was received in the trial. Watpac received a quote of \$102,600 from SureTech to apply a screed to level the floor. Mr Sterling had received quotes for flood coating costs of \$80,000 and \$93,000.

505 I award Sterling Enterprises the sum of \$90,000 for the cost of the application of a screed to the warehouse floor. I find on the evidence of Mr Sterling, that it is probable that it will carry out that work.

(iii) rent of alternative premises while warehouse floor is rectified:

¹⁶³

T432

\$161,000

506 Sterling Enterprises claimed the sum of \$161,000 that Westaflex would be required to pay for additional premises while the factory was being rectified. It was based on an estimate from Mr Paul Evans, a real estate agent, who took into account the rent for two nearby premises in Bamfield Road, that were vacant. Mr Evan's estimate was based on a 6 months' lease.¹⁶⁴

507 Mr Evans provided a witness statement, but was not required to attend for cross-examination.

508 There was little evidence given about this claim. Mr Sterling gave evidence of how he coped with the lack of space up until September 2009, he said that:

"Because I didn't have the warehousing facility that I required, I had things stored in fire exits. I had machines coming in everywhere. There was stuff everywhere."¹⁶⁵

509 Watpac argued that no detail was provided as to the size of property that Westaflex would require. It also argued that no consideration had been given to using space available in other local properties owned by Sterling Enterprises and /or leased by Westaflex.

Conclusion

510 Westaflex used existing premises that it leased while the previous attempts at rectification were made. I did not award Sterling Enterprises damages in respect of the rent of those premises.

511 I accept that a rectification by flood coating of the warehouse floor would disrupt Sterling Enterprises' business. However, Sterling Enterprises' case lacked detail of the space that it would require. I am not persuaded of even an approximation of the cost of renting any other premises that Westaflex might incur, if flood coating of the warehouse floor took place.

164 T308
165 T218

512 I therefore find that this claim has not been established.

(iv) Mitigation

513 Mr Sterling gave evidence that in February 2010 it did not request Watpac to return and continue rectification works because it was fed up at the previous unsuccessful attempts. Watpac had had four months to carry out work with two subcontractors and yet had failed to rectify the floor. The rectification work had been extremely disruptive to Sterling Enterprises' business.¹⁶⁶

514 Watpac argued that Sterling Enterprises had failed to mitigate its loss because it did not allow it to continue to carry out further grinding.

Conclusion

515 Watpac had already performed extensive grinding of the warehouse floor. It has not established that it was unreasonable for Sterling Enterprises to refuse to permit further grinding work to occur.

Factory slab costs

Issue 26 Have the defects which are found to exist in the factory slab caused Sterling Enterprises to suffer loss and damage of the following kinds:

- (1) rectification costs of \$93,000;**
- (2) removal and reinstatement of plant and equipment (\$406,000);**
- (3) loss of production of \$243,000;**
- (4) additional staffing costs due to the shutdown of the factory of \$128,000.**

516 The issue of the damages that Sterling Enterprises was entitled to recover in

¹⁶⁶ T207 and CB 2.080

respect of the factory slab, if breach of the Contract was proved in respect of that slab, was argued at length. I have concluded that Sterling Enterprises has not established that Watpac breached the Contract in respect of the factory slab, so the issue does not arise for determination.

517 Nevertheless, because of the extensive argument on the issue and in case I am incorrect in that finding, I will state, so far as I can, the conclusions that I would have reached in respect of the damages that Sterling Enterprises claimed in respect of the factory floor, if this claim of breach of Contract had been established.

518 There was an initial issue about whether Sterling Enterprises would ever actually rectify the factory floor, if it received damages to enable it do so. Watpac referred to Mr Sterling's statement of December 2009 and argued that it was unlikely that it would do so.¹⁶⁷ It also argued that the rectification of the factory floor would be an unreasonable expense because there has been no complaint about it and it was not causing disruption to the operation of the factory. The decision maker on this issue was Mrs Sterling and she has not given evidence.

519 However, Mr Sterling gave evidence that it was always Sterling Enterprises' intention to rectify the factory floor, to have it the way they wanted.¹⁶⁸ If they received the money from these proceedings for that task they would undertake the rectification.¹⁶⁹

520 While there can be no certainty about what may happen, I would have accepted Mr Sterling's evidence of intention.

(a) estimated additional consultants' fees

521 The sum of \$75,000 was claimed, being Mr Sterling's estimate of fees for

¹⁶⁷ T232 and CB
¹⁶⁸ T233
¹⁶⁹ T325 and 233

project management, engineering design, and quantity surveying during the future rectification of the factory. Mr Sterling in cross-examination agreed that his company had not asked the consultants to provide a quote or a scope of the work.

522 Watpac submitted that this claim was based on an earlier estimate of the costs for consultants, which has been discussed above and which commenced as a claim for \$76,000 and was reduced to \$26,000. Mr Sterling agreed that that was the case.¹⁷⁰This item of damages was likely to be reduced in a similar manner. No estimates of costs had been obtained from consultants.

Conclusion

523 Watpac's submissions that the Court should not be prepared to make assumptions, in circumstances where the evidence could have been called on the issue, but was not, has force. It is certainly possible that further consultants' costs will be incurred, but no evidence has been presented proving what those amounts were. I would therefore have been unable to award damages in respect of this claim.

(b) Factory floor rectification

524 This claim was put in different ways. First, was the claim based on Mr Sterling's evidence. This was the sum of \$406,441.33 consisting of:

| | |
|---|--------------|
| (i) removal and reinstatement of floor mounted equipment in factory | \$406,441.33 |
| (ii) rectification of factory floor | \$93,000.00 |
| (iii) estimated loss of production | \$243,869.94 |
| (iv) additional staffing costs due to factory shut down | \$128,467.94 |

(i) Removal and reinstatement of the floor-mounted equipment in the

¹⁷⁰ T257

factory

525 Sterling Enterprises' claim is for the costs which would be incurred to clear the factory floor, except for the mezzanine level, to provide access to enable the rectification to occur. It also includes the costs of setting up the factory again.

526 Mr Sterling gave evidence that the estimate was based on the costs of setting up the factory in 2009. He said that the damages calculations were generous to Watpac as they did not take into account increases in costs since 2009.¹⁷¹ However, the amount of the 2009 costs was not disclosed.

527 Mr Sterling's calculations to reach the sum of \$406,441.33 list various costs, but provides little detail of them. The list includes contractors who work with Blow Moulders and injection moulders and associated transport and insurance costs, the costs of a trades assistant, of a hydraulic and mechanical fitter, of an injection moulder specialist and of an electrician. There were also bills associated with Taiwanese blow moulder specialist and injection moulder specialists, who it appears would be required to work on the reinstatement of machinery. Claims were also made for hydraulic oil, the disposal of oil and the rental of storage space machinery.

528 Mr Sterling said that he has considerable experience in arranging for the movement of plant and equipment. and that he has previously organised the removal and installation of equipment in connection with the business.¹⁷²

529 However, none of the contractors was called as a witness and no quotations from them was provided. The need to bring technicians from overseas was not explained.

530 Watpac objected to Mr Sterling's calculations and argued that his calculations were a mixture of hearsay and estimate.

Conclusion

¹⁷¹ T271
¹⁷² T261 and 2669

531 It is clear enough that Sterling Enterprises would be likely to incur costs associated with rectifying the floor in removing, storing and reinstalling the machinery at the factory. But the Court cannot speculate about such costs.

532 The amount claimed by Sterling Enterprises has not been proved. However, Mr Clack also gave evidence about this issue and put the cost at \$93,000. I would have accepted that figure. As stated in respect of the warehouse floor costs, I consider that Mr Clack had the specialised knowledge and instruction to make such an estimate.

(ii) Rectification of factory floor

533 It is not possible to express any definite conclusion concerning the amount that would be required to rectify the factory floor in circumstances where I have found that no breach of contract has been proved. The cost of rectification would have been found after proof that the floor did not comply with the Contract.

(iii) Estimated loss of production – \$243,869

534 Sterling Enterprises claims the sum of \$243,869 based on Westaflex not being able to produce its products at the factory for six months, while rectification was completed. Mr Sterling gave evidence that during that period Sterling Enterprises would have to purchase required components in order to carry on the business. This would add 20% to Westaflex's costs. This was a conservative estimate, based on figures provided by Mr Ho for 2009/2010. The period of six months was based on his experience of the time that it took to set the factory up.

535 Mr Sterling gave evidence that Sterling Enterprises and Westaflex were not presently making a profit. He said that Sterling Enterprises chose not to make a loss of profits claim due to its experience of how complex, time consuming and costly such a claim could be. Instead, it made an increased cost of

working claim.¹⁷³

536 Watpac argued that Mr Sterling's evidence was generalised unsubstantiated assertion.

Conclusion

537 I would have concluded that Sterling Enterprises has not established that Westaflex would suffer the claimed loss of production, or indeed any loss of production during any rectification of the factory floor. The information that Sterling Enterprises provided was too general and lacking in detail. In addition, in the absence of findings about the extent of the defects in the floor, it is not possible to determine for what period a loss of production might occur.

(iv) additional staffing costs due to factory shutdown \$128,467

538 Sterling Enterprises claimed the sum of \$128,467 for labour costs that it would have incurred for standing down and rehiring of staff, for work force management and the need to pay out staff while the rectification of the factory floor occurred. Mr Sterling stated that once the floor was rectified and the equipment moved back in, Sterling Enterprises would have to rehire staff to operate it.¹⁷⁴ Mr Sterling's estimate was based on the costs of hire companies, calculated at April 2011. Mr Sterling was unsure whether the staff were Uniflex or Westaflex employees. The evidence in the case of employment practices in the Sterling group suggests that they were employed by Uniflex.

539 Watpac argued that there was no evidence that the staff were employed by Westaflex. The entitlements are accrued irrespective of any alleged breach of contract. The appropriate method of rectification, ie grinding, would mean no recruitment was required.

Conclusion

¹⁷³ T272-273
¹⁷⁴ T278

540 I would have concluded that this claim had not been established. The staff were probably employed by Uniflex. It is not clear how Sterling Enterprises might be liable to Westaflex in respect of this claim. In addition, the amount of the costs associated with the dismissal of staff would depend on when any rectification of the factory slab occurred. This is because the amount of employment termination payments, including redundancy payments, depends on length of service.

Section D Watpac's Counterclaim

Issue 32: Is Watpac entitled to extensions of time, and if so how many days?

541 This issue is connected to **Issue 7: What was the date for Practical Completion properly adjusted?**

542 Watpac contends that it was delayed in reaching practical completion by qualifying causes of delay.

543 The agreed practical completion date for the warehouse was 14 July 2009, but practical completion occurred on 11 September 2009.

544 Watpac submits that it is entitled to 39 days extension of time by the deeming provisions of clause 34.5 because two Extension of Time (EOT) claims that it made were not responded to within the three days required by the Contract. Watpac seeks delay costs of \$82,000.95 for 39 days at \$2105 per day.

545 The causes of delay, for which the EOTs should be deemed to be granted, were compensable causes which include acts, defaults or omissions of the Superintendent, the Principal or its consultants, agents or other contractors (not being employed by the Contractor): see clauses 1 and 34.9 of the Contract.

546 Mr Artico gave evidence that the claims were submitted to the Superintendent

by email on 26 July 2010.¹⁷⁵ The Superintendent suggested that he did not receive the claims until 16 August 2010. However, I accept Mr Artico's evidence on this issue.

547 Both the Extension of Time claims were rejected by the Superintendent on 19 August 2010. He stated that he had no power to extend the time for practical completion other than for the benefit of the Principal.¹⁷⁶

548 Watpac argued that because the Superintendent failed to assess the EOT claims within 3 days, pursuant to clause 34.5 of the Contract, they were deemed assessed with a direction for the extensions of time claimed.

549 Sterling Enterprises argued that Watpac was not entitled to any delay costs because the Extension of Times claims were submitted well after the date of practical completion and well outside the time fixed by clause 34.3 of the Contract. Further, Watpac was being delayed in reaching practical completion by causes that were not compensable causes, including delays of its own electrical sub-contractor.

550 Clause 34, which deals with Extensions of Time, provides:

34.1 Progress

The *Contractor* shall ensure that *WUC* reaches *practical completion* by the *date for practical completion*.

34.2 Notice of delay

A party becoming aware of anything which will probably cause delay to *WUC* shall promptly give the *Superintendent* and the other party written notice of that cause and the estimated delay.

34.3 Claim

The *Contractor* shall be entitled to such extension of time for carrying out *WUC* (including reaching *practical completion*) as the *Superintendent* assesses ('EOT'), if:

- a) the *Contractor* is or will be delayed in reaching *practical*

¹⁷⁵ CB 10.275 - 329
¹⁷⁶ CB 11.029

completion by a qualifying cause of delay; and

b) the *Contractor* gives the *Superintendent*, within 7 days of when the *Contractor* should reasonably have become aware of that causation occurring, a written claim for an *EOT* evidencing the facts of causation and of the delay to *WUC* (including extent).

If further delay results from a *qualifying cause of delay* evidenced in a claim under paragraph (b) of this subclause, the *Contractor* shall claim an *EOT* for such delay by promptly giving the *Superintendent* a written claim evidencing the facts of that delay.

34.4 Assessment

When both non-qualifying and *qualifying causes of delay* overlap, the *Superintendent* shall apportion the resulting delay of *WUC* according to the respective causes' contribution.

In assessing each *EOT* the *Superintendent* shall disregard questions of whether:

- a) *WUC* can nevertheless reach *practical completion* without an *EOT*; or
- b) the *Contractor* can accelerate,

but shall have regard to what prevention and mitigation of the delay has not been effected by the *Contractor*.

34.5 Extension of time

Within 3 days after receiving the *Contractor's* claim for an *EOT*, the *Superintendent* shall give to the *Contractor* and the *Principal* a written *direction* evidencing the *EOT* so assessed. If the *Superintendent* does not do so, there shall be a deemed assessment and *direction* for an *EOT* as claimed.

Notwithstanding that the *Contractor* is not entitled to or has not claimed an *EOT*, the *Superintendent* may in its sole discretion and for the benefit of the *Principal* extend the time for practical completion at any time and from time to time before issuing the *final certificate* direct an *EOT*. The *Contractor* acknowledges and agrees that the *Superintendent*, in exercising this discretion, is under no obligation to do so reasonably, for the benefit of the *Contractor*, or at all.

If the *Superintendent* uses the discretion to direct an *EOT* under this subclause 34.5A:

- a) the *Superintendent* shall give the *Contractor* written notice of such direction; and
- b) the *Contractor* shall not be entitled to any other compensation.

34.6 Practical completion

The *Contractor* shall give the *Superintendent* at least 14 days written notice of the date upon which the *Contractor* anticipates that *practical completion* will be reached.

When the *Contractor* is of the opinion that *practical completion* has been reached, the *Contractor* shall in writing request the *Superintendent* to issue a *certificate of practical completion*. Within 14 days after receiving the request, the *Superintendent* shall give the *Contractor* and the *Principal* either a *certificate of practical completion* evidencing the *date of practical completion* or written reasons for not doing so.

If the *Superintendent* is of the opinion that *practical completion* has been reached, the *Superintendent* may issue a *certificate of practical completion* even though no request has been made.

34.7 Liquidated damages

If *WUC* does not reach *practical completion* by the *date for practical completion*, the *Superintendent* shall certify, as due and payable to the *Principal*, liquidated damages in *Item 24* for every day after the *date of practical completion* to and including the earliest of the *date of practical completion* or termination of the *Contract* or the *Principal* taking *WUC* out of the hands of the *Contractor*.

If an *EOT* is directed after the *Contractor* has been paid or the *Principal* has set off liquidated damages, the *Principal* shall forthwith repay to the *Contractor* such of those liquidated damages as represent the days the subject of the *EOT*.

37.8 Bonus for early practical completion

...

34.9 Delay damages

For every day the subject of an *EOT* for a *compensable cause* and for which the *Contractor* gives the *Superintendent* a claim for delay damages pursuant to subclause 41.1, damages certified by the *Superintendent* under subclause 41.3 shall be due and payable to the *Contractor*.

34.10 Acceleration

..."

551 In the first *EOT*, number 17, Watpac sought an extension for 11 days due to the rescheduling of the pour works to the northern hardstand to accommodate delivery of the client's warehouse racking. Mr Artico had raised with Mr Vincent that there was a problem with the grades in the civil drawings, because the descent from the footpath into the driveway was too steep and that large semi-trailers would bottom out. Mr Vincent did not accept that, but re-designed the hardstands twice. The pouring of the northern hardstand was delayed because Mr Vincent needed to have the racking delivered. This

caused delays between 20 July and 3 August 2009 when the hardstand and associated work was completed.

552 The second Extension of Time claim, number 18, related to two main issues.

One was the requirement of the building surveyor that Watpac:

“5} Provide a rail not more than 50mm above the stair nosing for the two stairs leading from the first floor to the factory.”

553 The railings were not part of the Contract works. There were delays in having the building surveyor inspect the works.

554 There was also an issue with the occupant warning system. When tested, the audibility was found to be less than required by the Standard. Installation of four additional speakers was completed on 3 September 2009.

555 Watpac argued that Mr Artico was not challenged by Sterling Enterprises in relation to his evidence of the reasons for the delays. Sterling Enterprises had possession of the warehouse from July 2009 and undertook its own works from that point.

556 Watpac also sought to rely on an estoppel argument to prevent Sterling Enterprises relying on the provisions of the extension of time clause. Watpac said that throughout the project it had been led to believe that liquidated damages were not going to be an issue.¹⁷⁷ However, that argument was not pleaded and Watpac did not pursue it.

557 Watpac argued that the “prevention principle” applied so that the time for an extension of time claim was enlarged. Where the acts or omissions of the principal, or proprietor, cause the contractor to fail to complete works by the date for practical completion and where there is no power under the Contract to grant the contractor relief, then the express obligation to complete by the stipulated date is replaced by an implied obligation to complete within a

¹⁷⁷ CB 10.275

reasonable time.¹⁷⁸

558 However, even where there was the a contractual provision dealing with delays, the Superintendent was obliged to exercise his power independently. The Superintendent merely adopted the assessment of the principal and took into account the quantity surveyor's decision. Mr Vincent was not called to explain his actions.

559 Sterling Enterprises relied on the fact that both EOT claims were submitted nearly a year after the alleged delay events, far outside the seven day period prescribed by the Contract. They were time barred and the delay suggested that they are not genuine delays. There was no provision in the Contract to permit the seven day period in clause 34.3 to be extended.

560 Sterling Enterprises, in the alternative, submitted that Watpac has not satisfied the onus of proving that the delays were due to a compensable cause. There has been no critical path analysis provided and no proof that the project as a whole had been delayed. There were other concurrent delays caused by Watpac that delayed practical completion, including delays by Watpac's electrical subcontractor. These included the existence of outstanding items that needed to be completed to obtain Certificates of Compliance for electrical and fire safety works. The Certificate of Compliance was required in order to obtain the Occupancy Permit.¹⁷⁹ The Building Surveyor's Inspection Notice raised a number of mandatory regulatory issues, including some pertaining to fire safety.¹⁸⁰

Conclusion

561 Watpac's Extension of Time claims have not been established. The Claims were not submitted within the time required by the Contract. Therefore no

¹⁷⁸ See Halsbury's *Laws of Australia*, Volume 3(2), [65-1020]
¹⁷⁹ CB15.105 – 107, cf T705
¹⁸⁰ CB15.121

deemed assessment occurred.

562 Nor am I persuaded, that the prevention principle applies to require the certifying of the extensions of time. The ambit of that principle was not the subject of any detailed submission. The Contract contained a complete regime for delays and extensions of time.

563 In any event, I am not persuaded that the delays which are the subject of Watpac's application were caused by the acts or omissions of Sterling Enterprises. There was conflicting evidence relevant to this issue. Watpac established that the delays on which it relies occurred. However, Sterling Enterprises established that there were other outstanding issues, eg the fire safety issues, which were the cause of delays in completing the project.

Issue 33: Is Watpac entitled to delay costs and if so how many days and at what daily rate?

Conclusion

564 As the claims for extensions of time fail, then Watpac is indebted to Sterling Enterprises for liquidated damages for the period 14 July 2009 to 11 September 2009, being a total of 8.4 weeks which is \$42,142, which is the amount certified by the Superintendent.

Issue 31: What sum is Watpac entitled to on account of contract works?

565 Watpac claims \$368,585.00 being the balance of the payments due for the contract works. This sum is reached by the total of the adjusted Contract sum of \$4,549,505.00, less the sum of \$4,214,427.00 paid by Sterling Enterprises to Watpac. The balance is \$335,078.00 plus GST, being \$368,585.00. From that sum must be deducted the liquidated damages of \$42,142 that Sterling Enterprises has been awarded.

566 Mr Akrigg gave evidence of the make up of the claim and of the payments

received from Sterling Enterprises. Watpac has not received any payment since 3 September 2009.

567 Sterling Enterprises argued that Watpac had failed to complete the works in accordance with the contract and was not entitled to payment of the contract sum.¹⁸¹ It contended that, if it was awarded damages to rectify the concrete slabs, then Watpac was entitled to set off \$199,936, excluding GST, being the unpaid balance of the contract as certified by the Superintendent on 25 August 2010.

Conclusion

568 The difference between the Superintendent's certificate of 25 August 2010 in the sum of \$219,932 and Watpac's claim is substantially the amount of the liquidated damages and an amount of \$93,000 for a concreting item. The nature of the concreting item, and why Mr Vincent deducted it, was not explained in evidence.

569 Mr Artico gave evidence, which I accept, that Watpac rectified the defects that were required by the Superintendent under the Contract. No basis has been shown for deducting the concreter's item from the amount certified by the Superintendent. In that sense Watpac has performed the building works required by the Contract, even though it is liable to damages for rectification.

570 Watpac is entitled to the balance of moneys due to it under the building Contract. It claims the sum of \$368,585 less the liquidated damages of \$42,142, leaving \$326,443.00.

571 The amount to which Watpac is entitled exceeds the amount to which Sterling Enterprises is entitled by way of damages.

572 In the circumstances, I consider that it is appropriate to give judgments on the

¹⁸¹ T1248 -1249

claim to Sterling Enterprises and on the counterclaim to Watpac.

Issue 34 Is Watpac entitled to a variation?

573 Watpac claimed that it was entitled to a variation. Sterling Enterprises disputed this claim. However, Watpac conceded that it was unable to quantify its entitlement and in effect did not pursue it.

Issue 35 Is Watpac entitled to interest and enforcement costs in relation to the adjudication amount and if so in what sum?

574 Watpac also claims the interest that has accrued and the enforcement costs of the adjudication sum and the Court judgment that has been paid into the interest bearing account.

575 Watpac argues that it was entitled on an interim basis to receive the benefit of that sum and should receive the interest that has accrued on it.

576 Progress payments made under the *Building and Construction Industry Security of Payment Act 2002* do not affect any proceedings arising under a construction contract save as is provided in s47(3) and (4). Section 47(3) is relevant and provides:

“In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal –

- (a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order, determination or award it makes in these proceedings; and
- (b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.”

577 Sterling Enterprises argued that the adjudication fees are part of the adjudicated amount which has been certified by the authorised nominating authority and entered as a judgment of this Court on 27 January 2011.

578 Sterling Enterprises submitted that Watpac cannot claim the interest payable

on the sum deposited in the solicitors' trust account.

Conclusion

579 The appropriate manner in which to deal with the moneys contained in the solicitor's trust account is likely to be affected by the amounts that I have awarded to each party.

580 I refer to the judgment of Dixon J in *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 4)*¹⁸² in that regard.

581 I will hear any further submissions the parties wish to make in respect of the moneys contained in the interest bearing account, including the interest component.

582 The *Act* provides that both parties are jointly responsible for the adjudicator's fees and expenses:s45(3) and (4).

Issue 36 is Watpac entitled to the return of the second bank guarantee together with the cost of it being provided late?

Issue 10 Did on or about 13 October 2011, the Superintendent send Sterling Enterprises and Watpac a memorandum confirming that the separate defects liability period of twelve months as directed by him on 9 September 2010, commenced at 4.00pm on 11 May 2011?

583 The Superintendent did issue a memorandum on 13 October 2011 that a twelve months rectification period did commence at 4pm on 11 May 2011.¹⁸³

584 Watpac seeks an order for the return of its bank guarantee that it provided under the Contract. It is valued at \$108,602.00. Watpac argued that the defects liability period expired on 7 December 2011, as there was no contractual entitlement to extend the defects liability period after completion.

¹⁸² [2012] VSC 155
¹⁸³ CB 14.084

Clause 5 of the Contract deals with Security. Clause 5.4 provides:

“Upon the issue of the *certificate of practical completion* a party’s entitlement to *security* (other than in *Item 13(e)*) shall be reduced by the percentage or amount in *Item 13(f)* or *14(d)* as applicable, and the reduction shall be released and returned within 14 days to the other party.

The *Principal’s* entitlement to *security* in *Item 13 (e)* shall cease 14 days after incorporation into the *Works* of the plant and materials for which that *security* was provided.

A party’s entitlement otherwise to *security* shall cease 14 days after *final certificate*.

Upon a party’s entitlement to *security* ceasing, that party shall release and return forthwith the *security* to the other party.”

585 On 7 September 2010, Mr Artico requested the Superintendent to release Watpac’s bank guarantee.¹⁸⁴ His letter stated that:

“As the completion of the Defect Liability Period is due on September 11 2010, we request the release of our Bank Guarantee G314550 to the value of \$108,602.00.”

586 The Superintendent responded on 9 September 2010 referring to defects in the report and detailing what were said to be defects in the works. The Superintendent directed under clause 35(b) of the Contract, that there be a separate defects liability period of 12 months commencing at 4.00pm on the date that the rectification was completed.

587 The Superintendent responded on 18 November 2010 confirming that the “defects liability period would commence at 4pm on the day upon which the contractor complete the rectification that I have directed.”¹⁸⁵

588 Watpac argued that the Superintendent’s decision was invalid because he was only entitled to extend the defects liability in respect of defects notified prior to the original defects liability period.

589 Mr Artico gave evidence that the last defect notified during the original period

184 CB 11.120
185 CB11.154

concerned balcony tiling and that was completed by December 2010.¹⁸⁶ The defects liability period expired on 17 December 2011.

590 In the alternative, Watpac argued that, at the latest, it became entitled to the return of the bank guarantee on 6 July 2012, being 14 days after the final certificate was issued on 21 June 2012.

591 Mr Akrigg gave evidence about the cost of the bank guarantee. The daily charge incurred by Watpac for maintaining the bank guarantee is \$11.51 per day.

592 Clause 35 of the Contract, the Defects Liability clause, provides:

“The *defects liability period* stated in Item 27 shall commence on the *date of practical completion* at 4.00pm.

The *Contractor* shall carry out rectification at times and in a manner causing as little inconvenience to the occupants or users of *the Works* as is reasonably possible.

As soon as possible after the *date of practical completion*, the *Contractor* shall rectify all defects existing at the *date of practical completion*.

During the *defects liability period*, the *Superintendent* may give the *Contractor* a *direction* to rectify a defect which:

- a) shall identify *the defect* and the date for completion of its rectification; and
- b) may state a date for commencement of the rectification and whether there shall be a separate *defects liability period* therefor (not exceeding that in Item 27, commencing at 4.00pm on the date the rectification is completed and governed by this clause).

If the rectification is not commenced or completed by the stated dates, the *Principal* may have the rectification carried out by others but without prejudice to any other rights and remedies the *Principal* may have. The cost thereby incurred shall be certified by the *Superintendent* as moneys due and payable to the *Principal*.”

593 Sterling Enterprises argued that Watpac could only succeed on this application if there were no defects in the slab justifying the holding back of the bank guarantee. By way of analogy, Watpac had retained some \$60,000 of Civiworks retention money.

¹⁸⁶ CB2.114

Conclusion

594 There was no evidence for Mr Vincent about his reasons for extending the defects liability period. I accept Mr Artico's evidence concerning when the defects were completed. Watpac was entitled to the return of the bank guarantee on 17 December 2011. Sterling Enterprises has failed to return it. Watpac is entitled to damages for Sterling Enterprises' breach of the Contract by not returning the bank guarantee at that time.

595 I accept Mr Akrigg's calculation of the cost to Watpac of the bank guarantee.

596 Watpac is entitled to the sum of \$11.51 per day from 17 December 2011 to 22 May 2013. That totals \$6,019.73.

597 I declare that Watpac is entitled to the second bank guarantee.