

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2014 0152

GROCON CONSTRUCTORS (VICTORIA)  
PTY LTD  
(ACN 148 006 624)

Applicant

v

APN DF2 PROJECT 2 PTY LTD  
(ACN 128 883 581)  
and  
GROCON (SCOTS CHURCH) PTY LTD  
(ACN 143 199 491)

First Respondent

Second Respondent

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JUDGES:

SANTAMARIA, KYROU and McLEISH JJA

WHERE HELD:

MELBOURNE

DATE OF HEARING:

16 June 2015

DATE OF JUDGMENT:

23 July 2015

MEDIUM NEUTRAL CITATION:

[2015] VSCA 190

JUDGMENT APPEALED FROM:

*APN DF2 Project 2 Pty Ltd v Grocon Constructors (Victoria) Pty Ltd* [2014] VSC 597 (Vickery J)

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BUILDING CONTRACT - Principles for construction of commercial contracts - Relationship between building contract and side deed - Meaning of phrase 'actual ... cost payable' - Judge erred in interpreting phrase as meaning 'costs actually paid' - Application for leave to appeal granted and appeal allowed.

BUILDING CONTRACT - Principles for implying a term into a commercial contract - Judge erred in implying a term requiring builder to provide to principal documents evidencing payment to subcontractors.

BUILDING CONTRACT - Principles for determining when a term of a contract is to be inferred - Judge correctly held that no term is to be inferred requiring builder to provide to principal documents evidencing payment to subcontractors.

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APPEARANCES:

Counsel

Solicitors

For the Applicant

J J Gleeson QC with  
R G Craig and A G Rollnik

Minter Ellison

For the First Respondent

A J Myers QC with  
P Zappia QC and O Bigos

Arnold Bloch Leibler

For the Second Respondent

D J McAndrew

Thomson Geer

SANTAMARIA JA  
KYROU JA  
McLEISH JA:

*Introduction and summary*

1 This is an application for leave to appeal from a decision of the trial division that the applicant ('Grocon'), as building contractor, breached its obligations to the respondents ('APN' and 'Scots Church', collectively 'principals'), under a contract for the design and construction of a building ('Project') at 150 Collins Street, Melbourne ('Land').<sup>1</sup> As Scots Church is related to Grocon,<sup>2</sup> it did not take an active part at trial or at the hearing of Grocon's application in this Court.

2 The trial judge's finding of a breach of contract related to Grocon's refusal to provide certain records to APN to enable APN to verify costs actually paid by Grocon in completing the Project ('payment records'). The judge's finding was based on the following reasoning:

- (a) The obligation of the principals to make progressive payments under the design and construction contract that was entered into on 4 July 2012 ('D&C Contract')<sup>3</sup> was amended by a side deed dated 4 July 2012 ('Side Deed').<sup>4</sup> Consequently, the phrase 'Actual Trade Cost' in cl 2 of the Side Deed – which is defined in cl 1.1 of that deed – applied to that obligation and determined the amounts payable to Grocon.<sup>5</sup>
- (b) The phrase 'actual trade, supplier, consultant or subcontract cost payable by [Grocon]' in the definition of 'Actual Trade Cost' in cl 1.1 of the Side Deed ('Disputed Phrase') meant costs actually paid by Grocon to its suppliers, consultants and subcontractors.

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1 *APN DF2 Project 2 Pty Ltd v Grocon Constructors (Victoria) Pty Ltd* [2014] VSC 597 ('Reasons').

2 The ultimate holding company of both companies is Grocon Group Holdings Pty Ltd.

3 The obligation to make progressive payments is set out at [19] below.

4 Reasons [78], [83], [92], [104], [106], [111(a)]. The extent to which the Side Deed amended the D&C Contract is discussed at [49]–[80] below.

5 Clauses 1.1 and 2 of the Side Deed are set out at [30]–[32] below.

- (c) Based on the interpretation at [2(b)] above, the following term 'is implied into the D&C Contract, as amended by clause 2 of the Side Deed': '[APN] is entitled to be provided with and examine records evidencing actual trade, supplier and subcontract costs incurred and paid by [Grocon] for work undertaken, materials supplied, defects rectified or services provided to or on behalf of [Grocon] for the purposes of the D&C Contract, including any bank statements, receipts, cheque books, recipient created tax invoices, bill notes and/or EFT transfer records in the possession or control of [Grocon]' ('Implied Term').<sup>6</sup>
- (d) An obligation on the part of Grocon to provide to APN payment records of the type referred to in [2(c)] above cannot be inferred from – as distinct from implied into – the D&C Contract as amended by the Side Deed.
- (e) By refusing to provide to APN the payment records referred to in [2(c)] above, Grocon breached the D&C Contract.

3 Grocon seeks leave to appeal from the findings summarised at [2(b)], [2(c)] and [2(e)] above on the following proposed grounds:

- (a) The word 'payable' in the Disputed Phrase meant 'owed' or 'due', rather than 'paid', and consequently Grocon became entitled to payment upon incurring a liability for the costs of a supplier, consultant or subcontractor.
- (b) The conditions that must be satisfied before a court can imply a term into a contract were not met in relation to the Implied Term.

4 APN has filed a notice of contention in relation to the finding summarised at [2(d)] above. APN seeks to support the decision below on the basis that an obligation on the part of Grocon to provide the payment records is to be inferred from various provisions of the D&C Contract and the Side Deed.

5 For reasons that follow, we have concluded that the application for leave to appeal should be granted, that the appeal should be treated as having been heard

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<sup>6</sup> Paragraph 2 of Vickery J's order dated 16 November 2014 ('Impugned Order'). See also Reasons [83], [106], [111(b)].

immediately and that the appeal should be allowed.

### *Facts*

6 The most relevant documents for the determination of the application for leave to appeal are a joint venture agreement dated 30 November 2011 between APN and Scots Church ('JVA'), the D&C Contract, the Side Deed and an undated independent certifier deed ('IC Deed') between APN, Scots Church, GPT Funds Management Ltd ('GPT'), Grocon and RCP (Vic) Pty Ltd ('RCP'). After setting out the relevant provisions of those agreements, we will describe the circumstances giving rise to the dispute between the parties.

### *JVA*

7 On 7 April 2008, APN entered into a 99 year lease with the owner of the Land. It subsequently entered into the JVA with Scots Church to develop the Land, by constructing a building upon it, and to sell the building and APN's interest as lessee.

8 The Recitals to the JVA relevantly provide:

- B APN has agreed to develop the Land with [Scots Church] as co-developer upon APN and [Scots Church] securing a tenant or tenants for 50 per cent or more of the Development and securing funding for the Project as contemplated by this Agreement.
- C APN and [Scots Church] will participate as co-developers on a 50/50 basis.
- D APN and [Scots Church] will jointly enter into a Building Contract with the Head Contractor to carry out the Development.
- E It is the intention of APN and [Scots Church] to effect the Project and sell the Property as soon as it is advantageous to do so, which may be at, before or after Practical Completion.

9 Clause 1.1 of the JVA relevantly defines:

- (a) '**Building Contract**' as the contract that became the D&C Contract;

- (b) 'Development' as the building and improvements to be erected on the Land as part of the Project;
- (c) 'Head Contractor' as Grocon;
- (d) 'Project' as the development, leasing and sale of the Property;
- (e) 'Property' as the improvements on the Land and APN's interest in the Land; and
- (f) 'Works' as all works necessary to complete the Development.

10 Clause 9.1 of the JVA provides that APN and Scots Church will appoint Grocon as the Head Contractor and enter into the Building Contract with Grocon to procure the construction of the Works. Clause 9.2 is headed 'Building Contract' and relevantly provides:

The appointment of the Head Contractor will be contingent upon:

- (a) the Head Contractor providing a price for the performance of the Works which is a *cost only price* consistent with the principles set out in Schedule 1 [of the JVA] and otherwise acceptable to the Management Committee;
- (b) the Building Contract being in a form acceptable to the Management Committee and providing that the Head Contractor must:
  - (i) submit all payment claims on an '*open book*' basis;
  - ...
  - (v) enter into a side deed with [APN and Scots Church] in relation to the processes for claims and costs ...<sup>7</sup>

11 Schedule 1 of the JVA, to which cl 9.2(a) refers, is headed 'Building Contract Pricing Principles' and relevantly provides:

- 1. Objective is to deliver the construction *at cost by way of open book tendering*.
- ...
- 3. Structure (including all jump forms, full protection systems and scaffold) at *actual cost*.

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<sup>7</sup> Emphasis added.

4. Preliminaries of 13.2% ... Nil margin.<sup>8</sup>

*D&C Contract*

12 On 4 July 2012, APN and Scots Church, as 'Principal', entered into the D&C Contract with Grocon, as 'Contractor'.<sup>9</sup> The D&C Contract comprises:

- (a) a 'Formal Instrument of Agreement';
- (b) 'General Conditions of Contract for Design and Construct', including Annexures, Appendices and Schedules ('General Conditions'); and
- (c) the 'Principal's Project Requirements'.

13 Clause 1 of the Formal Instrument of Agreement applies to that agreement the definitions in the General Conditions. They include:

- (a) '**Actual Trade Cost**', which is defined to mean:
  - (a) the actual trade, supplier, consultant or subcontract cost payable by [Grocon] for work undertaken, materials supplied, defects rectified or services provided to or on behalf of [Grocon] *in respect of the variation*; and
  - (b) the amount payable to any Project Consultant as defined in the [JVA] for the provision of services *in respect of the variation*;<sup>10</sup>
- (b) '**Works**', which is defined to mean 'the whole of the work to be executed in accordance with the [D&C] Contract'.

14 Clause 2 of the Formal Instrument of Agreement states that the three documents described at [0] to [0] above 'comprise the entire contract between [APN and Scots Church] and [Grocon]'. Clause 5 provides that the D&C Contract supersedes any prior agreement, understanding, correspondence, documentation or discussion on anything connected with that subject matter.

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<sup>8</sup> Emphasis added.

<sup>9</sup> Grocon Constructors Pty Ltd is also a party to the D&C Contract as guarantor of Grocon's obligations under the contract. As the role of the guarantor is not relevant, we will not make any reference to it.

<sup>10</sup> Emphasis added.

15 Clause 3 of the Formal Instrument of Agreement states that the 'Works' the subject of the D&C Contract comprise 'the design, construction, commissioning and completion of an office building on the [Land] and ancillary retail component and any additional works required to be completed by [APN and Scots Church], including ... associated works as more fully defined and described in the [D&C] Contract.'

16 Clause 4 of the Formal Instrument of Agreement, which is titled 'Fixed Contract Sum', relevantly provides:

[Grocon] must carry out the work under the [D&C] Contract in accordance with the [D&C] Contract (other than the variations to the Works arising from the Agreed Base Building Modifications and the Agreed Fitout Works or other variations arising under [the D&C] Contract) for the fixed lump sum amount of \$109,455,897 (exclusive of GST) but excluding any additions or deductions which may be required to be made under the [D&C] Contract ('**Fixed Contract Sum**') (see trade breakdown schedule of Fixed Contract Sum set out in Annexure Part M for the purposes of clause 42.1).

17 Clause 3.1 of the General Conditions obliges APN and Scots Church to pay Grocon 'for work for which [they] accepted a lump sum (being the Works other than the Agreed Fitout Works) the lump sum comprising the Fixed Contract Sum, adjusted by any additions or deductions made pursuant to the [D&C] Contract.'

18 Clause 40.5 of the General Conditions is titled 'Valuation' and provides that, in circumstances where a valuation is to be made, the principals shall pay Grocon or Grocon shall pay the principals an amount ascertained by the superintendent in accordance with the clause. Clause 40.5(d) relevantly provides:

- (d) if Clause 40.5(a), (b) or (c) does not apply:
  - (i) if an amount is payable to [Grocon], the Actual Trade Cost incurred for the variation plus 15% of that amount;
  - (ii) if an amount is payable to [APN and Scots Church], the Actual Trade Cost that will not be incurred as a result of the variation ...

19 Clause 42.1 of the General Conditions is titled 'Payment Claims, Certificates, Calculations and Time for Payment'. It sets out, among other things, what Grocon

was required to deliver to the independent project superintendent in support of its payment claims and the process for assessment of those claims. It relevantly provides:

[A]t the times for payment claims or upon completion of the stages of the work under the [D&C] Contract stated in Annexure Part A and upon the issue of a Certificate of Practical Completion ... [Grocon] shall deliver to the Superintendent (with a copy provided to [APN and Scots Church]) claims for payment supported by:

(a) evidence of the amount due by [APN and Scots Church] to [Grocon];

...

(e) such information as the Superintendent may reasonably require.

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

...

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

...

[W]ithin 14 days of issue by the Superintendent of the Superintendent's payment certificate and within 14 days of the issue of a Final Certificate, [APN and Scots Church] shall pay to [Grocon] or [Grocon] shall pay to [APN and Scots Church], as the case may be, an amount not less than the amount shown in such certificate as due to [Grocon] or to [APN and Scots Church], as the case may be. A payment made pursuant to this Clause 42.1 shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, [APN and Scots Church] or [Grocon], as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable.

Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily

but shall be a payment on account only, except as provided under Clause 42.6. ...

20 Item 46(a) of Part A of the annexure to the General Conditions specifies the first day of each month as the time for 'payment claims' for the purposes of cl 42.1. The Trade Breakdown Schedule in Part M of that annexure provides a cost breakdown of the Fixed Contract Sum of \$109,455,897. It allocates specific cost amounts for various items, such as \$13,159,840 for 'External Walls', \$13,155,897 for 'Preliminaries' and \$4,235,370 for 'Builders Margin'.

21 Clause 42.5 of the General Conditions is titled 'Final Payment Claim' and relevantly provides:

Within 28 days of the expiry of the Defects Liability Period ... [Grocon] shall provide the Superintendent (with a copy provided to [APN and Scots Church]) with completed certificates in such form as [APN and Scots Church] may reasonably require from Consultants and subcontractors (as relevant) prior to the end of the Defects Liability Period under clause 9.6 ... and a final payment claim endorsed 'Final Payment Claim'.

In addition to claims for payment required to be included in a payment claim under Clause 42.1, [Grocon] shall include in the Final Payment Claim all claims for moneys which [Grocon] considers to be due from [APN and Scots Church] arising out of any alleged breach of the [D&C] Contract. All such claims, whether under Clause 42.1 or this Clause 42.5, which have not already been barred, shall be barred after the expiration of the period for lodging a Final Payment Claim.

22 Pursuant to cl 37 of the General Conditions and item 44 of Part A of the annexure, the 'Defects Liability Period' is 12 months commencing 'on the Date of Practical Completion'.

23 Clause 42.6 of the General Conditions deals with the issue of a 'Final Certificate' by the superintendent. It relevantly provides:

Within 10 Business Days of receipt of [Grocon's] Final Payment Claim ... the Superintendent shall issue to [Grocon] and to [APN and Scots Church] a final payment certificate endorsed 'Final Certificate'. In the certificate the Superintendent shall certify the amount which, in the Superintendent's opinion, is finally due from [APN and Scots Church] to [Grocon] or from [Grocon] to [APN and Scots Church] arising out of the [D&C] Contract or any alleged breach thereof.

24 Clause 43.1 of the General Conditions provides that Grocon must, as a condition precedent to certification of a 'progress claim', give 'a duly signed written statement in a form approved by the Superintendent that all employees and subcontractors of [Grocon] engaged in the carrying out of the Works have been paid all moneys properly due and payable'.

25 Clause 43.2 of the General Conditions, which is titled 'Payment of subcontractor or consultant by Principal', relevantly provides:

Despite any other provision of the [D&C] Contract [APN and Scots Church] may in [their] absolute discretion (including where [APN and Scots Church] [become] aware that a subcontractor or consultant is entitled to suspend work which forms part of work under the [D&C] Contract pursuant to the Security of Payment Act) pay out of any moneys due or to become due to [Grocon] any moneys owing by [Grocon] to a subcontractor or consultant in relation to the execution of work under the [D&C] Contract and any payment under this clause 43.2 is deemed to have been paid to [Grocon] under the [D&C] Contract. ... [APN and Scots Church] must not pay under this clause 43.2 any amount greater than the amount specified as payable in the declarations or documents provided to the Superintendent under clause 43.1.

26 Clause 47 of the General Conditions sets out dispute resolution mechanisms. Those mechanisms could be used by either party to dispute the superintendent's assessment of a claim.

27 For convenience, unless otherwise specified, all future references to clauses of the D&C Contract are to clauses of the General Conditions.

#### *Side Deed*

28 Also on 4 July 2012, APN and Scots Church as 'Developer' entered into the Side Deed with Grocon as 'Contractor'. Recital G states that Grocon agreed to enter into the deed for the purposes of cl 9.2 of the JVA. Cause 8.1(a) provides that, '[e]xcept as expressly amended by this Deed, the [D&C] Contract shall continue to have full force and effect.'

29 Schedule 2 of the Side Deed, which is titled 'Subcontract Selection Process', sets out 'JV Open Book Tendering Principles' in relation to the objectives contained in

sch 1 of the JVA. Those principles include approval by APN and Scots Church of 'trade packages' for Grocon to put out to tender and pre-tender budgets for each trade package.

30 Clause 1.1 of the Side Deed relevantly defines:

- (a) 'ACL' as 'the advanced consequential loss [insurance] policy ... as required to be provided by [Grocon] ... with an estimated cost of \$155,897.00 (excluding GST)';
- (b) 'Actual Trade Cost' as:
  - (a) the actual trade, supplier, consultant or subcontract cost payable by [Grocon] for work undertaken, materials supplied, defects rectified or services provided to or on behalf of [Grocon] for the purposes of the [D&C] Contract (including any Agreed Fit Out Works as defined in the [D&C] Contract, compliance with GBCA<sup>11</sup> and NABERS<sup>12</sup> Ratings); and
  - (b) the amount payable to Agreed Project Consultants for the provision of services in respect of the [D&C] Contract; and
  - (c) any excess payable under the ACL – such amount to be treated as variation should it become payable.
- (c) 'Agreed Project Consultants' as 'the consultants specified in Schedule 3';<sup>13</sup>
- (d) 'Assessment Date' as 'the issue of the Final Certificate (as described in the [D&C] Contract)';<sup>14</sup>
- (e) 'Fixed Contract Sum' as 'the amount of \$109,455,897.00 which is the amount payable to [Grocon] under the [D&C] Contract'; and
- (f) 'Preliminaries Amount' as 'an amount fixed at \$13,155,897 (including \$155,897.00 for the ACL) (excl GST) for the scope of preliminaries items as set out in Schedule 1'.

31 Clause 2 of the Side Deed, which is titled 'Actual Trade Costs and Preliminaries',

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<sup>11</sup> Green Building Council of Australia.

<sup>12</sup> National Australia Built Environment Rating System.

<sup>13</sup> Schedule 3 lists certain consultants and the agreed sums to be paid to them.

<sup>14</sup> See cl 42.6 of the D&C Contract which is set out at [21] above.

has the effect of replacing Grocon's entitlement to payment of the Fixed Contract Sum of \$109,455,897 under the D&C Contract with an entitlement to payment of the 'Actual Trade Cost' (as defined) plus the 'Preliminaries Amount' of \$13,155,897 without any builder's margin for profit. Clause 2 also provides for how cost overruns and cost savings (relative to the amount of \$96,300,000, being the Fixed Contract Sum less the Preliminaries Amount) are to be apportioned between APN and Scots Church and when they are payable to Grocon.

32 Clause 2 of the Side Deed relevantly provides:

- (a) [Grocon] agrees to pay to [APN and Scots Church], to the extent that this is a positive figure:
  - (i) the amount payable by [APN and Scots Church] to [Grocon] under and in accordance with the [D&C] Contract, including for variations; less
  - (ii) the amount calculated as follows:
    - (A) the total of the Actual Trade Cost and the Preliminaries Amount ... at the times as stipulated for payment of progress claims in the [D&C] Contract ...; and
    - (B) any margin for profit payable by [APN and Scots Church] to [Grocon] will be calculated at the rate of 0%.
- (b) The parties irrevocably agree that the amount payable by [Grocon] under clause 2(a) ('**Set Off Amount**') will be set off progressively against each progress claim under the [D&C] Contract and is not required to be paid by [Grocon] until [APN and Scots Church make] a payment on account of the relevant progress claim at least equal to the Set Off Amount. The Set Off Amount will be dealt with by [Scots Church] and APN in accordance with clause 2(e).
- (c) [APN and Scots Church agree] to pay to [Grocon], to the extent that this is a positive figure:
  - (i) the amount calculated as follows:
    - (A) the total of the Actual Trade Cost and the Preliminaries Amount ... at the times as stipulated for payment of progress claims in the [D&C] Contract; and
    - (B) any margin for profit payable by [APN and Scots Church] to [Grocon] will be calculated at the rate of 0%; less
  - (ii) the amount payable by [APN and Scots Church] to [Grocon]

under and in accordance with the [D&C] Contract, including for variations; and

(d) [APN and Scots Church] must pay any amount payable under clause 2(c) as and when progress claims are due under the [D&C] Contract.

(e) APN and [Scots Church] agree that to the extent there are any net positive differences as calculated under clause 2(a) ... that the net positive difference will be maintained by [APN and Scots Church] in its project budget cash flow and bank account as 'Contractor's Contingency' to be available for payment of any subsequent net negative difference (eg cost over run) claimed by [Grocon] at a later date until at least the Assessment Date (unless APN and [Scots Church] otherwise agree in writing).

...

(g) To the extent that either [Grocon's] rights against [APN] or [Scots Church] under the [D&C] Contract or APN and [Scots Church's] rights as Developer against [Grocon] under the [D&C] Contract are inconsistent with this clause 2 then, to the extent of that inconsistency, each of APN, [Scots Church] and [Grocon] irrevocably waives those rights as against each other, as applicable.

(h) In consideration of [Grocon], APN and [Scots Church] agreeing to fix the Preliminaries Amount in accordance with this Deed, [Scots Church] and APN agree that the [JVA] (including clauses 2.3, 16.2 and 23 of it) is varied as follows:

(i) if the Actual Trade Cost at the Assessment Date is below \$96.3m (being the Fixed Contract Sum less the Preliminaries Amount) the first \$3,000,000.00 of that saving up to \$93.3m is to be shared between APN and [Scots Church] as follows:

APN 100%, [Scots Church] 0%

(and any savings on the Actual Trade Costs beyond \$93.3m are thereafter enjoyed as per Clause 2.3 of the [JVA].)<sup>15</sup>

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

APN 50%, [Scots Church] 50%

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

APN 0%, [Scots Church] 100%

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<sup>15</sup> Clause 2.3 of the JVA provides that APN's participation as co-developer is 70% and that of Scots Church is 30%.

...

- (j) As long as [Grocon] has used all reasonable endeavours to recover any additional Actual Trade Costs from its subcontractors, consultants and insurance after the issue of the Final Certificate under the [D&C] Contract, if the Actual Trade Cost increases after the Assessment Date:
  - (i) [APN and Scots Church] shall be obliged to make a further payment of such additional costs to [Grocon] in accordance with this Deed upon 30 days' written notice; and
  - (ii) either APN or [Scots Church] (as the case may be) will make any adjustment payment as between themselves for contribution at that time in accordance with the [JVA] (as varied above).

33 The judge summarised the effect of cl 2 of the Side Deed on the parties' payment entitlements and obligations as follows:

This results in the following payment regime:

1. Grocon is required to carry out the work under the D&C Contract for the fixed lump sum of \$109,455,897;
2. Pursuant to clause 42.1 of the D&C Contract, progress claims must be delivered to the Superintendent supported by 'evidence of the amount due' and shall include the 'value of the work carried out';
3. Pursuant to clause 2 of the Side Deed, at the time for payment of progress claims under the D&C Contract:
  - a) Grocon is required to pay APN (to the extent that this is a positive figure) a set-off amount ('Grocon Payable Amounts') being:
    - i. the amount payable by APN to Grocon under and in accordance with the D&C Contract, less
    - ii. the total of the Actual Trade Cost (as defined under the Side Deed) and the Preliminaries Amount (as defined under the Side Deed); or

On the other hand, APN is required to pay to Grocon (to the extent that this is a positive figure) ('APN Payable Amounts') an amount being:

- iii. the total of the Actual Trade Cost (as defined under the Side Deed) and the Preliminaries Amount (as defined under the Side Deed); less
- iv. the amount payable by APN to Grocon under and in accordance with the D&C Contract.

Grocon Payable Amounts are:

1. set off against each progress claim under the D&C Contract and are not required to be paid by Grocon until APN makes a payment on account of the relevant progress claim at least equal to that amount; and
2. kept by APN in its project budget cash flow and bank account as a 'Contractor's Contingency' to off-set any future [APN Payable] Amounts.

APN Payable Amounts to be paid by APN are paid as and when progress claims are due under the D&C Contract.<sup>16</sup>

### *IC Deed*

34 Although the IC Deed is undated, it is likely that it was executed on, or soon after, 27 June 2012. This is because that date appears at the footer of the IC Deed.

35 Pursuant to cl 2.1 of the IC Deed, APN, Scots Church and Grocon appointed RCP 'to carry out the IC's Obligations.' Clause 1.1 defines 'IC's Obligations' as 'the functions and duties described in Schedule 2 for each Agreement remaining in force.' Clause 1.1 also effectively adopts the definition of 'Works' in the D&C Contract. Schedule 2 refers to the D&C Contract and to a 'Development Agreement' to which APN, Scots Church and GPT are parties,<sup>17</sup> but makes no reference to the Side Deed.<sup>18</sup> In relation to the D&C Contract, sch 2 states that the IC's Obligations are '[a]ll the functions and duties of the Superintendent under the D&C Contract.'

36 Clause 14.4 of the IC Deed provides as follows:

#### **Copies of documents and other materials**

- (a) [APN, Scots Church and Grocon] must give [RCP] information and records in the possession or control of the party or the party's Related Entities which relate to the performance of the party's obligations

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<sup>16</sup> Reasons [31]-[33] (emphasis in original). The judge's summary focuses on the amounts payable under the Side Deed as distinct from the D&C Contract. The interrelationship between the two payments is discussed at [63] below.

<sup>17</sup> As the Development Agreement is not relevant for present purposes, no further reference will be made to it.

<sup>18</sup> The IC Deed refers to a 'Builder's Side Deed' which appears to be a different document from the Side Deed because GPT is said to be a party to the Builder's Side Deed.

under the [D&C] Contract, as reasonably requested by [RCP] for the purposes of performing the IC's Obligations.

- (b) [Grocon] and [APN and Scots Church] must ensure that [RCP] has access at all times to the quality assurance programme and records established and maintained by [Grocon] or [APN and Scots Church] for the Works.

37 Clause 5 of the IC Deed prohibits APN, Scots Church and Grocon from seeking to 'improperly influence or direct [RCP] in its performance of the IC's Obligations.'

*The dispute between the parties*

38 From July 2012, Grocon submitted monthly claims based on the value of the work completed ('Monthly Value Claims') as well as separate monthly claims for its Actual Trade Cost ('Monthly ATC Claims'). While it is clear that the superintendent assessed the Monthly Value Claims in accordance with cl 42 of the D&C Contract, it is not clear whether the superintendent had any involvement in assessing the Monthly ATC Claims.

39 A dispute arose between APN and Grocon as to whether Grocon was obliged to provide to APN copies of documents evidencing actual payments made by Grocon to its subcontractors to enable APN to verify Monthly ATC Claims.

40 On 21 June 2013, APN requested Grocon to produce records, including tax invoices, evidencing actual trade, supplier and subcontract costs incurred and paid by Grocon for work undertaken or services provided for the purposes of the D&C Contract. APN asserted that the D&C Contract and the Side Deed required Grocon to carry out the works 'at cost' and imposed an obligation on Grocon to provide to APN and Scots Church evidence of the 'actual costs incurred' by Grocon in carrying out the works. Correspondence ensued between APN and Grocon which culminated in a letter dated 11 April 2014 from Grocon to APN in which Grocon refused to provide the key documents requested by APN on the basis that APN was not contractually entitled to them. In its earlier letter dated 2 July 2013, Grocon noted that the definition of 'Actual Trade Cost' in cl 1.1 of the Side Deed used the

word 'payable' rather than the word 'paid'.

41 On 6 June 2014, APN commenced the proceeding below against Grocon. By its amended writ and statement of claim dated 21 July 2014, APN added Scots Church as a defendant and sought the following relief:

- (a) a declaration that Grocon is in breach of the D&C Contract and the Side Deed;
- (b) a declaration that '[APN] is entitled to records of actual trade, supplier and subcontract costs incurred and paid by [Grocon] for work undertaken or services provided for the purpose of the D&C Contract including bank statements, receipts, cheque books, recipient created tax invoices, bill notes and/or EFT transfer records'; and
- (c) an order that Grocon forthwith provide to APN the documents referred to at [410] above.<sup>19</sup>

42 Before discussing the issues raised by Grocon's proposed grounds of appeal and APN's notice of contention, we will deal with two preliminary matters which are relevant to those issues. The first matter is whether Grocon made any concession that it was obliged to provide any payment records to APN. The second matter is the extent to which the Side Deed amended the D&C Contract.

*Preliminary issue: Did Grocon make any concession?*

43 In its written submissions, APN asserted that Grocon did not deny the existence of an obligation to provide to APN access to records to verify amounts payable under cl 2 of the Side Deed, and that the dispute between the parties was only about the extent of the records that Grocon was required to provide. At the hearing of the application for leave to appeal, Grocon denied that it had made any concession that it was legally obliged to provide any records to APN.

44 APN explained that the assertion in its written submissions was based on para 15

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<sup>19</sup> APN did not seek any relief against Scots Church.

of Grocon's defence to para 15 of APN's amended statement of claim.

45 Paragraph 15 of APN's amended statement of claim alleged the following:

[Grocon] was and is obliged to provide to the Superintendent and [APN and Scots Church] records evidencing actual trade, supplier, consultant or subcontract costs incurred and paid by [Grocon] for work undertaken or services provided for the purpose of the D&C Contract.

**Particulars**

- (A) The obligation arises by reason of general condition 42.1(a) of the D&C Contract.
- (B) Alternatively, the obligation arises by reason of a term to that effect which is implied into the D&C contract as a matter of business efficacy.
- (C) Further, the obligation arises by reason of clause 2 of the Side Deed.
- (D) Alternatively, the obligation arises by reason of a term to that effect which is implied into the Side Deed as a matter of business efficacy.

46 In para 15 of its defence, Grocon stated:

As to paragraph 15 [of APN's amended statement of claim, Grocon]:

- (a) denies the allegations; and,
- (b) says further that [Grocon] is under no such obligation by reason of the following:
  - (i) pursuant to clause 42.1(a) of the D&C Contract, [Grocon] is required to provide the Superintendent (with a copy to [APN and Scots Church]) of the claims for payment 'supported by evidence of the amount due';
  - (ii) by the operation of clause 2 of the Side Deed, the 'amount due' for the purposes of clause 42.1(a) of the D&C Contract is calculated by reference to *inter alia* the total of the Actual Trade Cost;
  - (iii) the Actual Trade Cost is not defined in the Side Deed as being calculated by reference to costs 'incurred and paid' but rather costs that are 'payable' — being costs in respect of which there is an obligation or liability to pay rather than costs in respect of which the obligation or liability has already been discharged;
  - (iv) further, the obligation fails to satisfy the test for implication of a term as it:
    - A. is not reasonable and equitable;

- B. is not necessary to give business efficacy to the D&C Contract or Side Deed;
- C. is not so obvious that 'it goes without saying';
- D. contradicts the express term of the Side Deed, in the manner identified in paragraph 15(b)(iii) above.

47 In our opinion, there is nothing in para 15 of Grocon's defence which admits that Grocon is under any obligation to provide to APN any payment records independently of the provision of such records to the superintendent under cl 42.1(a) of the D&C Contract. In any event, the proceeding below was not conducted on the basis of any admission on the part of Grocon but rather on the basis that the existence of an obligation on the part of Grocon to provide payment records to APN was the key issue for determination by the judge.

48 However, it is worth noting that the above pleadings indicate agreement between the parties that the claims verification process in cl 42.1 of the D&C Contract applies not only to Monthly Value Claims and the final value claim under the D&C Contract (collectively 'Value Claims') but also to Monthly ATC Claims and the final claim under cl 2 of the Side Deed (collectively 'ATC Claims'). We will discuss this issue further below.

***Preliminary issue: Extent to which Side Deed amended D&C Contract***

49 In their written submissions, the parties referred to the fact that the judge had decided that the Side Deed had amended the D&C Contract, without making any submissions about the extent of that amendment. At the commencement of the hearing of the application for leave to appeal, the Bench invited the parties to make oral submissions on this issue. Those submissions will be discussed shortly.

50 The interrelationship between the Side Deed and the D&C Contract was considered by the judge in a separate proceeding which was heard by him prior to the hearing of the proceeding below. In the earlier proceeding ('Adjudicator Proceeding'), the plaintiff was APN and the defendants were Grocon, Scots Church

and Mr Michael Heaton QC in his capacity as adjudicator in an adjudication under the *Building and Construction Industry Security of Payment Act 2002* ('Act'). The judge delivered his reasons in the Adjudicator Proceeding<sup>20</sup> on the same day as his reasons in the proceeding below.

51 In the Adjudicator Proceeding, APN alleged that a payment claim made by Grocon under cl 2 of the Side Deed was not subject to the Act because it was not made under a 'construction contract' within the meaning of ss 4 and 7(1) of the Act. APN accepted that the D&C Contract was a 'construction contract', but it contended that the Side Deed, pursuant to which the payment claim was made, was not a 'construction contract'.

52 The judge rejected APN's contention and held that the payment claim was made under the D&C Contract, as amended by the Side Deed. His reasons were as follows:

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

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

52 Clause 2(a) and (c) change the rights and obligations of [Grocon] and [APN and Scots Church] under the D&C [Contract] as to what [Grocon] is to pay or receive and as to what [APN and Scots Church are] to receive or pay. This is a variation to the D&C [Contract] in my

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<sup>20</sup> *APN DF2 Project 2 Pty Ltd v Grocon Constructors (Victoria) Pty Ltd* [2014] VSC 596 ('Adjudicator Proceeding Reasons').

view.

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

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

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

**Subcontractor Selection**

In addition to the approval process in clause 9.2 of the [D&C] Contract, the Parties agree that the process which [Grocon] must follow in respect of the letting of any subcontract works will be in accordance with Schedule 2.

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

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

...

The claim was for '*Actual Trade Cost payable by [Grocon] works to end of May '14.*' The claim was made in respect of construction work carried out on the Project, which was in turn governed by the [D&C] Contract as varied by the Side Deed. Although this was expressed in the transmittal as being referable to the Side Deed, in fact it was a claim made under the payment structure of the [D&C] Contract as that structure had been amended by the Side Deed.<sup>21</sup>

- 53 No party to the Adjudicator Proceeding has sought leave to appeal from the decision in that proceeding.

- 54 The judge's reasons in the proceeding below are premised on the correctness of the decision in the Adjudicator Proceeding. The judge made various references to the D&C Contract being amended by the Side Deed. At para 78, he referred to 'the contract constituted by the D&C Contract, as amended in relation to payment, by the Side Deed.' At para 83, he stated that 'clause 2 of the Side Deed ... amends the D&C Contract'.<sup>22</sup> At para 92, he referred to 'the payment regime in the ... D&C Contract,

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<sup>21</sup> Adjudicator Proceeding Reasons [45]-[49], [62] (emphasis in original).

<sup>22</sup> The judge made similar references at paras 106 and 111(a) of his reasons.

as amended by clause 2 of the Side Deed'.<sup>23</sup>

55 No party to the proceeding below has sought to impugn the judge's reasoning in so far as it is based on the Side Deed having varied the D&C Contract. However, in their oral submissions at the hearing of the application for leave to appeal, APN and Grocon disagreed on the extent to which the Side Deed amended the D&C Contract. In particular, they disagreed on whether the provisions in cls 42 and 43 of the D&C Contract – which deal with information disclosure and verification of claims processes – applied to ATC Claims.

56 Grocon submitted that, properly construed, an ATC Claim would constitute a payment claim under cl 42.1 of the D&C Contract. Consequently, the claims verification processes prescribed under the D&C Contract, and those provisions of the IC Deed which applied to the D&C Contract, also applied to the verification of ATC Claims. In support of this construction, Grocon emphasised the following characteristics of the Side Deed and the D&C Contract:

- (a) Pursuant to cl 2 of the Side Deed, an amount calculated as payable for a Monthly ATC Claim must be paid at the time as stipulated for payment of a Monthly Value Claim under the D&C Contract. Consequently, cl 2 of the Side Deed had the effect that the assessment of a Monthly ATC Claim would be simultaneous with a Monthly Value Claim under the D&C Contract.
- (b) Clause 2 of the Side Deed was otherwise silent as to the process for the assessment of an ATC Claim, including what documents should be provided in support of a claim and what rights APN and Scots Church had to call for documents. This was particularly significant because cl 9.2(b)(v) of the JVA provides, and it was said to therefore have been contemplated by the parties, that Grocon would enter into a side deed with APN and Scots Church 'in relation to the processes for claims and costs'.
- (c) The formula prescribed by cl 2 of the Side Deed includes as one of its integers 'the amount payable by [APN and Scots Church] to [Grocon] under and in accordance with the [D&C] Contract, including for variations', namely the

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<sup>23</sup> The judge made a similar reference at para 104 of his reasons.

amount certified by the superintendent as payable by APN and Scots Church to Grocon under cl 42.1 of the D&C Contract.

- (d) The language of cl 42.1 does not confine the operation of that clause to any particular or rigid structure that could not comfortably accommodate an ATC Claim under cl 2 of the Side Deed. There was therefore nothing about a claim that included 'a cl 2 Side Deed component' which made it any less a claim for the purposes of cl 42.1 of the D&C Contract.

57 Grocon also relied on the judge's reasons in the Adjudicator Proceeding,<sup>24</sup> which it observed were not the subject of a notice of contention. According to Grocon, those reasons, in effect, subsumed ATC Claims within the process in cl 42 of the D&C Contract for dealing with Value Claims. As those reasons had not been challenged by APN, so it was said, this Court should proceed on the basis that the D&C Contract and the Side Deed operated together with respect to ATC Claims.

58 Grocon referred to the judge's statement in the decision below, and in para 2 of the Impugned Order, that the Implied Term – which imposed an obligation on Grocon to provide to APN the payment records – would be 'implied into the D&C Contract, as amended by clause 2 of the Side Deed'.<sup>25</sup> Grocon observed that this conclusion was also not the subject of a notice of contention. In the light of this, Grocon contended that it would be odd to conclude that the process for assessing an ATC Claim differed from the process prescribed under the D&C Contract.

59 APN contended that the provisions in cl 2 of the Side Deed and cl 42.1 of the D&C Contract sat together but prescribed independent processes. APN argued that there were only two respects in which the agreements coincided: timing<sup>26</sup> and the fact that one of the integers in the formula prescribed by cl 2 of the Side Deed was based on the amount certified by the superintendent as payable by the principals to Grocon under cl 42.1 of the D&C Contract. That cl 2 of the Side Deed and cl 42.1 of

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<sup>24</sup> See [52] above.

<sup>25</sup> See [2(c)] and n 6 above.

<sup>26</sup> Compare APN's written submission on timing, which is discussed at [65] below.

the D&C Contract prescribed independent assessment processes was said to follow from the fact that the Value Claims and ATC Claims were calculated differently and would produce different figures. According to APN, cl 2 of the Side Deed did not vary cl 42.1 of the D&C Contract and instead prescribed a different calculation for the limited purpose of determining, as between APN and Scots Church, how the financial consequences of the Project were to be shared. Accordingly, the superintendent had no role in assessing ATC Claims.

60 In our opinion, the provisions of the Side Deed dealing with payment of ATC Claims were not intended to operate independently of the claims payment and verification mechanisms in the D&C Contract.

61 Clause 8.1(a) of the Side Deed states that '[e]xcept as expressly amended by this Deed, the [D&C] Contract shall continue to have full force and effect.' Clause 2(g) states that, to the extent that the parties' rights under the D&C Contract are inconsistent with cl 2, the parties waive those rights to the extent of the inconsistency. These provisions have the effect of preserving the overall contractual framework established by the D&C Contract – including the scope and operation of cl 42 – save to the extent that the Side Deed contains provisions that are inconsistent with the D&C Contract.

62 It follows that the focus of the analysis must be to determine the extent to which cl 2 of the Side Deed is inconsistent with the D&C Contract. The most fundamental inconsistency is that cl 2 varied the contractual price of the Project by substituting a price based on Actual Trade Cost for the Fixed Contract Sum. It did so by establishing a formula which incorporates two key integers, namely, an amount for Value Claims and an amount for ATC Claims.

63 The only other provisions in the Side Deed which are inconsistent with the D&C Contract for present purposes, and which prevail over the provisions of the D&C Contract to the extent of any inconsistency, are as follows:

(a) Where the amount of a Monthly Value Claim exceeds the amount of a

Monthly ATC Claim, APN and Scots Church must pay the former amount to Grocon and must retain the difference between the two amounts – the ‘Set Off Amount’ – in their Project bank account as a ‘Contractor’s Contingency’ to be deployed as set out in cls 2(b) and (e) of the Side Deed.

- (b) Where the amount of a Monthly ATC Claim exceeds the amount of a Monthly Value Claim, APN and Scots Church must pay the former amount to Grocon at the time that progress claims are due under the D&C Contract, deploying, to the extent required, amounts in the Contractor’s Contingency.
- (c) The differences between ATC Claims and Value Claims are to be reconciled as at the Assessment Date and the final amount due is to be set out in the superintendent’s Final Certificate under cl 42.2 of the D&C Contract.
- (d) If Grocon overpays any subcontractors and uses all reasonable endeavours to recover the overpayment from them, to the extent that the overpayment has the effect of increasing the Actual Trade Cost after the Assessment Date, APN and Scots Church must pay to Grocon the amount of the increase upon 30 days’ written notice.

64 It is to be noted that cl 2 of the Side Deed does not contain any provisions which are inconsistent with the D&C Contract in relation to the timing of submission or payment of ATC Claims or the verification of such claims. This is because:

- (a) Clause 2 is silent on the timing of the making of ATC Claims.
- (b) In relation to the timing of payment of ATC Claims, cl 2(a)(ii)(A), (c)(i)(A) and (d) align the timing to the timing of payment of Value Claims. Clause 14.2 of the D&C Contract provides that Value Claims must be paid within 14 days of the issue by the superintendent of a payment certificate or the Final Certificate.
- (c) Clause 2 is silent in relation to verification of ATC Claims. However, the reference to ‘the Final Certificate under the [D&C] Contract’ in cl 2(j) indirectly acknowledges the verification role of the superintendent because cl 2 of the D&C Contract defines ‘Final Certificate’ as ‘a certificate issued by the Superintendent ... pursuant to cl 42.6’.

65 Although cl 2 of the Side Deed does not expressly require that ATC Claims be submitted to the superintendent simultaneously with Value Claims, this is likely to be the practical effect of its requirement that ATC Claims be paid when Value Claims are paid. From a practical point of view, in order for payments of ATC Claims to be made simultaneously with Value Claims, it is likely that all the steps that must be completed before payment can be made would need to be undertaken simultaneously. We reject APN's written submission insofar as it suggests that the payment regime in cl 2 of the Side Deed does not begin to operate until after the delivery of Value Claims under cl 42.1 of the D&C Contract. There is nothing in either agreement to prevent the processes leading up to the determination of the amount for a Value Claim and the amount for an ATC Claim being undertaken simultaneously.

66 In the light of the clear purpose of the Side Deed of preserving the contractual arrangements in the D&C Contract except to the extent that they are inconsistent with the Side Deed, the absence of any inconsistent mechanisms in the Side Deed in relation to the timing of the submission and payment of ATC Claims and the verification of those claims must mean that the mechanisms in the D&C Contract which apply to Value Claims in relation to such matters must also apply to ATC Claims. Those mechanisms, insofar as they apply to Monthly ATC Claims and Monthly Value Claims, are as follows:

- (a) on the first day of each month, Grocon must submit to the superintendent a Monthly Value Claim and a Monthly ATC Claim;
- (b) Grocon's claims must be supported by evidence of the amount due by the principals to it and such information as the superintendent may reasonably require;
- (c) Grocon's claims must be accompanied by a statement under cl 43.1 of the D&C Contract that all subcontractors 'have been paid all moneys properly due and payable';
- (d) within 10 business days of receipt of the claims, the superintendent must

assess the claims and issue a certificate stating the amount of the Monthly Value Claim and a certificate stating the amount of the Monthly ATC Claim; and

- (e) within 14 days of the issue of the certificates by the superintendent, the parties must comply with the payment obligations in cl 42 of the D&C Contract as varied by cl 2 of the Side Deed.

67 The conclusion in [66] above is compatible with the provisions of cls 42.1, 42.1A, 42.5, 42.6, 43.1 and 43.2.

68 Clause 42.1 does not refer to 'progress claims' but it refers to the generic expressions 'claim for payment' and 'payment claim' on 10 occasions. Accordingly, cl 42.1 is not confined to monthly claims for a proportion of the Fixed Contract Sum based on the value of the work completed. Rather, the clause covers claims for recurring or progressive payment in accordance with the D&C Contract. As such, it includes Value Claims as well as ATC Claims.

69 Clause 42.1A refers to 'payment claim' on three occasions and to 'progress claim' on four occasions. The latter references are to claims for 'Agreed Fitout Works'.

70 Clause 42.5 refers to 'a final payment claim', 'a payment claim under Clause 42.1' and 'all claims for money'.

71 Clause 42.6 states that the 'Final Certificate' 'shall certify the amount which, in the Superintendent's opinion, is finally due'.

72 Although cl 43.1 refers to 'progress claim' once and makes no reference to 'payment claim', when this clause is read in the context of the clauses that precede it, it is clear that the phrase 'progress claim' is used generically to describe any recurring or progressive claim. Clause 43.2 refers to 'moneys due or to become due to [Grocon]' and does not refer to progress claims.

73 The conclusion at [66] above is consistent with APN's and Grocon's pleadings, in

which they agree that, under cl 42.1 of the D&C Contract, Grocon is obliged to provide to the superintendent records evidencing Actual Trade Cost.<sup>27</sup> This common position is not affected by the parties' opposing positions on the meaning of the Disputed Phrase. APN's failure to file a notice of contention in respect of the judge's conclusion that the Implied Term 'is implied into the D&C Contract, as amended by clause 2 of the Side Deed'<sup>28</sup> is consistent with its pleading. We agree with Grocon's submission that APN's failure to challenge this conclusion is consistent with implicit acceptance, prior to the hearing of the application for leave to appeal, that the provision of information to verify Monthly ATC Claims is governed by the D&C Contract as amended by the Side Deed rather than by the Side Deed operating independently. Our conclusion is also consistent with the judge's conclusion in the Adjudicator Proceeding that a claim purportedly under cl 2 of the Side Deed was 'a claim made under the payment structure of the [D&C] Contract' as amended by the Side Deed,<sup>29</sup> in respect of which no notice of contention has been filed.

74 The conclusion at [66] above is also consistent with what a reasonable business person would regard as the commercial arrangements in which the parties entered. The fact that the D&C Contract and the Side Deed were executed by the same parties<sup>30</sup> on the same day (4 July 2012) strongly suggests not only that they were familiar with the contents of both agreements but also that they intended them to operate harmoniously. Common sense dictates that, if the parties intended that the claims verification processes in the D&C Contract would not apply to ATC Claims, they would have expressly stated this and also would have provided for alternative processes. The fact that no such alternative processes were established and that the processes in the D&C Contract are wide enough to encompass ATC Claims supports the conclusion that those processes extend to such claims. This is particularly so

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<sup>27</sup> The pleadings are relevantly set out at [45]-[46] above.

<sup>28</sup> See [2(c)] and n 6 above.

<sup>29</sup> See [52] above.

<sup>30</sup> The execution of the D&C Contract by Grocon Constructors Pty Ltd as guarantor of the obligations of Grocon can be disregarded for present purposes.

having regard to the overlap in the records that would be relevant to both Value Claims and ATC Claims. Invoices and other documents which evidence the value of work performed under the D&C Contract are also likely to evidence the costs that Grocon has incurred and/or paid to its subcontractors.

75 Further support for the conclusion at [66] above is to be found in the fact that the IC Deed does not refer to the Side Deed. As stated at [34] above, although that deed is not dated, it was probably signed on, or soon after, 27 June 2012. It may well have been signed on the same day as the D&C Contract and the Side Deed, namely, 4 July 2012. As discussed at [35] above, the IC Deed confers on the superintendent '[a]ll the functions and duties of the Superintendent under the D&C Contract'. The fact that, knowing that the Side Deed specified a process for submission of ATC Claims, the parties did not confer on the superintendent any functions under the Side Deed, indicates that the parties intended that the superintendent's functions and duties under the D&C Contract would encompass verification of ATC Claims.

76 The correctness of the conclusion at [66] above can also be supported by reference to a consideration of the alternative interpretation of the interrelationship between the D&C Contract and the Side Deed. The alternative interpretation is that there are no express contractual provisions for verification of ATC Claims. That interpretation must be considered in the following context:

- (a) the parties are sophisticated and experienced commercial organisations which are being advised by senior and experienced lawyers;
- (b) the subject matter of the agreements entered into by the parties on 4 July 2012 is a project valued at around \$100 million;
- (c) those agreements are very detailed;
- (d) the effect of cl 2 the Side Deed is to specify the amount payable to Grocon and provides for the possibility that that amount may be many millions of dollars greater or lower than the Fixed Contract Sum set out in the D&C Contract;
- (e) APN is not related to Grocon or Scots Church and has an obvious interest in

- ensuring that the Project proceeds efficiently and cost-effectively, and that there are contractual mechanisms for verification of claims made by Grocon;
- (f) the D&C Contract contains such mechanisms; and
  - (g) APN has signed the Side Deed and the IC Deed contemporaneously with the signing of the D&C Contract knowing that the former deeds are silent in relation to contractual mechanisms for verification of ATC Claims.

77 Having regard to the detailed and carefully drafted claims verification mechanisms in the D&C Contract, it is inconceivable that the parties intended that there be no such mechanisms in relation to ATC Claims. That is because the transaction in which the parties entered on 4 July 2012 by virtue of the agreements they signed on that day included as a key feature a formula for determining payments in cl 2 of the Side Deed which was made up of two components, namely, certified Value Claims and ATC Claims. An interpretation of the parties' contractual arrangements whereby the claims verification mechanisms in the D&C Contract apply only to one of the two components does not make any commercial sense. The more obvious interpretation is that the parties intended that those mechanisms would extend to both components.

78 It follows that the claims verification processes in cls 42.1, 42.1A, 42.5, 42.6, 43.1 and 43.2 of the D&C Contract apply to ATC Claims except to the extent of any inconsistency between those clauses and the Side Deed. Similarly the provisions of the IC Deed which apply to the D&C Contract also apply to ATC Claims.

79 It also follows that we reject APN's submissions on the interrelationship between cl 2 of the Side Deed and cl 42.1 of the D&C Contract. As we have explained, the superintendent has responsibility for assessing both ATC Claims and Value Claims. While it is true that cl 2 amended the JVA provisions dealing with how the financial consequences of the Project were to be shared between APN and Scots Church, those amendments are not relevant to the operation of cl 2 as between Grocon and the principals. Of relevance are the amendments to the provisions of the D&C Contract

dealing with the financial consequences of the Project as between Grocon and the principals which we have already discussed.

80 As stated at [38] above, it is not clear whether Grocon submitted Monthly ATC Claims to the superintendent for assessment in accordance with cl 42 of the D&C Contract. Even if it is assumed that Grocon submitted such claims directly to APN in the mistaken belief that the verification process in cl 42 did not apply to them, such conduct cannot affect the proper construction of the Side Deed and the D&C Contract and their interrelationship.<sup>31</sup>

***Did the judge misconstrue the Disputed Phrase?***

*Case law on construction of commercial contracts*

81 The most recent authoritative statement of the principles for interpreting commercial contracts was made by the High Court in *Electricity Generation Corporation v Woodside Energy Ltd.*<sup>32</sup> In that case the majority said:

[T]his Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating'. As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption 'that the parties ... intended to produce a commercial result'. A commercial contract is to be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience'.<sup>33</sup>

82 Grocon also relied on the earlier case of *Australian Broadcasting Commission v*

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<sup>31</sup> *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 582 [35], 625 [163]; *Lederberger v Mediterranean Olives Financial Pty Ltd* (2012) 38 VR 509, 517–18 [26]–[27].

<sup>32</sup> (2014) 251 CLR 640 ('*Woodside*').

<sup>33</sup> *Woodside* (2014) 251 CLR 640, 656–7 [35] (citations omitted).

*Australasian Performing Right Association Ltd*,<sup>34</sup> in which Stephen J stated:

[T]wo corporations have determined, in unambiguous terms and in a formal document obviously prepared with legal assistance, their quite complex contractual relationship for a considerable term of years into the future. The approach of the courts to the construction of such documents, when they contain no ambiguity nor any other patent error or omission, cannot be other than that of an uncritical rendering of the meaning of the text.<sup>35</sup>

83 In the same case, Gibbs J stated:

If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, 'even though the construction adopted is not the most obvious, or the most grammatically accurate' ...<sup>36</sup>

84 Reference should also be made to the following statement of Mason J in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*:<sup>37</sup>

[W]hen the issue is which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this setting. We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but it would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the written contract.<sup>38</sup>

85 It is not necessary for us to discuss the current status of the 'true rule' stated by Mason J in *Codelfa*, namely, that 'evidence of surrounding circumstances is admissible to assist in the interpretation of [a] contract if the language is ambiguous

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<sup>34</sup> (1973) 129 CLR 99 ('*Australian Broadcasting Commission*').

<sup>35</sup> *Australian Broadcasting Commission* (1973) 129 CLR 99, 114-5.

<sup>36</sup> *Australian Broadcasting Commission* (1973) 129 CLR 99, 109 (citations omitted).

<sup>37</sup> (1982) 149 CLR 337, 352 ('*Codelfa*').

<sup>38</sup> *Codelfa* (1982) 149 CLR 337, 352.

or susceptible of more than one meaning.<sup>39</sup> This is because the Disputed Phrase is ambiguous. In any event, the only 'surrounding circumstance' upon which the parties relied was the JVA, to which Grocon is not a party. It was not in dispute that the JVA was admissible and should be taken into account in construing the D&C Contract and the Side Deed.

86 There are two other principles of contractual interpretation relevant to this appeal. First, where parties to a carefully drafted agreement have used the same word more than once in that agreement, they will be taken to have intended that the word have the same meaning each time.<sup>40</sup> This is a rebuttable presumption and the particular context in which a word is used may disclose a contrary intention.<sup>41</sup> Secondly, the recitals to an agreement can assist in the construction of a contract, for example, by setting out the surrounding circumstances and purpose of the transaction.<sup>42</sup> However, a recital is not an operative term and cannot cut down operative words that are clear and unambiguous, even if the recital is also clear and unambiguous and is contrary to the operative provision.<sup>43</sup>

87 Both parties relied on the decision of Young J in *Christopher Chronis Designs Pty Ltd v Citadin Pty Ltd*<sup>44</sup> in relation to the meaning of the word 'payable'. That case involved a dispute about the meaning of a clause in a commercial lease which stated that the rent for a particular year 'shall be the current rent ... provided ... that the current rent so determined shall not be less than the minimum rent payable during

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<sup>39</sup> *Codelfa* (1982) 149 CLR 337, 352. The most recent discussion at an appellate level of the ongoing application of the 'true rule' is to be found in *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 310 ALR 113, 130-4 [71]-[86]; *Newey v Westpac Banking Corporation* [2014] NSWCA 319, [89]; *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd* [2014] WASCA 164 [33]-[45], [190]-[216]; *Stratton Finance Pty Ltd v Webb* (2014) 314 ALR 166, 174 [40].

<sup>40</sup> *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2013] VSCA 179, [26] ('*Dura*').

<sup>41</sup> *Dura* [2013] VSCA 179, [26].

<sup>42</sup> *Canty v PaperlinX Australia Pty Ltd* [2014] NSWCA 309, [46], [47] ('*Canty*').

<sup>43</sup> *Canty* [2014] NSWCA 309, [46].

<sup>44</sup> (1997) 8 BPR 15,659 ('*Christopher Chronis*').

the immediately preceding 12 [month] period'. The plaintiff argued that the phrase meant the rent that was actually paid in the preceding 12 month period. The defendant focused on the meaning of the word 'during' in the phrase. Young J relevantly stated:

I must say that the word 'payable' connotes liability on the tenant. The rent that is payable is a rent which can be demanded and, if not paid, sued for. This seems to me to indicate that what the clause is looking at is what the tenant was legally liable to pay for the whole of the preceding 12-month period. That is, the rent that was actually paid. The word 'payable' really does not lend itself to the interpretation put on it by either party in its natural meaning, but, it seems to me, that less violence is done to the word if one construes it in the way put by the plaintiff rather than the other way.<sup>45</sup>

*Decision below and Grocon's application for leave to appeal*

88 The judge interpreted the Disputed Phrase – 'actual trade, supplier, consultant or subcontract cost payable by [Grocon]' – to mean costs 'actually paid to a subcontractor' and stated that the phrase was not confined to costs for which there might merely be a liability incurred for payment.<sup>46</sup> The judge's reasons for this conclusion were as follows:

First, the word 'actual' in the definition qualifies the word 'cost'. The concept of an 'actual cost' connotes a cost that has not only been incurred, but a liability which has actually been discharged upon payment. Upon payment, it becomes an 'actual cost' and aptly falls within the definition.

In the second place, if upon payment, the cost becomes an 'actual cost' and is captured by the definition, a temporal element is clearly fixed by the event of payment. This assists to make the important contractual obligations to make progress payments between [APN and Scots Church] and [Grocon] work in a certain and well defined manner.

On the other hand, if liability to make a progress payment is to be governed merely by a liability incurred to make payment for 'work undertaken, materials supplied, defects rectified or services provided', real questions are likely to arise as to precisely when such a liability arose or arises. Such liabilities could, for example, be controlled by a wide variety of circumstances unique to each individual sub-contract transaction. Uncertainty in relation to the timing of the obligation to make progress payments between [APN and Scots Church] and [Grocon] in a D&C Contract of this type and scale,

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<sup>45</sup> *Christopher Chronis* (1997) 8 BPR 15,659, 15,661.

<sup>46</sup> Reasons [46], [52].

particularly given the large sums of money that are likely to become payable, is not consistent with the avoidance of commercial inconvenience and the production of a businesslike result.

Third, an amount which may initially be payable by Grocon to a sub-contractor for work undertaken, materials supplied, defects rectified or services provided, may not be the sum that is actually paid by it for such goods and services. A variety of commercial events, which are sometimes unforeseen and cannot be predicted, may arise and operate to discharge or alter a liability to make payment to a sub-contractor in the course of a large scale construction project. In these circumstances, it makes no commercial sense for Grocon to be put in funds by payments from APN in respect of liabilities which may never in fact be matched with actual payment.

Fourth, the meaning of the expression 'Actual Trade Cost' as defined in clause 1.1 of the Side Deed, is informed by its context and the object of clause 2 of the Side Deed which is to effectuate the delivery of the performance of the Works by [Grocon] under the Transaction Documents at cost.<sup>47</sup>

89 Earlier in his reasons, the judge stated that '[r]ecital G of the Side Deed expressly incorporates as its purpose, the purposes of clause 9.2 of the [JVA]'.<sup>48</sup> He subsequently set out cl 9.2 of the JVA and emphasised that it provided that the appointment of Grocon was contingent upon the D&C Contract 'being in a form acceptable to the Management Committee and providing that [Grocon] must ... submit all payment claims on an "open book" basis'.<sup>49</sup>

90 Grocon seeks leave to appeal against this aspect of the decision below on the following proposed grounds:

1. The learned trial judge erred in construing the phrase 'actual trade, supplier, consultant or subcontract cost payable ...' found in the definition of 'Actual Trade Cost' in clause 1.1 of the Side Deed as meaning 'costs actually paid' (*Reasons* at [ 46]).
2. The learned trial judge ought to have held that 'payable' in the definition of 'Actual Trade Cost' in clause 1.1 of the Side Deed meant 'owed' or 'due' and that consequently the applicant, Grocon, became entitled to a payment from APN pursuant to clause 2 of the Side Deed in respect of 'actual supplier, consultant and sub-contractor costs' it had a liability to pay (cf *Reasons* at [39]-[40]).

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<sup>47</sup> Reasons [47]-[51] (emphasis in original).

<sup>48</sup> Reasons [12].

<sup>49</sup> Reasons [12]. Clause 9.2 is set out at [10] above.

*Parties' submissions on the alleged construction error*

91 Grocon submitted that the judge's construction of the Disputed Phrase as meaning costs 'actually paid to a sub-contractor' was erroneous for five reasons.

92 First, Grocon contended that the clear, well-known and unambiguous meaning of the word 'payable' in the commercial world was 'owed', 'due' or 'to be paid'.<sup>50</sup> The meaning of 'payable' was said to be distinct from the word 'paid'; it instead connoted an obligation to be discharged and not one that had been discharged. Grocon contended that the word 'paid' was necessarily past tense, whereas 'payable' was not necessarily past tense. Grocon argued that, if the judge's construction of the word 'payable' as meaning 'paid' were adopted, the natural and ordinary meaning that arose whenever an adjective ending with 'able' was used – namely, a capacity for something to happen – would be subverted. As the meaning of 'payable' was unambiguous, Grocon contended that the judge ought to have given effect to that meaning.<sup>51</sup>

93 Secondly, Grocon drew attention to the use of the word 'paid' in cls 22.2, 2.2.5(b), 42.1(i), 42.1A(e)(iii), 42.2(b) and 42.7 of the D&C Contract and cls 2(b) and 2(f)(ii)(B) of the Side Deed, in contradistinction to the word 'payable'. It was contended that, as the parties expressly used the word 'paid' when they intended to refer to actual payment, the term 'payable' could not sensibly be construed as meaning 'actually paid'.

94 Similarly, Grocon emphasised the following examples of the use of the word 'payable' in the Side Deed and the D&C Contract in clear contradistinction to the word 'paid':

(a) Paragraph (b) of the definition of Actual Trade Cost refers to 'the amount

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<sup>50</sup> Grocon cited the *Macquarie Dictionary* without identifying any particular edition. We note that the first meaning of 'payable' in the sixth edition is 'owed; to be paid; due'. See *Macquarie Dictionary* (Macquarie Dictionary Publishers, 6<sup>th</sup> ed, 2013) 1080.

<sup>51</sup> In support of this proposition, Grocon cited the statement of Stephen J in *Australian Broadcasting Commission* (1973) 129 CLR 99, 114–5, which is set out at [82] above.

payable to Agreed Project Consultants for the provision of services in respect of the [D&C] Contract'. Grocon observed that sch 3 of the Side Deed, to which the definition of 'Agreed Project Consultants' refers, provides both for costs paid by APN and Grocon – under the headings 'Paid by APN' and 'Paid by Grocon @ 28-06-12' – and costs that are yet to be paid – under the heading 'Balance Remaining'. Accordingly, so it was said, para (b) of the definition of Actual Trade Cost was intended to capture amounts payable for the provision of services, including those amounts that were yet to be paid. Grocon contended that, if the judge's construction of the word 'payable' as meaning 'paid' was applied to para (b) of the definition of Actual Trade Cost, that definition would only pick up those amounts in sch 3 that had been paid by Grocon and would not pick up those costs that were yet to be paid.

- (b) Paragraph (c) of the definition of Actual Trade Cost refers to 'any excess payable under the ACL – such amount to be treated as variation should it become payable.' The ACL is defined as the advanced consequential loss insurance policy which is required to be provided by Grocon under cl 21C of the D&C Contract. Grocon observed that, conventionally, if an insured made an insurance claim, their excess would not be 'paid' – that is, the insured would not be required to pay out a cheque for the excess – but would instead reduce the net amount received from the insurer. According to Grocon, this further demonstrated the difficulty of adopting the judge's construction of the word 'payable' as meaning 'paid'.
- (c) Clause 42.9 of the D&C Contract provides that '[w]here, within the time provided by the [D&C] Contract, a party fails to pay the other party an amount due and payable under the [D&C] Contract, the other party may, subject to Clause 5.6, have recourse to retention moneys'. According to Grocon, if the judge's construction of the word 'payable' as meaning 'paid' was applied to cl 42.9, the clause would collapse in on itself because it would be impossible for a party to fail to pay an amount that it had paid.

95 Grocon also observed that, if the construction of the Disputed Phrase adopted by the judge, and advanced by APN, were applied to cl 2(h)(iii) of the Side Deed, it would be difficult for that clause to achieve its objective. Clause 2(h)(iii) sets out the financial consequences that flow, as between APN and Scots Church, when the

Actual Trade Cost as at the Assessment Date is above \$99.3 million. In that circumstance, Scots Church is liable to pay for 100% of the cost overrun. Grocon contended that, if the Disputed Phrase was construed to mean costs 'paid' by Grocon, the effect of this would be that cl 2(h)(iii) would not address at all what would happen in respect of costs that remained 'payable' by Grocon but not 'paid'.

96 Thirdly, Grocon argued that the judge was led into error by deploying the adjective 'actual' in the Disputed Phrase to transmute the meaning of the word 'payable' into 'paid'. Grocon's submission was comprised of the following limbs.

- (a) Grocon submitted that the judge had erred in concluding that an 'actual cost' was a cost that had not only been incurred but discharged, with the effect that, until Grocon had discharged that liability it could not be said to have incurred a 'cost'. According to Grocon, a liability to pay would not cease to be, or fail to reach the status of, a 'cost' because it was yet to be paid.
- (b) Grocon submitted that the word 'actual' merely reinforced that no margin for profit was payable to Grocon and distinguished between the costs actually payable to subcontractors, as invoiced for work performed, from the costs that were anticipated under the D&C Contract, namely the Fixed Contract Sum whose cost breakdown is contained in the Trade Breakdown Schedule in Part M of the annexure to the D&C Contract. In support of this proposition, Grocon drew attention to the following:
  - (i) In the Disputed Phrase, the word 'actual' appears before the words 'trade, supplier, consultant or subcontract cost'. According to Grocon, this location of the word suggested that it was a descriptor of the word 'cost' in the Disputed Phrase. Grocon contended that, even if the word 'actual' was located before the word 'payable' – and became an adverb – it would not add anything to 'payable'.
  - (ii) The Disputed Phrase refers to 'services provided' in the past tense. It was said that this language supported Grocon's contention that the definition of Actual Trade Cost was concerned with the cost of work that had already been provided as opposed to anticipated costs for work that was to be provided, which were set out in the Trade

Breakdown Schedule in Part M of the annexure.

97 Grocon also sought to impugn the judge's reasoning that, by his construction of the Disputed Phrase, a temporal element would be fixed by the event of payment which would, in turn, assist in making the contractual obligations to make progressive payments between APN and Grocon work in a certain and well defined manner.<sup>52</sup> This reasoning was said to be erroneous because it suggested that the judge's construction had been adopted so as to achieve his preferred outcome of fixing a date of payment as opposed to being based on the enquiry required by the authorities: namely, whether ambiguity and absurdity warranted a departure from an uncritical rendering of the meaning of the text. The reasoning was also said to be flawed because, contrary to commercial common sense, it appeared to assume that whether sums were due or owed could not be ascertained.

98 Fourthly, in its written submissions, Grocon contended that the judge erroneously treated the meaning of the Disputed Phrase as being informed by the provisions in the JVA providing for the delivery of the Project at cost by way of an 'open book' tendering. This was said to be inappropriate because:

- (a) although cl 9.2 of the JVA contemplated that the D&C Contract would provide that Grocon must submit all payment claims on an 'open book' basis, Grocon was not a party to the JVA;
- (b) the D&C Contract – to which Grocon was a party and which, by operation of cl 5 of the Formal Instrument of Agreement, superseded the JVA – did not ultimately include a term requiring submission of all payment claims on an 'open book' basis;
- (c) recital G of the Side Deed identified that the Side Deed was entered into 'for the purposes of clause 9.2 of the [JVA]', that is, in accordance with cl 9.2(b)(v) of the JVA. Contrary to the judge's reasons, recital G did not 'expressly incorporate as its purpose, the purposes of clause 9.2 of the [JVA]'<sup>53</sup> and thus

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<sup>52</sup> See [88] above.

<sup>53</sup> Reasons [12].

- did not incorporate the 'open book' requirement referred to in cl 9.2(b)(i);
- (d) in any event, a recital cannot change the meaning of words in an agreement that are clear and unambiguous; and
  - (e) the 'open book' system referred to in sch 1 of the JVA and sch 2 of the Side Deed was only relevant to subcontractors' costs that were used to calculate the Fixed Contract Sum and to tendering by Subcontractors. It was not relevant to Grocon's payment claims, which were instead determined pursuant to cl 42.1 of the D&C Contract and cl 2 of the Side Deed.

99 In oral argument, Grocon contended that its primary position was that the D&C Contract did articulate a process for submission of payment claims on an 'open book' basis as foreshadowed in cl 9.2 of the JVA. According to Grocon, the parties gave life to the principle expressed in cl 9.2 of the JVA by cls 42.1(a) to (e) of the D&C Contract. In the alternative, Grocon submitted that the D&C Contract did not provide for the submission of payment claims on an 'open book' basis and consequently the judge was led into error by treating the meaning of the Disputed Phrase as being informed by that principle.

100 Fifthly, Grocon argued that the judge's conclusion that there was 'no commercial sense for Grocon to be put in funds by payments from APN in respect of liabilities which may never in fact be matched with an actual payment'<sup>54</sup> was erroneous for the following reasons:

- (a) payments made by APN to Grocon during the Project were only payments on account;
- (b) the construction of the Disputed Phrase adopted by the judge transformed Grocon from the builder into the financier of the Project. This was said to be a momentous commercial consequence which militated against the judge's construction of the Disputed Phrase; and
- (c) pursuant to the construction of the Disputed Phrase advanced by Grocon –

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<sup>54</sup> See [88] above.

namely, that the term 'payable' meant 'owed' or 'due' – Grocon would not be placed in a position where it was required to pay a subcontractor a substantial sum and then left to recover that amount from APN. Instead, cash would flow through the contractual hierarchy once an obligation to pay arose.

101 In response to APN's submission that it made no commercial sense for Grocon to produce only records evidencing amounts 'payable' to subcontractors when those amounts may not ultimately be paid by Grocon,<sup>55</sup> Grocon contended that the D&C Contract provided a number of mechanisms for determining the costs Grocon had actually paid to its subcontractors. Those mechanisms were said to be contained in cls 42.1(a), (e), and 43.1, in respect of which Grocon made the following submissions:

- (a) Clause 42.1(a) required Grocon to support its payment claim by delivering to the superintendent 'evidence of the amount due by [APN and Scots Church] to [Grocon]'. According to Grocon, cl 42.1(a) left it to Grocon to determine how much or how little evidence it would provide but, sensibly, Grocon would provide enough evidence to secure a favourable assessment by the superintendent.
- (b) Clause 42.1(e) required Grocon to support its payment claim by delivering to the superintendent 'such information as the Superintendent may reasonably require'. Grocon contended that, pursuant to this clause, the superintendent had the power to reasonably require Grocon to provide a receipt in respect of a payment that had been claimed or further information as to whether an adjustment had been made in respect of that payment, such as a discount or partial or full reimbursement.
- (c) Clause 43.1 required Grocon to give, as a condition precedent to certification of a progress claim, 'a duly signed written statement' that all of its subcontractors 'have been paid all moneys properly due and payable'. By this mechanism, Grocon contended that a superintendent would be alerted to a circumstance where Grocon had failed to pay its subcontractors an amount which it had claimed under cl 42.1 or where Grocon received a partial or full

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<sup>55</sup> See [104] below.

reimbursement.

102 APN submitted that the judge's construction of the Disputed Phrase as meaning costs 'actually paid to a sub-contractor' was supported by six textual and contextual reasons.

103 APN's first, second and fourth reasons reflect the judge's first, second and fourth reasons set out at [88] above. In oral argument, APN contended that the substance of the judge's reasons relied on the existence of the words 'payable' and 'actual' in the Disputed Phrase, which both contributed to the meaning of that phrase. According to APN, the word 'payable' had no necessary element of futurity and merely meant a cost in respect of which there was a legal obligation to pay. That being so, the adjective 'actual' which preceded 'payable' in the Disputed Phrase had to be given work to do. In APN's submission, 'a thing is actual if it is a fact; if it has happened' and, accordingly, in the context of the Disputed Phrase, the composite expression 'actual ... cost payable' must refer to a cost that Grocon had not only incurred but been fully subjected to in the sense of having made payment.

104 APN's third reason reflects the judge's third reason set out at [88] above. In addition, APN contended that it made no commercial sense for Grocon to produce only records evidencing amounts 'payable' to subcontractors when those amounts may not ultimately be paid by Grocon due to discounts, rebates, compromises and other reasons. APN argued that it was only through the production of records showing payments actually made by Grocon to subcontractors that the principals could ensure that Grocon did not secretly profit from the Project, consistently with the non-profit objective of the D&C Contract as amended by the Side Deed.

105 APN's fifth reason was that, as a contract speaks from the time it takes effect, the word 'payable' in the Disputed Phrase was apt to refer to actual costs paid as the contract was performed. APN relied on *Christopher Chronis*<sup>56</sup> in support of the

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<sup>56</sup> (1997) 8 BPR 15,659, 15,661.

proposition that, in some contexts, the word 'payable' may refer to, or at least include, amounts actually paid.

106 APN's sixth reason was that if Grocon's construction of the Disputed Phrase was accepted, cl 2(h) of the Side Deed would be rendered unworkable for the purposes of a final accounting on the 'Assessment Date', that is, when a Final Certificate is issued by the superintendent on completion of the Project.<sup>57</sup> According to APN, the calculation in cl 2(h) proceeds on the basis that 'Actual Trade Cost' means costs that have been incurred and paid. Grocon's construction was said to confine 'Actual Trade Cost' to costs incurred but not yet paid which would amount to zero on the Assessment Date because all costs incurred would have been paid by that date.

107 In oral argument, in response to Grocon's submission summarised at [93] to [94] above, APN contended that there was 'a lot of inconsistency' in the language of the D&C Contract and submitted that, the principle that words in a long agreement are always used in the same way was, at best, a 'readily rebuttable presumption.'

108 In response to Grocon's submission summarised at [0] above, APN contended that cls 2(b) and 2(e) of the Side Deed protected Grocon's cash flow during the Project.

109 In response to Grocon's submission summarised at [0] above, APN contended that the judge's reasons on the construction of the Disputed Phrase were not affected by those provisions in the JVA and the Side Deed which provided for an 'open book' tendering process. Rather, so it was said, those provisions were taken into account in relation to the Implied Term. APN also contended that Grocon's submission that payments made by APN to Grocon were payments on account was incorrect.<sup>58</sup> Instead, according to APN, cls 2(b) and 2(d) of the Side Deed provided for progressive set-off of payments to and from Grocon when payments were made

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<sup>57</sup> Clause 2(h) of the Side Deed is set out at [32] above. As appears from [30] above, the 'Assessment Date' is the date on which the Final Certificate is issued.

<sup>58</sup> See [0] above.

in accordance with the terms of the D&C Contract. Accordingly, so it was said, it was also incorrect for Grocon to submit that the judge's construction of the Disputed Phrase 'transformed' it into the financier of the Project,<sup>59</sup> as it had always been obliged to pay a cost before it could seek reimbursement from the principals under the Side Deed.

*Decision on the alleged construction error*

110 For the purposes of analysis, we will assume that the Disputed Phrase 'actual trade, supplier, consultant or subcontract cost payable by [Grocon]' is capable of meaning 'costs payable by Grocon but not yet paid by it', 'costs payable by Grocon irrespective of whether they have been paid' and 'costs incurred by Grocon and actually paid by it'.

111 Initially, there was some confusion as to whether Grocon preferred the first or second of the above meanings. In the course of its oral submissions, Grocon adopted the second meaning. As no party contended that the first meaning should be adopted, we will not consider it further.

112 In our opinion, the Disputed Phrase bears the second meaning set out at [110] above. In the context of the definition of 'Actual Trade Cost', the Disputed Phrase means 'actual trade, supplier, consultant, or subcontract costs payable by [Grocon irrespective of whether they have been paid]'.

113 On the basis of our interpretation, and our conclusion at [66] above about the interrelationship between the Side Deed and the D&C Contract, the operation of cl 2 of the Side Deed may be illustrated as follows:

- (f) If Grocon receives an invoice from a subcontractor in month A which is due for payment in month B, the invoiced amount will form part of Grocon's ATC Claim for month A. Having been claimed in month A, the invoiced amount will not form part of Grocon's ATC Claim for month B even though it

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<sup>59</sup> See [0] above.

is paid in that month. However, in month B, the payment will be encompassed within the statement of payments that Grocon must provide to the superintendent under cl 43.1 of the D&C Contract ('Statement of Payments').<sup>60</sup>

- (g) If Grocon receives an invoice from a subcontractor in month A which is due for payment – and is paid by Grocon – in month A, the invoiced amount will form part of Grocon's ATC Claim for month A. The payment will be encompassed within Grocon's Statement of Payments for month A.
- (h) If Grocon receives an invoice from a subcontractor in month A which is due for payment in month B, the invoiced amount will form part of Grocon's ATC Claim in month A. If Grocon and the subcontractor enter into an agreement in month B whereby the invoice is withdrawn and no payment is made or the invoice is discounted and Grocon only pays the discounted amount, Grocon must disclose the relevant details to the superintendent in its Statement of Payments for month B. The superintendent will then adjust the amount of Actual Trade Cost to which Grocon is entitled for month B. This adjustment is authorised by cl 42.1 of the D&C Contract which provides that all payments, other than pursuant to the Final Certificate, are 'payment[s] on account only'.

114 Our interpretation of the Disputed Phrase is consistent with the interpretation of the phrase 'the minimum rent payable during the immediately preceding 12 [month] period' that was adopted by Young J in *Christopher Chronis*.<sup>61</sup> As appears from [87] above, Young J held that although 'payable' refers to amounts for which there is a legal liability to pay, in the context of the clause of the commercial lease in which it appeared, the phrase extended to the rent that had actually been paid in the preceding 12 month period.

115 *Christopher Chronis* demonstrates that the meaning of 'payable' in a commercial contract can be responsive to the point in time at which it is applied to a cost. At an

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<sup>60</sup> See [24] above.

<sup>61</sup> (1997) 8 BPR 15,659.

early point in time, a cost for which there is a legal liability to pay, but which has not yet been paid, can be described as 'payable'. At a later point in time, once the cost has been paid, it can still be described as a cost that was payable under the contract.

116 We will now set out our reasons for our interpretation of the Disputed Phrase.

117 The starting point for consideration of the meaning of the Disputed Phrase is the meaning of the adjective 'payable'. As submitted by Grocon, the Macquarie Dictionary relevantly defines 'payable' as 'owed; to be paid; due'.<sup>62</sup> Although 'payable' is couched in the future tense, we agree with APN that it does not necessarily require futurity. According to the Macquarie Dictionary, the verb 'paid' is the past tense and past participle of 'pay', which means 'to discharge (a debt, obligation, etc) as by giving or doing something'. On this basis, a cost that is 'paid' is one for which the liability to make payment has been discharged.

118 It is clear that, when one considers the meaning of 'payable' from a limited grammatical perspective, it does not have the same meaning as 'paid' and cannot be interpreted as such. From this limited perspective, 'payable', when used in a commercial contract, refers to an amount which a person has a legally enforceable obligation to pay.

119 Obviously, the word 'payable' cannot be construed in isolation but must be considered in the context of the Disputed Phrase, the Side Deed read as a whole and the interrelated agreements of the parties read as a whole.

120 The word 'actual' in the Disputed Phrase is an adjective which, according to the Macquarie Dictionary, means 'existing in act or fact; real; now existing; present'. We agree with Grocon's submission that 'actual' attaches to 'cost' rather than 'payable' and serves to emphasise that the cost must be real and existing, in the sense that what is being referred to is the net amount (after discounts and the like) which is the subject of a legal obligation, and not some other amount such as an amount in an

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<sup>62</sup> See n 50 above.

initial quote which is superseded by subsequent agreement.

121 However, even if 'actual' attaches to 'payable', the meaning would be the same: the amount must actually be payable in the sense that the obligation to pay is legally enforceable.

122 It follows from the above discussion that we do not agree with the judge's first reason for his finding that the Disputed Phrase means 'costs actually paid' by Grocon, which APN adopted.<sup>63</sup>

123 The Disputed Phrase appears in the definition of 'Actual Trade Cost'. This composite expression does not assist in the determination of the meaning of 'payable', other than to emphasise that the costs must be real and legally enforceable rather than non-binding, such as a superseded quote from a subcontractor.

124 The Disputed Phrase is central to the scope and operation of cl 2 of the Side Deed. The wording of that clause does not support APN's contention that 'payable' means 'incurred and actually paid'. The adjective 'payable' appears in the definition of 'Actual Trade Cost' on three occasions and also appears in the definition of 'Fixed Contract Sum'. Clause 2 refers to 'payable' on six occasions and to 'paid' on three occasions.<sup>64</sup> The use of both words demonstrates that the parties deliberately distinguished between them.

125 We do not accept APN's submission that 'payable' was included in the Disputed Phrase because the Side Deed would be operative immediately upon its execution and thus references to payment of costs to subcontractors had to be expressed in the future tense because no such payments would actually have been paid on the day the Side Deed took effect. The Side Deed has to be interpreted in a sensible manner to give it effect throughout the period it remains in force. Whether a payment falls within a particular description in the Side Deed depends on its status at the time the

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<sup>63</sup> See [88], [103] above.

<sup>64</sup> See cl 2(b), (f)(i), (f)(ii)(B).

issue of its classification arises. In any event, as appears from [124] above, the parties used the past tense 'paid' elsewhere in the Side Deed.

126 It follows from the above analysis that we disagree with the judge's fourth reason for his finding that the Disputed Phrase means 'costs actually paid' by Grocon, which APN adopted.<sup>65</sup> In our opinion, there is nothing in the context or object of cl 2 of the Side Deed which renders the judge's interpretation more cogent than the interpretation that we have adopted.

127 In the light of our conclusion at [66] above about the interrelationship between the Side Deed and the D&C Contract, it is appropriate to consider the provisions of the D&C Contract as part of the context for determining the meaning of the Disputed Phrase.

128 A review of the D&C Contract indicates that it uses a variety of words and phrases in relation to payment obligations. The following examples demonstrate this: the phrase 'has paid' appears in cl 4 of the Formal Instrument of Agreement; the phrase 'fees and charges payable' is used in the definition of 'Legislative Requirements' in cl 2; the phrase '[t]he amount paid' appears in cl 22.2; the phrases 'moneys ... be paid' and 'money so paid' appear in cl 22.5; the phrase 'amounts payable' appears in cl 26.2; the phrase 'paid by' appears in cl 31.7; the phrase 'liquidated damages paid' appears in cl 35.6(b); the phrase 'liquidated damages payable' appears twice in cl 35.6(c); the phrase 'an amount is payable' appears twice in cl 40.5(d); the phrase 'amounts paid' appears in cl 42.1; the phrase 'amount previously paid' appears in cl 42.1A(e)(iii); the phrase 'has been paid' appears in cl 42.2(b); the words 'paid' and 'payable' appear in cl 42.7; the phrase 'due and payable' appears in cls 42.8, 42.9 43.1 and 63(b); the word 'payable' appears in cls 42.6A, 42.10 and 45(b); the words 'paid' and 'payable' appear in cl 43.2; the phrase 'cost incurred' appears in cl 44.6; the phrase 'the amount payable' appears in cls 44.12(c) and 50(g); the phrases 'amount certified as then being due for payment'

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<sup>65</sup> See [88], [103] above.

and 'amount certified as being due for payment' appear in cl 44.12(c)(iv), (e), (f); and the phrase 'amounts owing' appears in cl 51.4(k).

129 The parties' choice of different language in various provisions of the D&C Contract to express their intended meaning provides no support for APN's preferred construction of the Disputed Phrase. This is amply demonstrated by the inclusion of the contrasting phrases 'liquidated damages paid' and 'damages payable' in cl 35.6.

130 We do not accept Grocon's submission that the word 'actual' was included in the Disputed Phrase to distinguish the costs payable under cl 2 of the Side Deed from Value Claims calculated as a proportion of the Fixed Contract Sum which would necessarily be based on an estimate of the proportion of the work that was completed. This rationale would not explain the use of the same wording in the definition of 'Actual Trade Cost' in the D&C Contract to cover variations under cl 40.5 of that contract.

131 As appears from [8] and [10] above, the D&C Contract was entered into to give effect to the JVA. However, the JVA does not refer to the Side Deed and provides little assistance in construing the Disputed Phrase. The reference to 'open book' in sch 2 of the Side Deed provides some assistance in explaining the types of contracts that Grocon entered into with its subcontractors, but provides no such assistance in relation to the D&C Contract or the Side Deed. This is because the 'open book' principle is not reflected in cl 42.1 of the D&C Contract or cl 2 of the Side Deed. The principle is reflected in cl 51.4(k) of the D&C Contract,<sup>66</sup> but this is confined to fitout subcontractors. We agree with Grocon's submission that the reference in recital G of the Side Deed that Grocon 'has agreed to enter this Deed for the purposes of clause 9.2 of the [JVA]' is to clause 9.2(b)(v) of the JVA. As appears from [10] above, that clause provides that the appointment of Grocon will be contingent upon the D&C Contract providing that Grocon must enter into a Side Deed with APN and Scots Church 'in relation to the processes for claims and costs'.

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<sup>66</sup> Clause 51.4(k) is set out at [171] below.

132 Our interpretation of the Disputed Phrase is reasonable from a commercial perspective. There is nothing unusual about a building contract requiring the principal to pay to the builder amounts 'payable' by the builder to subcontractors so that it is the principal, rather than the builder, who acts as 'banker' for the relevant project. On the other hand, if APN's preferred interpretation were adopted, Grocon, as the builder, would act as 'banker' for the Project because it would not be entitled to payment from APN for subcontractor costs unless and until it paid those costs. This is because, on APN's interpretation, a subcontractor cost would not fall within the definition of 'Actual Trade Cost' for which Grocon would be entitled to payment until that cost was 'actually paid' by Grocon.

133 We are unable to accept the judge's second reason for his finding that the Disputed Phrase means 'costs actually paid' by Grocon, which APN adopted. The judge's second reason was that actual payment provided temporal certainty as to when a cost was payable under cl 2 of the Side Deed.<sup>67</sup> With respect, such certainty is also provided by the interpretation that we have adopted. At any given time, the parties could ascertain whether Grocon had incurred a legally enforceable obligation to pay a cost to a subcontractor. An invoice from the subcontractor would be evidence of such an obligation.

134 We are also unable to accept the third reason for the judge's finding that the Disputed Phrase means 'costs actually paid' by Grocon, which APN also adopted. That reason was that, as the amount payable may not be the amount actually paid, it made no commercial sense for the principals to be liable to pay the amount payable as part of the Actual Trade Cost.<sup>68</sup> As appears from [113] above, we accept that an amount which is payable and which forms part of an ATC Claim in a particular month may be reduced prior to payment or may be waived entirely in a subsequent month. The manner in which such adjustments are to be managed is explained at [113] above.

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<sup>67</sup> See [88], [103] above.

<sup>68</sup> See [88], [103] above.

135 APN's submission that cl 2(h) of the Side Deed would be rendered unworkable if its preferred interpretation of the Disputed Phrase were not accepted was predicated upon the alternative interpretation being 'costs payable but not yet paid'. As stated at [111] above, this was not the interpretation that Grocon adopted. Our preferred interpretation would not render cl 2(h) unworkable because payment of a cost that was initially treated as payable for the purposes of the definition of 'Actual Trade Cost' and cl 2 of the Side Deed would not cause that cost to cease to be payable for the purposes of cl 2(h).

136 For the above reasons, proposed ground of appeal 1 has been made out. Proposed ground of appeal 2 has also been made out, except to the extent that it is predicated on 'payable' being confined to amounts 'owed' or 'due' but not yet paid. As discussed at [111] above, in its oral submissions, Grocon eschewed this construction of 'payable'.

*Did the judge err in accepting the Implied Term?*

*Case law on implying terms into commercial contracts*

137 The implication of a term into a contract can be contrasted with rectification of the contract. A term implied into a contract is one which it is presumed that the parties would have agreed upon had they turned their minds to it, whereas rectification will occur where a term has been omitted which should have been included and was actually agreed upon by the parties. Thus, implication of a term is designed to give effect to the parties' presumed intention, whereas rectification of a contract gives effect to the parties' actual intention.<sup>69</sup>

138 A contractual term implied as a matter of fact is specific to the contract in question, and derives from the court's view of the intention of the parties.<sup>70</sup> The

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<sup>69</sup> *Codelfa* (1982) 149 CLR 337, 346.

<sup>70</sup> *Cromwell Property Securities Ltd v Financial Ombudsman Service Ltd* (2014) 288 FLR 374, 391 [60].

conditions for implying a term in fact into a contract were set out by the majority of the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*,<sup>71</sup> and adopted by Mason J in *Codelfa*<sup>72</sup> ('BP Test'). Those conditions are as follows:

- (a) the term must be reasonable and equitable;
- (b) the term must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
- (c) the term must be so obvious that 'it goes without saying';
- (d) the term must be capable of clear expression; and
- (e) the term must not contradict any express term of the contract.

139 In adopting the *BP Test*, Mason J relevantly stated:

For obvious reasons the courts are slow to imply a term. In many cases, what the parties have actually agreed upon represents the totality of their willingness to agree; each may be prepared to take his chance in relation to an eventuality for which no provision is made. The more detailed and comprehensive the contract the less ground there is for supposing that the parties have failed to address their minds to the question at issue. And then there is the difficulty of identifying with any degree of certainty the term which the parties would have settled upon had they considered the question.<sup>73</sup>

140 The conditions in the *BP Test* are cumulative and import different considerations.

141 In relation to the condition that an implied term 'must be reasonable and equitable', we note that the High Court has refused to imply a term that would operate in a partisan fashion.<sup>74</sup> The application of the condition will often require consideration of the matrix of facts in which a contract was agreed.<sup>75</sup>

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<sup>71</sup> (1977) 180 CLR 266, 282-3 ('BP').

<sup>72</sup> (1982) 149 CLR 337, 347.

<sup>73</sup> *Codelfa* (1982) 149 CLR 337, 346.

<sup>74</sup> *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 442 ('Byrne').

<sup>75</sup> See, eg, *BP* (1977) 180 CLR 266, 284.

142 The condition that an implied term ‘must be necessary to give business efficacy to the contract’ requires consideration of whether the term is necessary for the purposes of ‘giving to the transaction such efficacy as both parties must have intended that at all events it should have’,<sup>76</sup> making the agreement work or avoiding an unworkable situation.<sup>77</sup> Where the express terms of an agreement are sufficient to give it the business efficacy the parties intended it to have, it will not become necessary to imply additional terms.<sup>78</sup> However, a term may be commercially necessary, in order for the contract to be workable in a business sense, notwithstanding that it can operate without the term.<sup>79</sup> In *Commonwealth Bank of Australia v Barker*,<sup>80</sup> French CJ, Bell and Keane JJ stated that the requirement that a term implied in fact be necessary ‘to give business efficacy’ to a contract can be regarded as a ‘specific application’ of the criterion of necessity which also supports the implication of a term in law. They also said that ‘[i]mplications which might be thought reasonable are not, on that account only, necessary.’<sup>81</sup>

143 The condition that an implied term ‘must be so obvious that “it goes without saying”’ requires consideration of whether, at the time that the parties were making their bargain, the suggestion of insertion of the implied term into the agreement by an ‘officious bystander’ would have been met ‘with a common, “Oh, of course”’ from the parties.<sup>82</sup>

144 In relation to the condition that an implied term ‘must be capable of clear expression’, it is worth noting the observation of Gibbs J in *Ansett Transport Industries*

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<sup>76</sup> *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 66 (*Hospital Products*), quoting *The Moorcock* (1889) 14 PD 64, 68.

<sup>77</sup> *Hospital Products* (1984) 156 CLR 41, 66.

<sup>78</sup> *Hospital Products* (1984) 156 CLR 41, 66.

<sup>79</sup> *Sekisui Rib Loc Australia Pty Ltd v Rocla Pty Ltd* (2012) 291 ALR 140, 153 [50].

<sup>80</sup> (2014) 312 ALR 356 (*Barker*).

<sup>81</sup> *Barker* (2014) 312 ALR 356, 365–6 [28]–[29].

<sup>82</sup> *BP* (1977) 180 CLR 266, 283–4, quoting *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227.

(*Operations*) Pty Ltd v Commonwealth<sup>83</sup> that the ‘width and lack of precision’ of a term supplied an argument against implying it.<sup>84</sup> Mason J in *Codelfa* refused to imply a term into a contract on the basis that, had the parties explored the term at the time that they entered into the contract, negotiation about the term ‘might have yielded any one of a number of alternative provisions, each being regarded as a reasonable solution’.<sup>85</sup> It has been observed by this Court that it is elementary that a contractual party who is to be subjected to an additional obligation by reason of the implication of a term into a contract should be ‘left in no doubt of the extent of the obligation’ and, accordingly, a term that would leave a party in a ‘state of speculation’ as to the extent of its obligations would not be implied.<sup>86</sup>

145 Conflation of the ‘reasonable and equitable’ and the ‘necessity’ conditions of the *BP* Test may lead a court into error. This follows from the statement at [142] above in *Barker* and also from Mason J’s earlier statement in *Codelfa* that it is not enough that it is reasonable to imply a term, it must also be necessary to do so to give business efficacy to the contract.<sup>87</sup>

146 However, the authorities acknowledge that the conditions in the *BP* Test may overlap.<sup>88</sup> Relevantly for the purposes of this appeal, Einstein J in *New South Wales v Banabelle Electrical Pty Ltd*<sup>89</sup> observed that the condition that an implied term ‘must be so obvious that “it goes without saying”’ involves a considerable degree of overlap with the condition that a term ‘must be necessary to give “business efficacy” to a contract’.<sup>90</sup>

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<sup>83</sup> (1977) 139 CLR 54 (*Ansett*).

<sup>84</sup> *Ansett* (1977) 139 CLR 54, 62.

<sup>85</sup> *Codelfa* (1982) 149 CLR 337, 356.

<sup>86</sup> *Narni* [2001] VSCA 31, [20].

<sup>87</sup> *Codelfa* (1982) 149 CLR 337, 346.

<sup>88</sup> *BP* (1977) 180 CLR 266, 283; *Narni Pty Ltd v National Australia Bank Ltd* [2001] VSCA 31, [16] (*Narni*).

<sup>89</sup> (2002) 54 NSWLR 503 (*Banabelle*).

<sup>90</sup> *Banabelle* (2002) 54 NSWLR 503, 522 [50].

147 There are examples in the case law of the global application of the conditions in the *BP* Test to a particular case. APN relied on *OneSteel Manufacturing Pty Ltd v United KG Pty Ltd*,<sup>91</sup> in which DeBelle J held that a provision in a building contract which entitled a contractor to be reimbursed for costs incurred was subject to the implied term that the costs would be those that had been reasonably and properly incurred. DeBelle J did not individually address each of the conditions in the *BP* Test, and instead simply stated that, in his view, the implied term the subject of that case, 'satisfie[d] all of the tests in *BP*'.<sup>92</sup>

148 Similarly, in *Specialist Diagnostic Services Pty Ltd v Healthscope Ltd*,<sup>93</sup> this Court implied into a lease an obligation of good faith which prohibited the landlord from materially altering the physical form of the hospital it was leasing to the tenant so as to substantially deprive the tenant of the benefit of a restraint of trade clause in the lease. That clause (cl 20.1.(b)) prohibited the landlord from granting a licence or any right to occupy any part of the hospital to any other person who carried on the same business as the tenant. The Court's application of the conditions in the *BP* Test was as follows:

The negative obligation we would imply meets the tests laid down in the *BP Refinery* case.

Such a term is reasonable and equitable. It is necessary to give business efficacy to cl 20.1(b). It is so obvious 'it goes without saying'. It is capable of clear expression and it does not contradict any express term of the contract.<sup>94</sup>

*Decision below and Grocon's application for leave to appeal*

149 The judge accepted that the Implied Term set out at [2(c)] above should be implied into the D&C Contract, as amended by the Side Deed.<sup>95</sup> He did so by

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<sup>91</sup> (2006) 94 SASR 376 ('*OneSteel*').

<sup>92</sup> *OneSteel* (2006) 94 SASR 376, 392 [38].

<sup>93</sup> (2012) 305 ALR 569 ('*Specialist*').

<sup>94</sup> *Specialist* (2012) 305 ALR 569, 587 [90]-[91].

<sup>95</sup> Reasons [83], [106], [111].

applying the principles in *Codelfa*,<sup>96</sup> noting that 'the transaction documents under examination provided a formal, detailed, and at least on their face a comprehensive, set of contractual arrangements.'<sup>97</sup>

150 Under the heading 'Reasonable, Equitable and Necessary', the judge concluded that the Implied Term was 'necessary for the contract to work in the way that the parties, as reasonable people, must have intended it to work'.<sup>98</sup> In support of this conclusion, he relevantly stated:

In the first place, it would be inequitable for one party to the contractual payment process (Grocon) to have full access to all the necessary accounting records to determine and satisfy itself whether the other party (APN) should pay, or be paid, a progress payment in a particular sum, while the other party (APN) is denied such a facility. It would be unreasonable and unfair for the process, in essence, to become a unilateral determination of one party to the transaction which is conducted behind 'closed doors' on the basis of material not provided to the other party.

For this reason it is necessary for records evidencing 'Actual Trade Cost' to be provided by the Contractor (Grocon) to the Co-Developers (which includes APN) to enable them to determine and exercise their rights and obligations under clause 2 of the Side Deed. Without the provision of such records APN (as a Co-Developer) would not be able to determine and verify any amount required to be paid to it or by it under clause 2 of the Side Deed.

Accordingly, the Implied Term is reasonable and necessary to provide an equitable balance in the payment process.<sup>99</sup>

151 The judge's second reason for his conclusion that the Implied Term was reasonable and equitable was that the particular context in which the agreements were to operate in governing a construction project 'points strongly to the necessity for the Implied Term'.<sup>100</sup> The judge reasoned as follows:

- (a) Construction projects were risky ventures and vulnerable to disputation, and good communication was one of the keys to preventing conflicts escalating to

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<sup>96</sup> (1982) 149 CLR 337, 347, quoting *BP* (1977) 180 CLR 266, 282-3.

<sup>97</sup> Reasons [71].

<sup>98</sup> Reasons [84].

<sup>99</sup> Reasons [85]-[87].

<sup>100</sup> Reasons [88].

dysfunctional, costly and consuming disputes.<sup>101</sup> Accordingly, the Implied Term was 'a reasonable and equitable means to reduce the risk of conflicts arising and escalating to disputes which can only be resolved through litigation.'<sup>102</sup>

- (b) The open exchange of the payment records would also act as an aid to good decision-making and promote confidence in the determination that is made about what was payable to Grocon, which would advantage the parties.<sup>103</sup>
- (c) Fairness demanded that, on request, APN be furnished with the documentary evidence upon which a payment claim is founded.<sup>104</sup>
- (d) The payment records would be likely to come into the possession of Grocon as the Project proceeded and thus the Implied Term would provide definition to the obligation of verification, and would further narrow the ambit for dispute.<sup>105</sup>
- (e) The payment records would be discoverable in litigation over the contractual payment obligations. However, no reasonable business person would accept the discovery processes in litigation as an appropriate way to administer a construction contract.<sup>106</sup>

152 Under the heading 'Business Efficacy', the judge stated that, given his interpretation of the Disputed Phrase as meaning costs actually paid to a subcontractor, 'business efficacy demands that some evidence of payment be provided to verify the obligation to make payment to, or receive payment from, [Grocon] on an ongoing basis.'<sup>107</sup> He stated that this conclusion was particularly so in the light of the fact that documentary evidence of payments to subcontractors was likely to be generated and be in the possession of only one party to the D&C

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101 Reasons [88]-[90].

102 Reasons [92].

103 Reasons [93].

104 Reasons [94].

105 Reasons [95].

106 Reasons [96].

107 Reasons [97].

Contract, Grocon.<sup>108</sup> He further observed that the timely provision of the payment records would give business efficacy to the contractual payment regime and would support its intended harmonious and efficient operation and, in turn, would reduce the potential for costly disputation and litigation arising from a lack of documentary evidence.<sup>109</sup> He added that, in a practical sense, the payment provisions under the Side Deed would not be effective without the Implied Term and would be productive of disputes which could escalate to litigation.<sup>110</sup>

153 Under the heading 'Obviousness', the judge stated that '[w]hen the need for the [Implied Term] is considered in the context as I have described it, the necessity for it becomes obvious to the point that the existence of such a term "goes without saying"'.<sup>111</sup>

154 Under the heading 'Clear Expression', the judge stated that the Implied Term was capable of being given expression in an acceptably clear fashion.<sup>112</sup>

155 Under the heading 'Consistency', the judge concluded that the Implied Term was not inconsistent with the D&C Contract or the Side Deed.<sup>113</sup> He stated that the Implied Term 'directly supports and supplements the payment regime provided in the D&C Contract, insofar as it is amended by the Side Deed'.<sup>114</sup> This was said to be particularly so in the light of cl 42.1 of the D&C Contract, which provided that payment claims were to be supported by 'evidence of the amount due by [APN and Scots Church] to [Grocon]' and were required to include the 'value of the work carried out by [Grocon] in the performance of the Contract'. The judge also stated that the Implied Term was 'consistent with the "open book" system or process

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108 Reasons [98].

109 Reasons [99].

110 Reasons [100].

111 Reasons [101].

112 Reasons [102].

113 Reasons [103].

114 Reasons [104].

referred to in the Side Deed'.<sup>115</sup>

156 Grocon seeks leave to appeal against this aspect of the decision below on the following grounds:

3. The learned trial judge erred:
  - a. in his application of the criterion for implication articulated in *BP ...* and adopted by Mason J ... in *Codelfa ...* (**BP Criterion**) by failing to individually assess whether each of the BP Criterion were established and by instead treating the satisfaction of one requirement as sufficient to dispose of subsequent independent criterion (*Reasons* at [84]-[87] and [101]); and/or
  - b. [in] his conclusion that the Implied Term ... ought to be implied in fact into the Side Deed (*Reasons* at [106]).
4. The learned trial judge ought to have held that the Implied Term did not satisfy any or all of the BP Criterion and accordingly could not be implied in fact into the Side Deed.

*Parties' submissions on the alleged implied term error*

157 Grocon contended that the judge had failed to correctly apply the *BP* Test for the following reasons:

- (a) As a consequence of the alleged construction error,<sup>116</sup> which was described as 'the threshold Construction Error', the judge adopted the incorrect foundation for the application of the *BP* Test. Grocon contended that, if this Court accepted its submission that, properly construed, the Disputed Phrase meant 'costs payable by Grocon which do not cease to have that character once they are paid', it would follow that the Implied Term was not 'reasonable' as it would impose on Grocon an obligation to provide evidence of, in all respects, costs incurred for the payment claims it made.
- (b) The judge failed to individually assess whether each of the conditions in the *BP* Test was established in the present case. In particular, Grocon contended that the judge erroneously treated the satisfaction of the condition that the Implied Term was 'reasonable and equitable' as also answering the question

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<sup>115</sup> Reasons [105].

<sup>116</sup> Grocon's submissions on the alleged construction error are set out at [91]-[99] above.

of whether the term was 'necessary', and subsequently treated this conclusion as also resolving whether or not the term was so obvious as to go without saying.

- (c) The judge erroneously concluded that the Implied Term was capable of clear expression. According to Grocon, the Implied Term as drafted left unclear: when APN would be entitled to be provided with the payment records (was it on demand by APN or each time a payment claim was submitted by Grocon?); how the Implied Term affected the payment claim regime prescribed under cl 42.1 of the D&C Contract; whether the Implied Term conferred on APN the right to withhold payment of a progress claim if it was not satisfied with the payment records provided by Grocon; how long APN had to confirm payment after receipt of the payment records; and the role of the superintendent in the claim payment process under the Implied Term. In support of its submission that the Implied Term was not capable of clear expression, Grocon drew attention to the different formulations of the Implied Term in paras 83, 106 and 111 of the decision below and para 2 of the Impugned Order.

158 As discussed at [56] above, at the hearing of the application for leave to appeal, Grocon submitted that an ATC Claim would constitute a payment claim under cl 42.1 of the D&C Contract and, consequently, the claims verification processes prescribed under the D&C Contract, and those provisions of the IC Deed which applied to the D&C Contract, also applied to the verification of ATC Claims. Grocon contended that, if this Court accepted this submission, it followed that the Implied Term was not 'necessary to give business efficacy' to the D&C Contract or the Side Deed as those agreements worked without it. According to Grocon, the parties had turned their mind to the question of what evidence Grocon should provide in support of an ATC Claim and had deliberately adopted the 'non-specific' language of cl 42.1(a) of the D&C Contract – which required Grocon to provide 'evidence of the amount due by [APN and Scots Church] to [Grocon]' – supplemented by cl 42(1)(e) of the D&C Contract – which required Grocon to provide 'such information as the Superintendent may reasonably require'.

159 Even if this Court accepted that an ATC Claim was not subject to those provisions, however, Grocon contended that, as the process for assessing ATC Claims was similar to that for assessing Value Claims, it would make no sense to imply a term into the D&C Contract which imposed fundamentally different disclosure obligations on Grocon to those imposed under the D&C Contract in respect of Value Claims.

160 APN disputed that the judge had committed a 'threshold Construction Error' and submitted that, if this Court upheld the construction of the Disputed Phrase adopted by the judge, it must also uphold as correct the judge's conclusion as to the existence of the Implied Term.

161 APN contended that Grocon's submission at [0] above was misconceived for two reasons. First, as demonstrated by the authorities, the assessment of the conditions in the *BP* Test in a global way was no bar to their application. Secondly, in any case, the judge applied each condition separately and did not conflate the 'reasonable and equitable' criterion with the criterion of 'necessity'. To the extent that the judge discussed whether the term was 'necessary' under the first heading, this was in the context of the assessment of whether it was 'reasonable and equitable'.

162 APN denied that the Implied Term lacked clarity as to when APN would be entitled to be provided with the payment records. According to APN, that obligation arose upon payment of the subcontractor by Grocon so as to facilitate the payment adjustment contemplated under cl 2 of the Side Deed. The Implied Term was said to leave undisturbed the payment claim regime under cl 42.1 of the D&C Contract because the adjustment required by cl 2 of the Side Deed took effect after delivery and certification of claims under cl 4.2 of the D&C Contract.

163 In response to Grocon's contention that, if this Court concluded the claims verification processes prescribed under the D&C Contract applied to ATC Claims, the Implied Term was not necessary to give business efficacy to either the D&C Contract or the Side Deed, APN made two observations:

- (a) first, under cl 42.1(a) or (e) of the D&C Contract, only the superintendent, and not APN, could make requests to Grocon to provide payment records; and
- (b) secondly, the calculation of Actual Trade Cost under cl 2 of the Side Deed was different to the calculation of the value of work under cl 42 of the D&C Contract. As cl 42 did not apply to the calculation required by cl 2, the case for the implication of a term into the Side Deed – rather than the D&C Contract – that enabled APN and Scots Church to determine or verify Actual Trade Cost was ‘very powerful’.

164 In oral argument, senior counsel for APN contended that, even if this Court did not accept APN’s submission that the Disputed Phrase meant costs incurred by Grocon and paid to its subcontractors, it would not follow that a term could not be implied into either the D&C Contract or the Side Deed compelling Grocon to produce certain payment records. According to APN, if the Disputed Phrase was construed as meaning costs ‘payable’ by Grocon to its subcontractors, APN would still be entitled to be provided with payment records under any subsequently implied term because those records, which evidenced costs actually paid by Grocon to its subcontractors, would be ‘very good evidence’ of the costs that were ‘payable’ by Grocon.

*Decision on the alleged implied term error*

165 We reject APN’s submission that the Implied Term would be capable of operation even if we were to reject APN’s preferred construction of the Disputed Phrase as meaning ‘costs incurred and actually paid’. The wording of the Implied Term is very specific: it covers documents relating to costs incurred and actually paid. The Implied Term does not extend to costs payable but not yet paid. As the application for leave to appeal to this Court is confined to the Implied Term as formulated by the judge, it is not possible for us to consider whether a differently formulated term is open.

166 At the hearing of the application for leave to appeal, senior counsel for APN

conceded that, if the claims verification processes in cl 42.1 of the D&C Contract applied to ATC Claims under cl 2 of the Side Deed, then there would be no room for the Implied Term. In our opinion, that concession was properly made. As we have concluded at [66] above that those processes apply to such claims, it follows that the judge's conclusion in relation to the Implied Term cannot stand. This is so irrespective of whether the Disputed Phrase means 'costs payable irrespective of whether they have been paid' or 'costs incurred and actually paid'. In other words, our conclusion is not dependent on our construction of the Disputed Phrase at [112] above.

167 The concession by senior counsel for APN is correct because the applicability of cl 42.1 of the D&C Contract to ATC Claims under cl 2 of the Side Deed has the inevitable consequence that the conditions in the *BP* Test cannot be satisfied.

168 The Implied Term cannot be reasonable or equitable where cl 42.1 of the D&C Contract is applicable to ATC Claims under cl 2 of the Side Deed. If APN's construction of the Disputed Phrase were adopted, Grocon could be compelled to provide evidence of payments actually made to the independent superintendent under cl 42.1 of the D&C Contract as well as to APN under the Implied Term. These separate but overlapping verification processes would be unreasonable as well as inequitable in the context of the Project, whose size and scale would give rise to thousands of documents dealing with payments to subcontractors. As the parties expressly agreed to the detailed independent verification processes in cl 42.1, read together with the IC Deed, they must have regarded them as fair and reasonable for both parties. In those circumstances, it is difficult to see the utility of a parallel verification process under the Implied Term, which is to be undertaken directly by APN as a party to the various contracts.

169 The Implied Term is not necessary to give business efficacy to either the D&C Contract or the Side Deed. For the reasons set out at [168] above, those agreements are commercially workable and effective without the Implied Term.

170 The Implied Term is not so obvious that 'it goes without saying'. On the contrary, acceptance of the Implied Term would attribute to the parties an irrational intention to add to the express verification processes a further verification process which would add time and cost burdens without any obvious benefits.

171 As we have stated, the parties are experienced and sophisticated commercial organisations. They are capable of negotiating written contracts which reflect their commercial intentions. Clause 51.4(k) of the D&C Contract demonstrates that, where the parties intended for APN to have access to Grocon's records to verify payments to subcontractors, they included an express provision to that effect rather than creating a need for an implied term. That clause provides that Grocon must 'pay on time all amounts owing to any Fitout Subcontractor and, if reasonably requested by [APN and Scots Church] ..., promptly provide them with copies of payment receipts or such other evidence of payment as they require.' Although the clause is confined to fitout subcontractors and may have been inserted in the D&C Contract for the benefit of the major tenant, it supports the proposition that the parties expressly provided for verification processes to meet their commercial objectives and left no room for the operation of implied verification processes.

172 The Implied Term cannot be said to be incapable of clear expression as a matter of drafting. However, the fact that its ultimate wording was not set out in APN's amended Statement of Claim<sup>117</sup> and evolved in the course of the judge's reasons<sup>118</sup> indicates how difficult it is to reconcile the Implied Term with the express provisions in the D&C Contract and the Side Deed.

173 It is not necessary for us to decide whether the Implied Term contradicts any express term of the D&C Contract or the Side Deed. As the conditions in the *BP* Test are cumulative, even if this condition were met, that would not be sufficient to permit acceptance of the Implied Term. However, we disagree with the judge's

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<sup>117</sup> See [41] above.

<sup>118</sup> See Reasons [83], [106], [111(b)] and para 2 of the Impugned Order.

reasons for concluding that the Implied Term is not inconsistent with the D&C Contract or the Side Deed.<sup>119</sup> For the reasons set out [168] above, the Implied Term would not directly support or supplement the payment regime in the D&C Contract but would needlessly duplicate it. As for the 'open book' system, for the reasons set out at [131] above, that system does not apply as between the principals and Grocon either under the D&C Contract or the Side Deed.

174 It is also not necessary for us to consider APN's submission that the judge failed to individually assess whether each of the conditions in the *BP* Test was established.

175 It follows that proposed grounds of appeal 3 and 4 are made out.

***Did the judge err in rejecting the inferred term?***

*Case law on inferring terms in the context of commercial contracts*

176 It has been observed that the line between inference and implication will not always be easy to draw.<sup>120</sup> However, the distinction between the two processes is set out in Deane J's judgment in *Hawkins v Clayton*.<sup>121</sup> After concluding that a contract existed between a testatrix and her solicitors in relation to the preparation, execution and safe custody of her will,<sup>122</sup> Deane J considered what the terms of that contract were. He observed that the contractual terms upon which the will remained in the safe custody of the solicitors were left 'largely unarticulated by the parties'.<sup>123</sup> In those circumstances, he identified two 'stages', which he said may well overlap, for the ascertainment of the relevant terms. The first stage was described as 'essentially one of inference of actual intention', and entailed an inquiry as to 'what,

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119 See [155] above.

120 *Breen v Williams* (1996) 186 CLR 71, 91 ('*Breen*'); *Kitching v Phillips* (2011) 278 ALR 551, 562 [64] ('*Kitching*').

121 (1988) 164 CLR 539 ('*Hawkins*').

122 *Hawkins* (1988) 164 CLR 539, 569.

123 *Hawkins* (1988) 164 CLR 539, 569–70.

if any, are the terms which can properly be inferred from all the circumstances as having been included in the contract as a matter of actual intention of the parties'. The second stage was described as 'one of imputation' and entailed an inquiry as to 'what, if any, are the terms which are, in all the circumstances, implied in the contract as a matter of presumed or imputed intention'.<sup>124</sup>

177 In *Byrne v Australian Airlines Ltd*,<sup>125</sup> Brennan CJ, Dawson and Toohey JJ drew a similar distinction between the inference of contractual terms and their implication in circumstances where there was no formal contract between the parties.<sup>126</sup> They relevantly stated:

In those cases the actual terms of the contract must first be inferred before any question of implication arises. That is to say, it is necessary to arrive at some conclusion as to the actual intention of the parties before considering any presumed or imputed intention.<sup>127</sup>

178 McHugh and Gummow J similarly stated that, where a contract was not in writing and was oral or partly oral, or it appeared that the parties had not reduced their agreement to a complete written form, courts should exercise caution and avoid an automatic or rigid application of the conditions in the *BP Test*.<sup>128</sup> They then relevantly stated:

In such situations, the first task is to consider the evidence and find the relevant express terms. Some terms may be inferred from the evidence of a course of dealing between the parties. It may be apparent that the parties have not spelled out all the terms of their contract, but have left some or most of them to be inferred or implied.<sup>129</sup>

179 Similarly, in *Breen v Williams*,<sup>130</sup> Dawson and Toohey JJ stated that where there was no formal agreement, the actual terms of the contract would have to be inferred

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124 *Hawkins* (1988) 164 CLR 539, 570.

125 (1995) 185 CLR 410.

126 *Byrne* (1995) 185 CLR 410, 422.

127 *Byrne* (1995) 185 CLR 410, 422.

128 *Byrne* (1995) 185 CLR 410, 442.

129 *Byrne* (1995) 185 CLR 410, 442.

130 (1996) 186 CLR 71.

before any question of implication could arise.<sup>131</sup>

180 In *Kitching v Phillips*,<sup>132</sup> the Western Australian Court of Appeal considered whether it was possible to infer a term granting an easement over land in an agreement for the sale of the land and a registered transfer of the land. Murphy JA, with whom Pullin and Newnes JJA agreed, cited *Hawkins, Byrne and Breen* and stated that inferred terms of the kind referred to by Deane J in *Hawkins* would typically arise where there was no formal written agreement between the parties.<sup>133</sup> He then relevantly stated:

In this case, where there was a formal written contract, and a formal conveyance (the transfer), I see no scope for inferring a term of the kind alleged. The parties have gone to considerable lengths to record their bargain in writing. It may not be supposed that there was the conferral of an incorporeal right in perpetuity, by way of a term actually intended by the parties, but left unexpressed in the written record of their bargain, in both the written contract and the transfer.<sup>134</sup>

*Decision below and APN's notice of contention*

181 The judge rejected APN's contention that Grocon's obligation to produce the payment records may be inferred from cl 2 of the Side Deed or cls 42.1 and 43.2 of the D&C Contract.<sup>135</sup> He did so on the following bases:

- (a) Clause 2 of the Side Deed contained no provision as to the verification of a payment claim or the adjustment mechanism set out.<sup>136</sup>
- (b) Although cl 42.1 of the D&C Contract required Grocon to supply 'evidence of the amount due by [APN and Scots Church] to [Grocon]' in making a payment claim and that claims for payment 'shall include the value of work carried out', it did not stipulate anything concerning the nature of the

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<sup>131</sup> *Breen* (1996) 186 CLR 71, 90-1.

<sup>132</sup> (2011) 278 ALR 551.

<sup>133</sup> (2011) 278 ALR 551, 562 [64].

<sup>134</sup> (2011) 278 ALR 551, 562 [65].

<sup>135</sup> Reasons [79].

<sup>136</sup> Reasons [80].

evidence that Grocon was required to proffer.<sup>137</sup>

- (c) Clause 43.2 of the D&C Contract contained no requirement for verification.<sup>138</sup>

182 APN has filed a notice of contention by which it contends that the above decision was erroneous and that the judge's order should be affirmed on the following ground:

The obligation for [Grocon] to provide the documents sought by [APN] arises, inter alia, by way of inference either under clause 2 the Side Deed ...; clause 42.1 of the D&C Contract ...; and/or clause 43.2 of the D&C Contract.

*Parties' submissions on APN's notice of contention*

183 Although APN filed written submissions in support of its notice of contention, at the hearing of the application for leave to appeal, senior counsel for APN conceded that it would be difficult for APN to succeed in relation to the inferred term issue if this Court upheld Grocon's appeal in relation to the Implied Term. While senior counsel did not abandon the notice of contention and continued to rely on APN's written submissions, he refrained from any further oral submissions. In these circumstances, we will briefly consider the parties' written submissions.

184 APN contended that Grocon's obligation to produce the payment records arose as a necessary incident of the rights and obligations set out in cl 2 of the Side Deed – to which the Disputed Phrase was central – and accordingly should be inferred into that contract. According to APN, those rights and obligations could not be exercised, nor could the commercial intent of the clause be given effect, in the absence of the payment records. This was said to be because APN would otherwise be unable to determine and verify the amounts to be paid by it, or to it, pursuant to cl 2.

185 APN also argued that the obligation to produce the payment records could be inferred from cl 42.1 of the D&C Contract. This clause requires Grocon to deliver to

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<sup>137</sup> Reasons [81].

<sup>138</sup> Reasons [82].

the superintendent (with a copy to the principals) claims for payment supported by 'evidence of the amount due' by the principals to Grocon. APN argued that such evidence would include the payment records.

186 APN also submitted that the obligation to produce the payment records could be inferred from cl 43.2 of the D&C Contract. This clause confers on the principals a right to pay 'out of any moneys due or to become due to [Grocon] any moneys owing by [Grocon] to a subcontractor ... in relation to the execution of work under the [D&C] Contract and [such] payment ... is deemed to have been paid to [Grocon].'<sup>139</sup> According to APN, it may be inferred that, to give effect to this clause, Grocon would be required to provide to the principals documents relating to payments to subcontractors.

187 In reliance on the authorities summarised at [176] to [180] above, Grocon contended that, in circumstances where the relevant agreements governing the Project were wholly in writing, comprised the entire agreement between the parties, and were prepared by solicitors retained by each of the parties who were well resourced, there was no need or warrant for the Court to infer any terms into either the D&C Contract or the Side Deed.

188 In response to APN's contention that Grocon's obligation to produce the payment records could be inferred from cl 2 of the Side Deed, Grocon argued that such an obligation was significant, and, if the parties had intended for such a significant invasion of Grocon's standard commercial entitlements, they would have expressly provided for it.

189 In response to APN's contention that Grocon's obligation to produce the payment records could be inferred from cl 42.1 of the D&C Contract, Grocon contended that this clause left no room for any term to be inferred. This was because that clause did not prescribe or fetter the manner in which the amount claimed by Grocon was to be

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<sup>139</sup> See [25] above.

evidenced and left to the superintendent to determine the amount due under the payment claim, by reference to the evidence provided in support of the claim and the 'work carried out'. Under this mechanism, if the superintendent deemed that Grocon had provided insufficient evidence to support its payment claim, it was open to the superintendent to reduce the amount certified as payable. Thus, according to Grocon, the inference of an obligation on Grocon to provide payment records from cl 42.1 would impermissibly confine and define the range of considerations available to the superintendent in assessing a payment claim.

190 In response to APN's contention that Grocon's obligation to produce the payment records could be inferred from cl 43.2 of the D&C Contract, Grocon submitted this clause cross-referred to cl 43.1, which in turn expressly dealt with what was required to be provided in order to evidence a payment claim under cl 43.2. That was 'a duly signed written statement' that Grocon's subcontractors had been paid 'all moneys properly due and payable'. Accordingly, so it was said, there was no warrant for the Court to infer an obligation on Grocon to provide any further documents from cl 43.2.

*Decision on APN's notice of contention*

191 Our reasons for rejecting the Implied Term<sup>140</sup> apply with even greater force to the inferred term. As the parties turned their minds to the mechanism for verifying ATC Claims and decided to adopt the mechanism in cl 42.1 of the D&C Contract for that purpose, there is no room for an inference that they intended some other mechanism. The authorities governing the inference of terms into contracts deal with contracts whose terms are not all in writing and thus need to be established by inference. Those authorities have limited application to cases such as the present where experienced and sophisticated commercial organisations negotiated and signed detailed written agreements.

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<sup>140</sup> See [165]-[174] above.

192 It follows that the notice of contention must be dismissed.

***Conclusion***

193 For the above reasons, the application for leave to appeal will be granted, the appeal will be treated as having been heard immediately and will be allowed.

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