

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

S ECI 2019 05113

FAÇADE DESIGNS INTERNATIONAL PTY LTD (ACN 099 706 859)

Plaintiff

v

YUANDA VIC PTY LTD (ACN 166 473 089)

Defendant

JUDGE: RIORDAN J
WHERE HELD: Melbourne
DATES OF HEARING: 13-14, 18-20 May 2020
27-28, 30 July 2020
DATE OF JUDGMENT: 15 September 2020
CASE MAY BE CITED AS: Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd
MEDIUM NEUTRAL CITATION: [2020] VSC 570

BUILDING CONTRACTS - *Building and Construction Industry Security of Payment Act 2002* (Vic) ('the Act') - Application for judgment after principal failed to provide payment schedule - Principles to be applied in determining validity under s 14 of the Act - Whether payment claim invalid for insufficient identification of construction work - Whether payment claim invalid if any part fails to sufficiently identify the construction work - Whether a court must be satisfied under s 16(4) of the Act that the claimed amount does not include any excluded amount on the face of the claim or in fact - Whether the claimed amount can be amended to delete an excluded amount - Whether an excluded amount can be severed from the claimed amount.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr M G Roberts QC with Ms C L Symons	Piper Alderman
For the Defendant	Mr M R Scott QC with Ms L Mills	K&L Gates

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HIS HONOUR:

1 By originating motion filed 12 November 2019, the plaintiff ('Façade') seeks the following relief against the defendant ('Yuanda'):

- (a) an order that Yuanda pay Façade the amount of \$3,469,365.58 (inclusive of GST) pursuant to s 16(2)(a) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) ('the Act');
- (b) an order that Yuanda pay interest on the judgment sum, to be calculated on and from 30 October 2019 until the date of judgment, at the rate prescribed under s 2 of the *Penalty Interest Rates Act 1983* (Vic); and
- (c) an order that Yuanda pay Façade's costs of the proceeding.

2 In support of the application, Façade relied upon the following affidavits:

- (a) Affidavits of Anthony Callipari sworn:
 - (i) 11 November 2019;
 - (ii) 19 November 2019 (No 1);
 - (iii) 19 November 2019 (No 2);
 - (iv) 20 December 2019;
 - (v) 21 January 2020; and
 - (vi) 6 May 2020.
- (b) Affidavit of Faye Rozon sworn 5 May 2020.
- (c) Affidavit of Walter Bond sworn 6 May 2020.

3 In opposition to the application, Yuanda relied upon the following affidavits:

- (a) Affidavits of Rith Nguon affirmed:
 - (i) 13 December 2019; and
 - (ii) 6 May 2020.

- (b) Affidavits of Zhijun Liu affirmed:
- (i) 13 December 2019; and
 - (ii) 6 May 2020.
- (c) Affidavit of David Rees affirmed 12 May 2020.

Background

- 4 By Supply and Installation Agreement dated 13 April 2018 ('the Contract'), Façade agreed to carry out the installation of façade elements manufactured and supplied by Yuanda as part of the construction of commercial and residential towers at 447 Collins Street, Melbourne, Victoria, known as 'the Arch on Collins' ('the Project') for the price of \$14.5 million.
- 5 From September 2018 until the Contract was terminated in November 2019, Façade performed works under the Contract.¹
- 6 On 30 September 2019, Façade purported to provide a payment claim under s 14 of the Act for \$4,584,820.68 (inclusive of GST) ('the Payment Claim').
- 7 On 2 October 2019, Yuanda paid Façade the amount of \$1,115,455 (inclusive of GST) reducing the amount claimed to \$3,469,365.58.
- 8 Yuanda failed to provide a payment schedule to Façade within 10 business days of receiving the Payment Claim, as required by s 15 of the Act.
- 9 Accordingly, pursuant to s 15(4) of the Act, Façade contends that Yuanda became liable to pay the amount claimed on 30 October 2019, being the due date for the progress payments to which the Payment Claim related.

¹ On 6 November 2019, Façade served a notice of intention to suspend carrying out construction works under the Contract. On 13 November 2019, Façade suspended works on the Project pursuant to s 29 of the Act. On 14 November 2019, Yuanda purported to terminate the Contract by issuing a termination notice. On 14 November 2019, Façade responded to the purported termination notice by terminating the Contract and vacating the Project site.

10 By this proceeding, Façade seeks judgment for the amount claimed (after some conceded reductions) pursuant to s 16(2)(a) of the Act. However, pursuant to s 16(4), Façade is not entitled to judgment unless the Court is satisfied that:

- (a) Yuanda:
- (i) became liable to pay the claimed amount to Façade under s 15(4) as a consequence of failing to provide a payment schedule within the time allowed by that section; and
 - (ii) failed to pay the whole or any part of the claimed amount on or before the due date for the progress payments to which the Payment Claim related; and
- (b) the claimed amount does not include any excluded amount.

11 Yuanda contends that Façade is not entitled to judgment for the following reasons:

- (a) the Payment Claim was invalid because it did not sufficiently identify the construction work or related goods and services to which the progress payments related within the meaning of s 14(2)(c), and therefore Yuanda did not become liable to pay the amount claimed to Façade under s 15(4); and/or
- (b) the Payment Claim included excluded amounts within the meaning of ss 14(3)(b) and 16(4)(a)(ii).

The Payment Claim

12 The Payment Claim was a three page excel spreadsheet which comprised the following:

- (a) The first page was headed:

Project: 447 Collins Street Project	Subcontract:	Curtain Walling
Subcontract: Curtain Walling (Contract No. 3017/S00002)	Subcontract Value:	\$14,500,000
Issue Date: 30/09/2019	Variations:	\$5,698,425
Progress Claim No. 15: (Month of September 2019)	Revised Contract Value:	\$20,198,425 (Excl GST)

<u>Claimed to:</u>	<u>Payment claim from:</u>
YUANDA VIC PTY LTD	Supplier: FAÇADE DESIGNS INTERNATIONAL Pty Ltd
Main Office: Unit 503, Level 5, 447 Kent Street, Sydney, NSW	Address: 95 Stanhope Street, West Footscray, Vic, 3012
Vic Office: Suite 14, 255 Drummond St, Carlton Vic 3000	ABN: 97 099 706 859
ABN: 99 166 473 089	

- (b) Under the heading 'Contract Works' were 72 line items identifying the percentage of the works completed to date.
- (c) At the foot of the page was the following subtotal relating to 'Original Contract Works':

Description	Total	Complete to Date (Claimed in this Payment Claim)	Previously Claimed	Difference	Yuanda Paid to Date (Excludes GST but includes any Security withholdings)	Difference this Payment Claim
SUB-TOTAL - Original Contract Works	\$14,500,000.00	\$9,913,452.50	\$9,449,057.50	\$464,395.00	\$8,013,257.13	\$1,900,195.38

- (d) On the second page under the heading 'Variations' were 48 line items identifying work claimed by Façade to be variations under the Contract. The 25 variations ('Claim Items') set out in Appendix 1 to these reasons ('the Variations Table') are the individual claimed amounts comprising the Payment Claim. The Claim Items as finally claimed were summarised by Façade as follows:

Claim Item	Reference	Payment Claim Amount	Revised Amount	Claim
1B	Original Contract Works	\$886,145.38	\$886,145.38	
2B	1099	\$88,252.50	\$88,252.50	
3B	1109	\$20,475.00	\$20,475.00	
4B	1120	\$35,070.00	\$35,070.00	
5B	1128	\$61,587.50	\$61,587.50	
6B	1129	\$724,260.76	\$724,260.76	
7B	1131	\$33,120.00	\$33,120.00	
8B	1132	\$168,385.45	\$168,385.45	
9B	1140	\$68,527.50	\$68,527.50	
10B	1141 & Credit Note 1141	\$171,488.37	\$171,488.37	
11B	1142 & Credit Note 1142	\$7,775.00	\$7,775.00	
12B	1143 & Credit Note 1143	\$235,455.00	\$235,455.00	
13B	1144 & Credit Note 1144	\$72,340.00	\$72,340.00	
14B	1145 & Credit Note 1145	\$69,255.00	\$69,255.00	
15B	1146 & Credit Note 1146	\$8,909.70	\$8,909.70	
16B	1149	\$50,115.00	\$50,115.00	
17B	1150	\$125,860.26	\$125,860.26	

18B	1151	\$308,072.50	\$292,502.50 ²
19B	1152	\$36,187.50	\$36,187.50
20B	1153	\$85,217.90	\$85,217.90
21B	1154	\$5,500.00	\$5,500.00
22B	1155	\$140,301.11	\$140,301.11
23B	1156	\$19,255.63	\$13,753.63 ³
24B	1157	\$76,000.00	\$76,000.00
25B	1158	\$51,680.00	\$35,360.00 ⁴
26B	1162	\$64,154.37	\$0 (not claimed) ⁵
TOTAL ex GST		\$3,613,391.43	\$3,511,845.00
Less Security (retention) - deducted from Item 1B		(\$459,422.63)	(\$459,422.63)
TOTAL ex GST		\$3,153,968.80	\$3,052,422.43
TOTAL CLAIMED AMOUNT incl. GST		\$3,469,365.68	\$3,357,664.67

- 13 On the third page was the following table of totals, together with five explanatory notes, including a statement in accordance with s 14(2)(e) that the claim had been issued under the Act:

GROSS AMOUNT CLAIMED	\$15,611,877.91
Deduct Security - Maximum amount as per MC 20 & MC21 of Annexure J ($[\$14,500,000 - \$725,000] \times 5\%$) = \$688,750.00 Security withholding in this payment claim is calculated as \$9,913,452.50 less \$725,000.00 (Site Establishment Fee ref clause MC 20) = \$9,188,452.50 $\times 5\%$ = \$459,422.62 As per Annexure J clause MC 21 Security should not withheld from Variations.	-\$459,422.63
NET AMOUNT CLAIMED THIS PAYMENT CLAIM (Excluding GST but including Security withholding)	\$15,152,455.29
Add GST	\$1,515,245.53
NET AMOUNT CLAIMED THIS PAYMENT CLAIM (Including GST)	\$16,667,700.81
Actual Amount Paid to Date (Including GST)	\$12,082,880.13
Actual Security Payment Retain to date (incl. GST)	\$463,925.42
Balance Due (Including GST)	\$4,584,820.68

Nature of the hearing

- 14 An application for judgment under s 16 of the Act is intended to be summary in nature.⁶ However that does not mean that the principles relevant to applications for summary judgment under s 61 of the *Civil Procedure Act 2010* (Vic) or ord 22 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) apply.⁷ Before entering judgment the Court does not need to be satisfied that the respondent has no real

² Reduced prior to trial.

³ Reduced prior to trial.

⁴ Reduced during closing submissions.

⁵ Reduced during closing submissions.

⁶ *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* (2016) 337 ALR 452, 464-5 [56], 474 [92], 479-80 [112].

⁷ *John Beever v Roads Corporation* [2018] VSC 635, [60] (Digby J).

prospect of success. Rather, the Court should finally determine on the evidence, whether it is satisfied of the matters referred to in s 16(4)(a) of the Act according to the principles referred to in paragraphs 40 to 41 and 54 to 59 below.⁸ Any enquiry into whether the respondent has arguable cross-claims or defences would be contrary to s 16(4)(b).

Relevant provisions of the Act

15 Section 3 sets out the object of the Act as follows:

- (1) The object of this Act is to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.
- (2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in accordance with this Act.
- (3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves –
 - (a) the making of a payment claim by the person claiming payment; and
 - (b) the provision of a payment schedule by the person by whom the payment is payable; and
 - (c) the referral of any disputed claim to an adjudicator for determination; and
 - (d) the payment of the amount of the progress payment determined by the adjudicator; and
 - (e) the recovery of the progress payment in the event of a failure to pay.
- (4) It is intended that this Act does not limit –
 - (a) any other entitlement that a claimant may have under a construction contract; or

⁸ *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93, [11] (Basten JA with whom Meagher JA and Emmett AJA agreed) (*Epping Land*); *Style Timber Floor Pty Ltd v Krivosudsky* (2019) 100 NSWLR 133, 142 [43] (Leeming JA) (*Style Timber*).

- (b) any other remedy that a claimant may have for recovering that other entitlement.

16 Section 9(1) establishes the right to progress payments as follows:

On and from each reference date under a construction contract, a person –

- (a) who has undertaken to carry out construction work under the contract; or
- (b) who has undertaken to supply related goods and services under the contract –

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

17 Section 14 sets out the requirements with respect to payment claims as follows:

- (1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the *claimant*) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
- (2) A payment claim –
 - (a) must be in the relevant prescribed form (if any); and
 - (b) must contain the prescribed information (if any); and
 - (c) must identify the construction work or related goods and services to which the progress payment relates; and
 - (d) must indicate the amount of the progress payment that the claimant claims to be due (the *claimed amount*); and
 - (e) must state that it is made under this Act.
- (3) The claimed amount –
 - (a) may include any amount that the respondent is liable to pay the claimant under section 29(4);
 - (b) must not include any excluded amount.

...

18 Section 15 provides for the serving of a payment schedule in reply to a payment claim and the consequences of failing to do so as follows:

- (1) A person on whom a payment claim is served (the *respondent*) may reply to the claim by providing a payment schedule to the claimant.
- (2) A payment schedule –

- (a) must identify the payment claim to which it relates; and
 - (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the *scheduled amount*); and
 - (c) must identify any amount of the claim that the respondent alleges is an excluded amount; and
 - (d) must be in the relevant prescribed form (if any); and
 - (e) must contain the prescribed information (if any).
- (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
- (4) If—
- (a) a claimant serves a payment claim on a respondent; and
 - (b) the respondent does not provide a payment schedule to the claimant—
 - (i) within the time required by the relevant construction contract; or
 - (ii) within 10 business days after the payment claim is served;
- whichever time expires earlier—

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

19 Section 16 establishes the rights of a claimant arising from a respondent's failure to provide a payment schedule or failure to pay the claimed amount as follows:

- (1) This section applies if the respondent—
 - (a) becomes liable to pay the claimed amount to the claimant under section 15(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section; and
 - (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
- (2) In those circumstances, the claimant—
 - (a) may—

- (i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or
 - (ii) make an adjudication application under section 18(1)(b) in relation to the payment claim; and
- (b) may serve notice on the respondent of the claimant's intention –
- (i) to suspend carrying out construction work under the construction contract; or
 - (ii) to suspend supplying related goods and services under the construction contract.
- (3) A notice referred to in subsection (2)(b) must state that it is made under this Act.
- (4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt –
- (a) judgment in favour of the claimant is not to be given unless the court is satisfied –
 - (i) of the existence of the circumstances referred to in subsection (1); and
 - (ii) that the claimed amount does not include any excluded amount; and
 - (b) the respondent is not, in those proceedings, entitled –
 - (i) to bring any cross-claim against the claimant; or
 - (ii) to raise any defence in relation to matters arising under the construction contract.

20 Section 10B defines excluded amounts as follows:

- (1) This section sets out the classes of amounts (*excluded amounts*) that must not be taken into account in calculating the amount of a progress payment to which a person is entitled under a construction contract.
- (2) The excluded amounts are –
 - (a) any amount that relates to a variation of the construction contract that is not a claimable variation;
 - (b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to –
 - (i) latent conditions; and

- (ii) time-related costs; and
- (iii) changes in regulatory requirements;
- (c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;
- (d) any amount in relation to a claim arising at law other than under the construction contract;
- (e) any amount of a class prescribed by the regulations as an excluded amount.

21 Section 10A defines claimable variations as follows:

- (1) This section sets out the classes of variation to a construction contract (the *claimable variations*) that may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.
- (2) The first class of variation is a variation where the parties to the construction contract agree –
 - (a) that work has been carried out or goods and services have been supplied; and
 - (b) as to the scope of the work that has been carried out or the goods and services that have been supplied; and
 - (c) that the doing of the work or the supply of the goods and services constitutes a variation to the contract; and
 - (d) that the person who has undertaken to carry out the work or to supply the goods and services under the contract is entitled to a progress payment that includes an amount in respect of the variation; and
 - (e) as to the value of that amount or the method of valuing that amount; and
 - (f) as to the time for payment of that amount.
- (3) The second class of variation is a variation where –
 - (a) the work has been carried out or the goods and services have been supplied under the construction contract; and
 - (b) the person for whom the work has been carried out or the goods and services supplied or a person acting for that person under the construction contract requested or directed the carrying out of the work or the supply of the goods and services; and

- (c) the parties to the construction contract do not agree as to one or more of the following—
 - (i) that the doing of the work or the supply of goods and services constitutes a variation to the contract;
 - (ii) that the person who has undertaken to carry out the work or to supply the goods and services under the construction contract is entitled to a progress payment that includes an amount in respect of the work or the goods and services;
 - (iii) the value of the amount payable in respect of the work or the goods and services;
 - (iv) the method of valuing the amount payable in respect of the work or the goods and services;
 - (v) the time for payment of the amount payable in respect of the work or the goods and services; and
- (d) subject to subsection (4), the consideration under the construction contract at the time the contract is entered into—
 - (i) is \$5 000 000 or less; or
 - (ii) exceeds \$5 000 000 but the contract does not provide a method of resolving disputes under the contract (including disputes referred to in paragraph (c)).
- (4) If at any time the total amount of claims under a construction contract for the second class of variations exceeds 10% of the consideration under the construction contract at the time the contract is entered into, subsection (3)(d) applies in relation to that construction contract as if any reference to '\$5 000 000' were a reference to '\$150 000'.

Issues for determination

22 The issues raised in this proceeding require determination of the following questions:

- (a) Is the Payment Claim a valid payment claim under s 14 of the Act?
- (b) As a matter of statutory construction, in determining whether or not any Claim Item constitutes or includes an excluded amount, should the Court have regard to:
 - (i) the description of the Claim Item as appearing on the face of the Payment Claim; or

- (ii) evidence of the substance of the Claim Item.
- (c) Does the inclusion of an excluded amount in the Payment Claim preclude the Court from giving judgment for any amount under s 16?

Principles of statutory interpretation

23 The primary object of statutory construction is to construe the relevant provision so that its legal meaning is consistent with:

- (a) the language of the relevant provision, being the text; and
- (b) the legislative purpose of the statute.⁹

The legal meaning is 'the meaning that the legislature is taken to have intended [the provision] to have'.¹⁰ It may or may not be the same as the literal meaning.¹¹

24 Accordingly, in statutory construction, the focus is on the text and the legislative purpose as follows:

- (a) The primacy of the text has been emphasised by the High Court.¹² It has been said that the process of statutory interpretation starts and ends with the text.¹³
- (b) To ascertain the legislative purpose, the Court first considers the text of the relevant provision in its context.¹⁴ The context means:
 - (i) the whole of the Act or other instrument;

⁹ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*').

¹⁰ *Ibid* 384 [78].

¹¹ *Ibid*.

¹² See the examples cited in *Commissioner of State Revenue v EHL Burgess Properties Pty Ltd* [2015] VSCA 269, [56]-[63]. See also *Di Paolo v Salta Constructions Pty Ltd* [2015] VSCA 230, [32]-[48] (Osborn and Kyrou JJA); *Lowe v The Queen* (2015) 48 VR 351, 357-9 [12]-[18] (Warren CJ).

¹³ *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ). The expression was adopted by the High Court in *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ) and by the Court of Appeal in *DPP v Walters* (2015) 49 VR 356, 358 [2] (Maxwell P, Redlich, Tate and Priest JJA).

¹⁴ This approach 'needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction': *Mills v Meeking* (1990) 169 CLR 214, 235 (Dawson J).

- (ii) the existing state of the law;
- (iii) the mischief that the statute was intended to remedy;¹⁵ and
- (iv) the history of the legislative scheme.¹⁶

25 Section 35(b) of the *Interpretation of Legislation Act 1984* (Vic) provides that '[i]n the interpretation of a provision of an Act ... consideration *may* be given to' extrinsic material to ascertain the purpose of the legislation, even if the language is clear and unambiguous.¹⁷ I emphasise 'may' because if the meaning of the text is plain 'there is no occasion to look to the extrinsic material'.¹⁸ As the Court of Appeal has said in the context of this section:

- (a) 'it would be inappropriate to resort to parliamentary debates in order to seek to create an ambiguity in a section which is otherwise, at least in relative terms, clear';¹⁹ and
- (b) 'the court needs to be careful not to permit recourse to this section to undermine its primary function of seeking to ascertain the intention of the legislation from the content of the Act itself'.²⁰

This section does permit 'a court to consider the purposes of an Act in determining whether there is more than one possible construction',²¹ but such material cannot displace the meaning of the statutory text.²²

¹⁵ For this purpose, courts may have regard to reports of law reform bodies: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) ('*CIC Insurance*').

¹⁶ *Ibid*; *Federal Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ); *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297, 305-6 (Gibbs CJ), 324, 334 (Aickin J) ('*Cooper Brookes*').

¹⁷ *Mills v Meeking* (1990) 169 CLR 214, 235 (Dawson J); *Humphries v Poljak* [1992] 2 VR 129, 136-7 (Crockett and Southwell JJ); *Alcoa Portland Aluminum Pty Ltd v Victorian Workcover Authority* (2007) 18 VR 146, 159 [39] (Chernov JA with whom Maxwell ACJ and Neave JA agreed); *Secretary to the Department of Justice and Regulation v Century 21 Australia Pty Ltd* (2017) 53 VR 234, 248 [48] (Whelan, Beach and Ferguson JJA).

¹⁸ *Catlow v Accident Compensation Commission* (1989) 167 CLR 543, 550 (Brennan and Gaudron JJ).

¹⁹ *Rizza v Fluor Daniel GTI (Australia) Pty Ltd* [1999] 1 VR 405, 414 [37] (Chernov JA with whom Winneke P and Brooking JA agreed).

²⁰ *Masters v McCubbery* [1996] 1 VR 635, 646 (Winneke P).

²¹ *Mills v Meeking* (1990) 169 CLR 214, 235 (Dawson J). See also *Acts Interpretation Act 1901* (Cth) s 15AB.

²² *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39]

26 If the literal meaning of the text is consistent with the identified legislative purpose, the literal meaning will be accepted as the legal meaning.

27 However, if the literal meaning conflicts with the identified legislative purpose, a departure from the literal meaning may be justified. The resultant tension was described by Francis Bennion in *Statutory Interpretation* as follows:

Consideration of the enactment in its context may raise factors that pull in different ways. For example the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with.²³

28 Examples of conflicts between the literal meaning and the identified legislative purpose which have justified departure from the literal meaning, include where:

- (a) the literal meaning would conflict with other provisions of the statute;
- (b) the literal meaning is inconsistent with the purpose of the statute;
- (c) the literal meaning is incapable of practical application; and
- (d) adoption of the literal meaning would lead to a result that is absurd, unreasonable or anomalous.²⁴

29 If it is determined that such a conflict exists, the approach to reconciliation of the conflict is as follows:

- (a) First, if an alternative construction is to be adopted as the legal meaning, it is necessary that the alternative construction is 'reasonably open'²⁵ and 'consistent with the language in fact used by the legislature'.²⁶ This is

(French CJ, Hayne, Crennan, Bell and Gageler JJ); *Northern Territory v Collins* (2008) 235 CLR 619, 642 [99] (Crennan J).

²³ Francis Bennion, *Statutory Interpretation: A Code* (Butterworths, 3rd ed, 1997) 344; referred to with approval in *Project Blue Sky* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

²⁴ *Colonial Range Pty Ltd v CES-Queen (Vic) Pty Ltd* [2016] VSCA 328, [53] (Warren CJ, Whelan JA and Riordan AJA) (citations omitted).

²⁵ *CIC Insurance* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

²⁶ *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531, 549 [39] (French CJ, Crennan and Bell JJ). Although the Court was here referring to a modified meaning as one which added or omitted words, a fortiori, it must also be a requirement whenever a court is to infer that the legal meaning is other than a literal or grammatical meaning.

necessary because 'the task remains the construction of the words the legislature has enacted'.²⁷ 'The purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions'.²⁸

- (b) Section 35(a) of the *Interpretation of Legislation Act 1984* (Vic) provides that 'a construction that would promote the purpose or object underlying the Act ... shall be preferred to a construction that would not promote that purpose or object'. The choice is only between a construction that will promote the purpose and one that will not. The section is not directed to the choice 'as to the construction which "will best achieve" the object of the Act'.²⁹
- (c) If the inconsistency between the literal meaning and the legislative purpose is the result of 'simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision', an alternative construction which is consistent with the legislative purpose may be more 'readily' adopted.³⁰
- (d) After the identification of an alternative construction, the legal meaning will be determined by balancing:
 - (i) the strength of the literal meaning as against the alternative construction; and
 - (ii) the extent to which these meanings are consistent with the promotion of the legislative purpose.

²⁷ Ibid.

²⁸ *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378, 390 [26] (French CJ and Hayne JJ).

²⁹ *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249, 262 (Dawson, Toohey and Gaudron JJ).

³⁰ *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531, 548 [38] (French CJ, Crennan and Bell JJ). The unique nature of the power to correct drafting errors was recognised in *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 2 All ER 109, [115] (Lord Nicholls): 'It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. ... This power is confined to plain cases of drafting mistakes.'

- 30 This balancing exercise has been explained by the High Court as follows:
- (a) 'If the choice is between two strongly competing interpretations, as we have said, the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended.'³¹
 - (b) '[I]nconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which ... is reasonably open and more closely conforms to the legislative intent.'³²

31 With respect to interpreting a provision as if it contained additional words, guidance has been provided by the plurality of the High Court in *Taylor v The Owners – Strata Plan No 11564*.³³ Their Honours stated that 'the task remains the construction of the words the legislature has enacted' and 'any modified meaning must be consistent with the language in fact used by the legislature'.³⁴ The plurality further said that whether an interpretation of a provision as if it contained additional words is justified involves a judgment of matters of degree, and explained:

That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills 'gaps disclosed in legislation' or makes an insertion which is 'too big, or too much at variance with the language in fact used by the legislature'.³⁵

Is the Payment Claim a valid payment claim under s 14 of the Act?

32 Section 14(2)(c) of the Act states that a payment claim 'must identify the construction work or related goods and services to which the progress payment relates'.

³¹ *Cooper Brookes* (1981) 147 CLR 297, 321 (Mason and Wilson JJ).

³² *CIC Insurance* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

³³ (2014) 253 CLR 531 (French CJ, Crennan and Bell JJ).

³⁴ *Ibid* 549 [39].

³⁵ *Ibid* 548 [38] (citations omitted).

33 Failure to comply with this requirement will render the purported payment claim invalid.³⁶

34 In *John Beaver (Aust) Pty Ltd v Paper Australia Pty Ltd*, Lyons J comprehensively reviewed the authorities relating to the requirements for a payment claim to comply with s 14(2) of the Act. He summarised the principles as follows:

- (1) the test of whether a claim is a payment claim for the purpose of the Act is objective;
- (2) however, the manner in which compliance is tested is not overly demanding and should not be approached in an unduly technical manner or from an unduly critical point of view;
- (3) for the purposes of the identification requirement, it is necessary that the payment claim reasonably identifies the construction work to which it relates such that the basis of the claim is reasonably comprehensible to the recipient party when considered objectively ie from the perspective of a reasonable party who is in the position of the recipient;
- (4) in evaluating the sufficiency of the identification of the work, it is appropriate to take into account the background knowledge of the parties from their past dealings and prior exchanges of information including correspondence passing between them before and at the time of the payment claim. To that extent, the Court may go beyond the face of the document itself.³⁷

35 The case before me brings into sharp focus the extent to which evidence may be admitted about 'the background knowledge of the parties from their past dealings and prior exchanges of information including correspondence passing between them before and at the time of the payment claim'.³⁸ On the basis that it related to background knowledge, each party adduced extensive evidence relating to the subjective knowledge of employees, including whether employees understood or were able to calculate various Claim Items, communications between employees of the respective parties (both before and after service of the Payment Claim), and matters relevant to the merits and quantum of Claim Items in the Payment Claim. The procedures adopted resulted in a hearing with the features set out in paragraph

³⁶ *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183, [141(c)] (Vickery J) ('*Seabay Properties*').

³⁷ [2019] VSC 126, [83] ('*John Beaver*').

³⁸ *Ibid.*

71 below. The question arises as to whether this evidence is relevant and admissible in determining the validity of the Payment Claim.

Is evidence of surrounding circumstances admissible in determining the validity of a payment claim?

36 In my opinion, in determining whether a payment claim complies with s 14(2)(c) of the Act, the Court should not have regard to extrinsic evidence of surrounding circumstances³⁹ for the following reasons:

(a) Compliance with s 14(2)(c) of the Act is assessed on an objective basis. Evidence of conversations between parties or the subjective ability of parties to understand a payment claim should not be permitted.

(b) The proposition that the validity of payment claims under s 14 of the Act should be determined by reference to the face of the payment claim is supported by the weight of authority, including the following:

(i) In *Jemzone Pty Ltd v Trytan Pty Ltd*, Austin J held that the claimant was obliged to ensure that the payment claim complied 'on its face' with s 13(2) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the NSW Act'), being the equivalent of s 14(2) of the Act.⁴⁰ He observed that extraneous circumstances and previous communications should not be considered, stating:

[T]he payment claim must on its face contain all the ingredients required by the Act. While the court should not take an unduly strict approach to the construction of the claim, it ought not to cure defects in the claim document by reference to extraneous circumstances or previous communications.⁴¹

³⁹ In the context of contractual interpretation 'surrounding circumstances' are 'events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating': *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 117 [50] (French CJ, Nettle and Gordon JJ) ('*Mount Bruce*').

⁴⁰ (2002) 42 ACSR 42, 50 [41].

⁴¹ *Ibid.*

- (ii) In *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)*, Hodgson JA said that a payment claim would not be a nullity unless its failure to comply with s 13(2) of the NSW Act was 'patent on its face'.⁴² His Honour held that the test of validity was whether the payment claim 'purports in a reasonable way to identify the particular work in respect of which the claim is made'.⁴³
- (iii) Ipp JA agreed with the reasons of Hodgson JA and formulated the test of validity as being whether the payment claim 'is made in good faith and purports to comply with s 13(2) of the [NSW] Act'.⁴⁴
- (iv) In *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd*, the New South Wales Court of Appeal held that, for the purposes of the New South Wales equivalent of s 16 of the Act, the question of whether a claim was made for a variation under the NSW Act was resolved by reference to the face of the claim.⁴⁵

In my opinion, the admission of extrinsic evidence of surrounding circumstances would be inconsistent with the assessment of compliance on the basis of the purport of the payment claim document.⁴⁶

- (c) To the extent that guidance can be gained by reference to another area of the law which requires an objective assessment, the exclusion of extrinsic evidence of surrounding circumstances is consistent with the 'true rule' as

⁴² (2005) 64 NSWLR 462, 475 [36] ('*Nepean Engineering*').

⁴³ Ibid (Ipp JA agreeing at 484 [76], Santow JA dissenting on this point at 477 [47]) (emphasis added), quoted with approval in *Epping Land* [2020] NSWCA 93, [21] (Basten JA, with whom Meagher JA and Emmett AJA agreed). Adopted by *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1, [41(iv)] (Palmer J); *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* (2006) 196 FLR 388, 399 [45] (Brereton J); *KDV Sport Pty Ltd v Muggeridge Constructions Pty Ltd* [2019] QSC 178, [17] (Brown J); *T & M Buckley Pty Ltd v 57 Moss Rd Pty Ltd* [2010] QCA 381, [35] (Philippides J, with whom Fraser and White JJA agreed).

⁴⁴ *Nepean Engineering* (2005) 64 NSWLR 462, 484 [76] (emphasis added), quoted with approval in *Epping Land* [2020] NSWCA 93, [22] (Basten JA, with whom Meagher JA and Emmett AJA agreed). Applied in *AC Hall Airconditioning Pty Ltd v Schiavello (Vic) Pty Ltd (No. 2)* [2008] VCC 1490, [19] (Judge Shelton).

⁴⁵ *Epping Land* [2020] NSWCA 93, [23] (Basten JA, with whom Meagher JA agreed), [92] (Emmett AJA).

⁴⁶ Cf *Clarence Street Pty Ltd v Isis Projects Pty Ltd* (2005) 64 NSWLR 448, 457 [40] (Mason P with whom Giles and Santow JJA agreed). I do not read Mason P as considering the issue of whether 'earlier contractual dealings' would be relevant if not referred to in the payment claim.

applied by Mason J in objectively interpreting contracts.⁴⁷ The principal reasons for excluding evidence of surrounding circumstances under the true rule are as follows:

- (i) Admission of such evidence would undermine the Court's ability to avoid 'difficult, time-consuming, expensive and problematic' consideration of extraneous material.⁴⁸
 - (ii) The parties should be held to their written words, which appear plain on their face.⁴⁹
- (d) Similar considerations are particularly applicable to interpreting the requirements of a payment claim under the Act for the following reasons:
- (i) If, as in this case, the validity of a payment claim under the Act could be challenged by reference to extrinsic evidence of surrounding circumstances, it could cause long delays and very substantial costs to be incurred in making claims under the Act. It is not consistent with the purpose of the Act for the assessment of whether a payment claim successfully identified the construction work for which payment is claimed, to be undertaken 'in hindsight',⁵⁰ or 'after a full investigation of all the facts and circumstances'.⁵¹
 - (ii) The admission of evidence of dealings and communications between parties to a project, which may extend over years, on the basis of relevance to an extended view of 'context' or otherwise, 'would drive a horse and cart (or perhaps a B-double) through the legislative scheme'.⁵² As Vickery J explained in *Hickory Developments Pty Ltd v*

⁴⁷ *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 352.

⁴⁸ *Equiscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471, 483 [35] (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ).

⁴⁹ See the discussion in JD Heydon, *Heydon on Contract* (Lawbook Co, 2019) 404-6 [9.1520].

⁵⁰ *KDV Sport Pty Ltd v Muggeridge Constructions Pty Ltd* [2019] QSC 178, [17] (Brown J).

⁵¹ *Nepean Engineering* (2005) 64 NSWLR 462, 474 [34] (Hodgson JA).

⁵² *Abergeldie Contractors Pty Ltd v Fairfield City Council* [2017] NSWCA 113, [47] (Basten JA, with whom Beazley ACJ and Meagher JA agreed) with reference to the prospect of the Court being required to consider when practical completion had been achieved, rather than when an appropriate certificate had been issued. In *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229, [45] Basten JA identified the purpose of the Act as being 'to provide a speedy and effective means

Schiavello (Vic) Pty Ltd:

The Act also manifests another central aspiration, that of freedom from excessive legal formality. The provisions demonstrate a pragmatic concern to provide a dispute resolution process which is not bedevilled with unnecessary technicality. The *Building and Construction Industry Security of Payment Act 1999* (NSW) has led to a spate of litigation in its relatively short life. If the Victorian Act became prone to challenges founded on fine legal points, an important object of the Act would be defeated by the twin adversaries of cost and time.⁵³

- (e) If the Court applies an objective test to assessing the validity of a payment claim and its supporting documents, such documents should be readily available for the Court's assessment. Accordingly, determination of whether a payment claim has satisfied the requirement of s 14(2)(c) should be relatively straightforward. As was observed by Leeming JA in *Style Timber Floor Pty Ltd v Krivosudsky*:

Whether or not a document is a payment schedule must be something which is capable of ascertainment readily, and (at least ordinarily) without the assistance of a lawyer.⁵⁴

37 As compliance is 'not overly demanding and should not be approached in an unduly technical manner or from an unduly critical point of view',⁵⁵ it is not unfair on the claimant that the payment claim and its supporting documents should identify the relevant work as required by s 14(2)(c).

38 The undemanding standard for compliance with s 14(2)(c) is demonstrated by the following principles:

- (a) A payment claim is only required to be bona fide and reasonably purport to identify the particular work in respect of which the claim is made.⁵⁶

of ensuring that progress payments are made during the course of the administration of a construction contract, without undue formality or resort to the law'.

⁵³ (2009) 26 VR 112, 121 [46] (citations omitted).

⁵⁴ (2019) 100 NSWLR 133, 142 [44].

⁵⁵ *John Beever* [2019] VSC 126, [83] (Lyons J).

⁵⁶ *Nepean Engineering* (2005) 64 NSWLR 462, 475 [36] (Hodgson JA), 484 [76] (Ipp JA).

- (b) A payment claim is only a claim. It is unlike a payment schedule, which is intended to identify the scope of the dispute,⁵⁷ and articulate the respondent's case to be determined by the adjudicator.⁵⁸
- (c) A payment claim is not required to be as precise or as particularised as a pleading.⁵⁹ It need only provide sufficient detail to enable the respondent to identify the subject matter of the claim, not to make its own assessment of the amount payable.⁶⁰
- (d) Evidence of what officers did in response to a payment claim is unhelpful and whether they were able to understand the payment claim in fact is not relevant, because 'the focus must remain on the objective circumstances, not the subjective intentions or perceptions of one of the parties'.⁶¹
- (e) The fact that there may be typographical omissions or other errors does not invalidate a payment claim.⁶² As was said by the Full Federal Court in *Pyneboard Pty Ltd v Trade Practices Commission*:

[T]he mere fact that parsing and analysis in the artificial atmosphere of the courtroom can lead to the identification of a number of latent ambiguities will not invalidate what, as a matter of commonsense, is reasonably clear.⁶³

- (f) To interpret the identification requirement under s 14(2)(c) as imposing a more exacting standard would encourage challenges to the validity of purported payment claims in the courts. The words of s 14(2)(c) do not mandate such an approach. I consider that a more exacting standard would not accord with the legislative intention. As Hodgson JA observed in *Nepean*

⁵⁷ *Clarence Street Pty Ltd v Isis Projects Pty Ltd* (2005) 64 NSWLR 448, 455 [31] (Mason P with whom Giles and Santow JJA agreed) ('*Clarence Street*').

⁵⁸ *Style Timber* (2019) 100 NSWLR 133, 142 [45] (Leeming JA).

⁵⁹ *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, [76] (Palmer J), quoted with approval in *Style Timber* (2019) 100 NSWLR 133, 143 [46] (Leeming JA).

⁶⁰ *Clarence Street* (2005) 64 NSWLR 448, 454 [25], 456-7 [38]-[39] (Mason P with whom Giles and Santow JJA agreed).

⁶¹ *Ibid* 457 [38]-[39].

⁶² *Nepean Engineering* (2005) 64 NSWLR 462, 474 [34] (Hodgson JA).

⁶³ (1982) 39 ALR 565, 571 (Northrop, Deane and Fisher JJ) which referred to notice requirements under the *Trade Practices Act 1974* (Cth), quoted with approval in the context of a payment claim in *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266, [83] (Nicholas J).

Engineering, it cannot be consistent with the scheme of the Act for it to be construed as promoting:

[A] respondent [to] avoid the effect of the Act by not serving a payment schedule, and defending the [s 16] proceedings by raising a question as to identification, which could be as to just one of many items in a claim and could be such as to depend upon a very detailed examination of all the circumstances of the contract.⁶⁴

39 A possible consequence of finding a payment claim to be valid simply by examining the claim document 'on its face', may be that the respondent is unable in fact to identify the work to which the claim related. However, this issue is remedied by the adjudication process set out in pt 3, div 2 of the Act. A respondent in such a case is entitled to serve a payment schedule refusing to make payment on the basis that it cannot identify the work. The dispute would then be referred to and settled by an adjudicator, who would determine whether or not the work was adequately identified in the payment claim under s 23 of the Act.⁶⁵

Principles to be applied in determining the validity of a payment claim

40 On the basis of the above analysis, I would state the relevant principles as follows:

- (a) A payment claim is construed objectively. A payment claim will comply with s 14(2)(c) if a reasonable building practitioner in the position of the recipient would have understood the payment claim to be bona fide and to purport in a reasonable way to identify the particular work in respect of which the claim is made.⁶⁶
- (b) The payment claim will include documentation expressly or impliedly referred to on the face of the payment claim. Documentation will be impliedly incorporated by reference if a reasonable building practitioner in the position of the recipient would have understood the payment claim to refer to such supporting documentation. By way of example:

⁶⁴ *Nepean Engineering* (2005) 64 NSWLR 462, 475 [38].

⁶⁵ *Ibid* 474-5 [35] (Hodgson JA), quoted with approval in *Epping Land* [2020] NSWCA 93, [21] (Basten JA, with whom Meagher JA and Emmett AJA agreed).

⁶⁶ *Nepean Engineering* (2005) 64 NSWLR 462, 475 [36] (Hodgson JA), 484 [76] (Ipp JA).

- (i) In this case, the Payment Claim included a claim for \$20,475 relating to Invoice 1109. It referenced Invoice 1109, but contrary to the notation in the Payment Claim, the invoice and supporting documents were not issued with the Payment Claim.⁶⁷ However, a reasonable building practitioner in the position of the recipient would have understood that the Payment Claim related to Invoice 1109 and its supporting documents, which had been sent to the respondent by email on 4 June 2019.
- (ii) In *John Beever (Aust) Pty Ltd v Paper Australia Pty Ltd*, a payment claim sent to the respondent on 11 August 2014 identified the construction work as follows:

Project No: 20,139 PE705 - DIP Plant Mechanical Package 03
Order No / Contract: 50030556
...
Description:
Progress Claim 6 (MAY 2014).⁶⁸

A reasonable building practitioner in the position of the recipient would have understood that the payment claim related to the 'May 2014' claim and its supporting documents, which had been sent to the respondent by email on 3 June 2014.⁶⁹

41 The objective approach requires reference to the context, being the construction contract and the entire payment claim, together with documentation expressly or impliedly referred to in the payment claim.⁷⁰ This process of reference to the context is '[o]rdinarily ... possible by reference to the [construction] contract alone',⁷¹ together with the abovementioned documentation. The plurality in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* said 'ordinarily' because:

⁶⁷ See paragraphs 89 to 90 of Appendix 2.

⁶⁸ [2019] VSC 126, [20] (Lyons J).

⁶⁹ Ibid [13].

⁷⁰ See *Mount Bruce* (2015) 256 CLR 104, 116 [46] (French CJ, Nettle and Gordon JJ), analogous to the construction of a commercial contract.

⁷¹ Ibid 116 [48].

[S]ometimes, recourse to events, circumstances and things external to the contract is necessary [for the purpose of facilitating] ... an understanding 'of the genesis of the transaction, the background, the context and the market in which the parties are operating'.⁷²

However, for the reasons expressed in paragraph 36(d) above, the courts should be wary to ensure that the exception allowing for evidence of context is not used as a Trojan horse to admit extrinsic evidence of surrounding circumstances, including prior dealings and the subjective intentions or understanding of parties, which is irrelevant.⁷³

Is a payment claim invalid if any part fails to sufficiently identify the construction work?

42 If the validity of the payment claim is determined in accordance with the principles set out in paragraphs 40 and 41 above, no question of severance arises. Section 14 of the Act does not permit a payment claim to be partially invalid because, for example, some aspect of an item is insufficiently particularised or there are arithmetical errors. In my opinion, the scheme of the Act contemplates such inadequacies being dealt with as part of the adjudication process.⁷⁴ As Hodgson JA said in *Nepean Engineering*:

In my opinion, a document which purports to be a payment claim does not fail to be a payment claim, within the meaning of the Act, merely because it can be seen, after a full investigation of all the facts and circumstances, not to successfully identify all the construction work for which payment is claimed. *This could be the case, for example, if there is some typographical omission or other error in relation to one of a large number of items included in the claim; and the question whether or not the other party, by reason of its knowledge of the project, would have been able to fill in or correct that error could be one depending on a great deal of evidence concerning the circumstances of the case.* In my opinion, it is inconceivable that it was the intention of the legislature that the existence of a payment claim under the Act should depend on that kind of consideration.⁷⁵

Conclusion

43 In this case, the Payment Claim served by Façade was detailed. It attached and referred to extensive supporting documentation. In my opinion, for the reasons

⁷² Ibid 117 [49] (citations omitted).

⁷³ Similar to the 'true rule' as explained in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* 149 CLR 337, 352 (Mason J).

⁷⁴ *Nepean Engineering* (2005) 64 NSWLR 462, 474-5 [35] (Hodgson JA), quoted with approval in *Epping Land* [2020] NSWCA 93, [21] (Basten JA, with whom Meagher JA and Emmett AJA agreed).

⁷⁵ *Nepean Engineering* (2005) 64 NSWLR 462, 474 [34] (emphasis added).

stated above and in Appendix 2, a reasonable building practitioner in the position of Yuanda would have understood the Payment Claim to be bona fide and to purport in a reasonable way to identify the particular work in respect of which the claim was made. Accordingly, I consider that the Payment Claim was a valid claim under s 14 of the Act.

44 Yuanda contended that many of the individual Claim Items comprising the Payment Claim failed to sufficiently identify the construction work or related goods and services to which the progress payments related. In my opinion, for the reasons expressed above, the validity of the Payment Claim is to be considered in its totality.

45 In case I am in error, I have set out my reasons for rejecting Yuanda's submissions with respect to each of the disputed Claim Items in Appendix 2 to these reasons. In summary, Yuanda's contentions of insufficient identification were principally made on one of the following grounds, which I reject for the reasons set out below:

- (a) The Claim Item was not a claim for construction work under the Act, but was rather a claim for:
 - (i) idle time;
 - (ii) acceleration of works; and/or
 - (iii) compensation arising from the inability to access the site.

In my opinion, the relevant invoices and supporting documentation provided in respect of each such Claim Item sufficiently identified the services (being the provision of labour) which Façade claimed related to construction work. If Yuanda had wanted to contend that the claimed work was not construction work or related goods and services, it should have done so in a payment schedule.

- (b) The Claim Item was a claim for construction work:
 - (i) referred to in the Settlement Agreement which was back-dated and

invalid;

- (ii) with insufficient details of how the claimed amount was calculated;
and/or
- (iii) that had not been properly authorised.

In my opinion, the relevant invoices and supporting documentation provided in respect of each such Claim Item sufficiently identified the construction work claimed. A payment claim does not need to include sufficient particulars to disclose the calculation of the claimed amount. The validity of supporting documentation is a matter for determination by an adjudicator after service of a payment schedule, not for the Court under s 16 of the Act.

- (c) Mr Nguon, a project manager employed by Yuanda, gave evidence that he was unable to comprehend the construction work referred to in particular Claim Items and that insufficient details were provided as to how the claim was calculated. Façade contested this evidence on the basis that Yuanda had filed a payment schedule out of time, which demonstrated that it did not comprehend the construction work to which the Payment Claim related.

In my opinion, none of this evidence is relevant to an inquiry into compliance with s 14(2)(c) because evidence of the subjective opinions and knowledge of the parties' employees is not admissible for the purpose of the objective inquiry into the validity of a payment claim.

- (d) The Payment Claim included insufficient particulars of the request or direction from Yuanda to enable identification of the claims.

With respect to each of the Claim Items in the Variations Table, I have found that the Payment Claim and supporting documentation expressly or inferentially claimed that the relevant work was requested or directed by Yuanda or a person acting on its behalf. Yuanda's contention that, on full

investigation of the facts and circumstances, it was unable to identify the construction work claimed because:

- (i) the work claimed was not the work so requested or directed; or
- (ii) the claim included both work within the scope of the Contract and additional work beyond the scope, which could not be differentiated,

is not relevant for the purpose of assessing compliance with s 14(2)(c). On the face of the invoices and supporting documentation, the claims were for work requested or directed by Yuanda. Any challenge to that claim should have been made in a payment schedule.

- (e) The evidence established that the Payment Claim included some incorrect references to site instructions and other documents alleged to contain or refer to a direction or instruction by Yuanda.

Such errors do not invalidate a payment claim and an inquiry into whether a payment claim includes such errors is not relevant to the question of compliance with s 14(2)(c). For similar reasons, the fact that Façade acknowledged that there was some double counting between various Claim Items was not relevant because the Payment Claim, on its face, complied with s 14(2)(c).

As a matter of statutory construction, in determining whether or not any Claim Item constitutes or includes an excluded amount, should the Court have regard to:

- (a) the description of the Claim Item as appearing on the face of the Payment Claim; or**
- (b) evidence of the substance of the Claim Item?**

46 Under s 16(4)(a)(ii) of the Act, before entering judgment in favour of a claimant, the Court must be satisfied that the claimed amount does not include any excluded amount.

Yuanda's submissions

47 Yuanda submitted that, for the Court to be satisfied that the claimed amount does not include any excluded amount, the Court should have regard to extrinsic evidence beyond the face of the claim, for the following reasons:

- (a) It would be anomalous if extrinsic facts were considered to establish a prior communication as the basis for a claim under s 14(2)(c), but then excluded for the purposes of evaluating whether it included an excluded amount.
- (b) It would be contrary to public policy to deprive a respondent of reference to contextual facts to establish that a claim was based on selective, misleading or even fraudulent creation and use of documents.

Accordingly, the respondent should not be prevented from raising matters relevant to the question of whether the payment claim contains excluded amounts.

Façade's submissions

48 Façade submitted as follows:

For the purpose of both s 14(3)(b) and s 16(4)(a)(ii) of the Act, in determining whether or not any Claim Item constitutes or includes an Excluded Amount, the starting point of the Court's inquiry is the description of the Claim Item as appearing on the face of the Payment Claim. However, the Court is not otherwise restricted in its assessment and may, including on the initiative of a claimant, take into account evidence of the substance of the Claim Item, provided that by doing so, the Court does not entertain an argument that involves the introduction by a respondent of a defence under the contract, contrary to s 16(4)(b)(ii) of the Act.

Statutory scheme with respect to excluded amounts

49 The concept of 'excluded amounts' was introduced by the *Building and Construction Industry Security of Payment (Amendment) Act 2006 (Vic)*.

50 On the second reading of the bill introducing the amendments, Mr Hulls, the Minister for Planning, stated that the bill substantially adopted recommendations

contained in a report of the Security of Payment Working Group dated 8 October 2004 ('the Report').⁷⁶

51 The Report recommended that, if a respondent failed to serve a payment claim, it would be automatically liable to pay the amount owing without regard to defences or counterclaims. The Report recorded concerns with respect to applications to the courts for judgment where a respondent had failed to serve a payment schedule as follows:

Section 15 of the Act states that, if a respondent fails to serve a payment schedule and fails to pay the claimed amount by the due date, the respondent becomes liable to pay the claimed amount as a debt due to the claimant. This means that the claimant can recover the unpaid claimed amount, as a debt due, in a court of competent jurisdiction.

However, if a claimant does initiate court proceedings on the basis of section 15(4), it is uncertain whether the courts will undertake a full hearing, in order to evaluate the respondent's defence or counter-claims, before making a final decision. This would ensure that both parties have been afforded natural justice. However, this approach does not appear to be consistent with the intention of section 15 of the Act, which was supposed to make a respondent automatically liable to pay a claimed amount if they fail to serve a payment schedule and if that amount is not paid when due.

Due to the uncertainty surrounding the purpose and effect of section 15, claimants are reluctant to apply to the courts on the basis of that provision. A court hearing of the dispute would be expensive, time consuming and the final decision may fall in favour of the respondent. Therefore, the risks of court proceedings are too high for many claimants.⁷⁷

52 Accordingly, the Report recommended that the Act be amended to expressly state that, if the claimant exercises its right to apply to a court pursuant to s 15(4), the respondent is precluded from raising a defence or counterclaim.⁷⁸

53 The Act as amended, adopted the following scheme with respect to excluded amounts:

- (a) Under s 10(3), an excluded amount must not be taken into account in calculating the amount of a progress payment.

⁷⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 9 February 2006, 219.

⁷⁷ Security of Payment Working Group, *Review of the Building and Construction Industry Security of Payment Act, Victoria 2002* (Report, 8 October 2004) 44-5 (emphasis added).

⁷⁸ *Ibid* 46.

- (b) Under s 14(3)(b), the amount of the progress payment the claimant claims to be due must not include any excluded amount.
- (c) Under s 15(2)(c), a payment schedule must identify any amount of the claim that the respondent alleges is an excluded amount.
- (d) Under s 21(2)(ca), an adjudication response must identify any amount of the payment claim that the respondent alleges is an excluded amount.
- (e) Under s 23(2A), an adjudicator must not take into account any part of the claimed amount that is an excluded amount in determining an adjudication application, and under sub-s (2B), the determination is void to the extent that it is based on an excluded amount.
- (f) Under s 28B, a respondent may apply for the review of an adjudication determination only:
 - (i) on the ground that the adjudicated amount included an excluded amount; and
 - (ii) if the respondent has identified that amount as an excluded amount in the payment schedule or the adjudication response.
- (g) Under s 28C, a claimant can only apply for the review of an adjudication determination on the ground that an amount was wrongfully determined to be an excluded amount.
- (h) Under s 28I(3), a review adjudicator must not take into account any excluded amount in determining an adjudication review application, and under sub-s (4) the determination is void to the extent that it is based on an excluded amount.
- (i) Under s 28M, the respondent is required to pay an adjudicated amount (subject to the provisions with respect to applications for review in ss 28B and 28N).

- (j) Under s 28N, a respondent is required to pay an amount under a review determination.
- (k) Under s 28O, if the respondent fails to pay any part of an adjudicated amount in accordance with s 28M or s 28N, the claimant may request an adjudication certificate.
- (l) Under s 28R, a party may recover the amount of an adjudication certificate as a debt in any court of competent jurisdiction.
- (m) Under s 28R(5), a person who seeks to set aside a judgment cannot challenge an adjudication determination or a review determination, except under sub-s (6) on the ground that the person making the determination took into account a variation of the construction contract that was not a claimable variation.

Principles to be applied in relation to excluded amounts

54 The first constructional choice presented by s 16(4)(a)(ii) is whether the Court must satisfy itself that:

- (a) on the face of the Payment Claim, including the supporting documents, there is no claim for an excluded amount ('the former construction'); or
- (b) after full investigation of the facts and circumstances, there is no claim for any amount which should be properly classified as an excluded amount ('the latter construction').

55 In my opinion, the former construction should be preferred for the following reasons:

- (a) As set out above, the Act provides a detailed mechanism that:
 - (i) prohibits claimants claiming for excluded amounts;
 - (ii) requires respondents to identify any amount it alleges is an excluded amount; and

- (iii) directs adjudicators and review adjudicators not to take into account any part of a claimed amount that is an excluded amount and makes any determination void to the extent that it does so.
- (b) This scheme is detailed and it is inconsistent with the legislative intention to:
 - (i) permit avoidance of the scheme;
 - (ii) substitute an investigative role on the courts; and
 - (iii) advantage respondents who do not provide a payment schedule.
- (c) It would be strange indeed if, by failing to provide a payment schedule, the respondent could avoid:
 - (i) the need to identify any excluded amount to an adjudicator; and
 - (ii) the balance of the scheme adopted by the Act with respect to an adjudicator not taking into account excluded amounts,

but rather argue, as a knock out point before the Court, that it should not be satisfied that 'the claimed amount does not include an excluded amount'. As was observed by Hodgson JA in *Nepean Engineering*, such a construction would result in 'a very detailed examination of all the circumstances of the contract' and be 'wholly inconsistent with the scheme of the Act'.⁷⁹

- (d) As it is accepted that the inclusion of an excluded amount does not invalidate a payment claim for the purposes of the adjudication scheme under the Act, it is not consistent with the object of the Act for such an inclusion to effectively invalidate a payment claim for the purposes of s 16. As Hodgson JA said in *Nepean Engineering*:

If a payment claim which thus purports to identify the work in respect of which the claim is made is sufficient to support a valid determination ... it would in my opinion be wholly inconsistent with

⁷⁹ (2005) 64 NSWLR 462, 475 [38] commenting on a construction of the Act that permits a respondent to oppose judgment under the New South Wales equivalent of s 16 of the Act on the basis that the payment claim was invalid. See paragraph 39 above.

the scheme of the Act if it was not also sufficient to support a cause of action under s 15 of the [NSW Act] in a case where no payment schedule is served.⁸⁰

- (e) There are textual differences in the respective roles to be undertaken by the Court and the adjudicator under the Act, being:
- (i) under s 23, the adjudicator is required to determine an adjudication application by considering the matters referred to in sub-s (2) and not taking into account any part of the claimed amount that is an excluded amount under sub-s (2A); and
 - (ii) under s 16, the Court is not required to give consideration to specified matters or to make a determination.

The task imposed on the Court is different to the task imposed on the adjudicator, which is consistent with the fact that the Act requires the Court to be satisfied that there is no *claim* for an excluded amount.

- (f) Courts investigating and determining final claims would be inconsistent with the purpose of the Act. The Act is specifically not intended to determine the final rights of the contracting parties,⁸¹ and must be construed in that context. Applying the latter construction would result in a final determination of contractual liability issues with all the associated delay and expense, which the Act is intended to avoid. Such a final determination after a full hearing on the merits may well give rise to an issue estoppel on aspects of contractual liability, which would be inconsistent with s 47 of the Act.
- (g) Permitting the respondent to lead evidence to establish that a claimed amount was an excluded amount, for example because it was not a claimable variation, would permit it to raise a defence in relation to matters arising under the construction contract, which is not permitted under s 16(4)(b)(ii). As Basten JA observed in *Epping Land*:

⁸⁰ Ibid.

⁸¹ *Building and Construction Industry Security of Payment Act 2002* (Vic) s 47.
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It is possible that the amounts claimed for variations did not properly arise under the contract because, for example, relevant procedural steps had not been followed. However, to pursue that issue would involve raising a defence in relation to matters arising under the construction contract, a course prohibited by s 15(4) of the *Security of Payment Act*. Had the principals wished to challenge the claim on that basis, they could have done so by way of a payment schedule provided pursuant to s 14, indicating the claimed items intended to be paid and the reason for non-payment of any item not accepted. Such an issue would then have been addressed by the adjudicator appointed to determine any dispute thus arising. However, that course was not taken.⁸²

To similar effect Emmett AJA said:

The scheme of the Payment Act contemplates that disputes be determined by an adjudicator. The Principal failed to take advantage of the procedure afforded to it. Contractual defences are not intended to be raised at this stage of adjudication.⁸³

I am mindful of the fact that their Honours were considering the NSW Act which does not include s 16(4)(a)(ii). However I consider the construction which permits the subsection to be read consistently with the prohibition on raising a defence, as construed under the NSW Act, is to be preferred.

56 In *Epping Land*, the New South Wales Court of Appeal considered an appeal against a judgment made in favour of a builder under the NSW Act. The relevant facts were that:

- (a) The builder lodged a progress claim under the NSW Act seeking payment of some \$6.4 million.
- (b) The principals failed to provide a payment schedule to the builder within 10 business days after service of the payment claim.
- (c) The builder applied for judgment. The principals resisted judgment on various grounds, including that the payment claim was invalid.⁸⁴

⁸² [2020] NSWCA 93, [20].

⁸³ Ibid [95].

⁸⁴ Ibid [1]-[2], [15].

- (d) The principals submitted that it was arguable that, as a matter of construction of the payment claim, the amounts claimed for variations were not available pursuant to the contract, but were rather a quantum meruit claim. A quantum meruit claim does not give rise to an entitlement to a progress payment under the NSW Act because it would not arise 'under a construction contract'.⁸⁵

57 Basten JA accepted that it was possible that the amounts claimed for variations did not properly arise under the contract, but said that, if the principals had wished to challenge the claim on that basis, they could have done so by way of a payment schedule.⁸⁶ His Honour rejected the principals' contention because '[o]n the face of the claim, the payments were sought under the contract',⁸⁷ stating:

If [the variation claims] were not available under the contract, it might have been open to an adjudicator to reject those elements of the claimed amount. It was not open to the principals to resist judgment for the full amount of the payment claim on this basis. The trial judge was correct to reject this contention.⁸⁸

58 Similarly, Emmett AJA rejected the principals' contention, stating:

There is nothing in the Progress Claim to suggest that the claim for variations was made otherwise than under the Contract. Indeed, the Progress Claim states specifically that they are made under the Contract. Had the Principal filed a payment schedule, which it failed to do, it would have been a matter for an adjudicator to determine whether the amounts claimed were payable under the Contract.⁸⁹

59 Accordingly, in my opinion, s 16(4)(a)(ii) requires a Court to be satisfied that the claimed amount does not include, on the face of the payment claim, any excluded amount.

⁸⁵ Ibid [18].

⁸⁶ Ibid [20].

⁸⁷ Ibid [23].

⁸⁸ Ibid.

⁸⁹ Ibid [92].

Conclusion

60 The Payment Claim relating to Invoice 1162 was, on its face, a claim for interest under the Act and therefore an excluded amount within the meaning of s 10B(2)(d), a matter ultimately conceded by Façade.

61 Except for Invoice 1162, for the reasons set out in Appendix 2, I have rejected Yuanda's submissions that the Payment Claim included claims for excluded amounts. I have found that on the face of the Payment Claim, including the supporting documentation, each of the Claim Items in the Variations Table were expressly or inferentially claimed on the basis that the relevant work was carried out in accordance with a request or direction or the agreement of Yuanda or a person acting on its behalf.

62 In summary, Yuanda's contentions that the Payment Claim included claims for excluded amounts were principally made on one of the following grounds, which I reject for the reasons set out below:

- (a) On full investigation of the facts and circumstances, in fact:
 - (i) the request or direction was not made by Yuanda or a person acting on its behalf; and
 - (ii) the work carried out was in excess of that requested or directed.

In my opinion, whatever a court might determine after a full investigation of the facts and circumstances is not relevant for the purposes of determining whether a claim is, on its face, a claim for an excluded amount.

- (b) Façade was not entitled to the variations claimed in the Payment Claim because:
 - (i) the Contract provided that its rights could be no greater than Yuanda's rights under its contracts with Multiplex; and
 - (ii) it did not comply with the procedures for variations under the Contract.

Although such contentions may be properly raised as a defence to Façade's claim on adjudication following the submission of a payment schedule (subject to the provision in s 13 of the Act that 'pay when paid provisions' are of no effect), they are not relevant to whether a claim is, on its face, a claim for an excluded amount.⁹⁰

- (c) The evidence established that some Claim Items in the Payment Claim included incorrect references to site instructions and other documents alleged to contain or refer to a direction or instruction by Yuanda.

In my opinion, the fact that a full investigation of the facts and circumstances may demonstrate that all or part of the construction work was not authorised by a written request or direction, is not relevant for the purpose of determining whether a claim is, on its face, a claim for an excluded amount.

Does the inclusion of an excluded amount in the Payment Claim preclude the Court from giving judgment for any amount under s 16?

- 63 The inclusion of an excluded amount is prohibited by s 14(3)(b). Yuanda contended that the inclusion of such excluded amount prevented the entry of judgment under s 16. For the reasons set out below, the inclusion of an excluded amount in the Payment Claim did not invalidate the Payment Claim.

Façade's submissions

- 64 Façade submitted that it would be open and appropriate for the Court to sever the excluded amount without affecting the validity of what remained of the Payment Claim for the following reasons:

- (a) The definition of 'excluded' suggests a process whereby amounts determined to be excluded can be properly put to one side without affecting the remaining amounts.

⁹⁰ *Epping Land* [2020] NSWCA 93, [20] (Basten JA, with whom Meagher JA and Emmett AJA agreed).
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- (b) The availability of severance is reinforced by the fact that the Act provides for the adjudicator not to take into account an excluded amount. In doing so, the adjudicator effectively severs the excluded amounts from the remaining amounts claimed.
- (c) Yuanda's construction would frustrate the central purpose of the Act and the legislative intention behind the 2006 amendments, being to make the Act more effective in enabling a person who carries out building or construction work to properly recover progress payments.

Yuanda's submissions

65 Yuanda submitted that if a Claim Item in the Payment Claim included an excluded amount, it could not be severed under s 16 for the following reasons:

- (a) The terms of s 16(2)(a)(i) are so emphatic as to preclude the exclusion.
- (b) Excluded amounts may be severed from a payment claim so as to permit an adjudicator to make a determination with respect to the balance of the claim, under the statutory severance provisions, being s 23(2A). However, the legislation bifurcated between adjudication and judgment on a payment claim. Severance may arise to save the outcome of the former statutory process but is inapplicable in the latter context.

Conclusion

66 In my opinion, the second constructional choice presented by s 16(4)(a)(ii) is whether 'the claimed amount' is:

- (a) the claimed amount in the payment claim when served; or
- (b) the claimed amount at the time entry of judgment is sought.

67 In my opinion, the latter is to be preferred as an interpretation that promotes the legislative purpose for the following reasons:

- (a) Although s 14(3)(b) prohibits the inclusion of an excluded amount in a payment claim, the inclusion of an excluded amount does not invalidate the payment claim. This is evident from the fact that the Act provides for the respondent to identify excluded amounts in a payment schedule and for the adjudicator not to take such amounts into account in making a determination. Such provisions would be futile if the inclusion of an excluded amount was to render a payment claim invalid. There is no logic in construing the Act so that the inclusion of an excluded amount invalidates a payment claim for the purposes of judgment under s 16, but not for adjudication under s 23.⁹¹
- (b) On the construction contended for by Yuanda, unlike an adjudication where only the excluded amount is rejected, s 16(4) would prohibit judgment for the whole of the claimed amount if it included 'any excluded amount'. On this construction, the respondent would be advantaged by failing to file a payment schedule and not participating in the mechanism under the Act. In my opinion, such a construction does not promote the object of the Act. As Vickery J observed in *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd*:

Although the respondent in the payment schedule may deduct from the payment claim any sum in respect of a claimed 'excluded amount', nowhere in the Act is there any express statutory relief given to a respondent to avoid payment of the amount of the payment claim as a whole, because part of the claim comprises an 'excluded amount'. If such an outcome was to be implied into the Act, unintended consequences could arise which, in some cases, could work to undermine its central purpose. For example, if the position were otherwise, and if a relatively modest sum comprising an alleged 'excluded amount' was claimed in a payment claim, the respondent could, with impunity, avoid liability to make any payment at all to a claimant on the payment claim. If this was to occur, the claimant would be denied the benefits of the Act in respect of the large portion of his claim which, absent the relatively small 'excluded amount', he would otherwise have been entitled to. In my opinion, the Act was not intended to operate in this way.⁹²

The 'unintended consequences' referred to by Vickery J were presumably that a respondent could identify an excluded amount in a payment claim, no

⁹¹ *Nepean Engineering* (2005) 64 NSWLR 462, 475 [38] (Hodgson JA).

⁹² *Seabay Properties* [2011] VSC 183, [71].

matter how small, and then avoid any liability by refusing to provide a payment schedule. In my opinion, this would be an absurd result and could not have been intended by the legislature.

- (c) The text of s 16(4)(a)(ii) is in the present tense ('does not include'). If the legislative intent was that the claimed amount was fixed from the time it was served under s 14, this would have been more clearly expressed by the use of the past tense (for example, 'did not include').
- (d) On Yuanda's interpretation, the payment claim could not be amended after it was served. Accordingly, a claimant in Façade's position could not reduce the claimed amount for any reason, such as the identification of double payments. Such inflexibility would do nothing to promote the object of the Act.
- (e) The Act demonstrates that claims for excluded amounts should not be allowed. This object is achieved by the Court not entering judgment until the claimed amount is reduced by the sum of any excluded amount.

68 If it was necessary, I would consider that the doctrine of severance should apply to permit severance of any excluded amount from the amount claimed before judgment is entered for the balance.⁹³ As was observed by Vickery J in *Seabay Properties*:

[N]owhere in the Act is there any express statutory relief given to a respondent to avoid payment of the amount of the payment claim as a whole, because part of the claim comprises an 'excluded amount'.⁹⁴

Orders

69 For the reasons stated above, I am satisfied:

- (a) of the existence of the circumstances referred to in s 16(1) of the Act; and
- (b) that the claimed amount does not include any excluded amount.

⁹³ Ibid [65]; *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106, [93]-[116] (Vickery J); *SJ Higgins Pty Ltd v The Bays Healthcare Group Inc* [2018] VCC 805, [49] (Judge Woodward).

⁹⁴ *Seabay Properties* [2011] VSC 183, [71].

70 Accordingly, I propose to enter judgment for the plaintiff under s 16 of the Act in the sum sought in paragraph 12(d) above. I will hear the parties on the questions of interest and costs.

Final observation

71 As a result of the approach taken to the issues in this proceeding, its determination resulted in:

- (a) extensive discovery;
- (b) detailed schedules of issues;
- (c) the filing of fifteen affidavits;
- (d) a court book consisting of 3,260 pages;
- (e) cross-examination of witnesses over five days;
- (f) written submissions in excess of 350 pages;
- (g) a book of authorities in excess of 1,500 pages;
- (h) a total of eight hearing days; and
- (i) a delay of nearly nine months from filing to completion of the hearing.

72 Such delays and the substantial associated costs are an anathema to the scheme of the Act. If permitted to continue it will have the effect of discouraging contractors from exercising their rights to apply for judgment for fear of being caught in the Court's procedures.⁹⁵ The Court should strive to adopt appropriate procedures to allow contractors to exercise their rights in a summary, expedient and cost-effective manner.

⁹⁵ Security of Payment Working Group, *Review of the Building and Construction Industry Security of Payment Act, Victoria 2002* (Report, 8 October 2004) 45.

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Appendix 1 - Variations Table

Façade Invoice No (Claim Item)	Description of Claim Item	Yuanda Ref NCR/VAR	MPX SI No.	Total	Yuanda Paid To Date	Claimed amount
	VARIATIONS					
1099	SITE EVACUATION DUE TO SAFETY BREACH BY BUILDER			\$88,252.50	\$0.00	\$88,252.50
1109	SITE SHUT DOWN DUE TO SAFETY BREACH BY BUILDER			\$20,475.00	\$0.00	\$20,475.00
1120	SITE SHUT DOWN DUE TO SAFETY BREACH BY BUILDER			\$35,070.00	\$0.00	\$35,070.00
1128	ACCELERATION CLAIM DUE TO DELAYED PROGRAM BY BUILDER	VAR 015		\$212,712.50	\$151,125.00	\$61,587.50
1129	NON PRODUCTIVITY CLAIM '2' DUE TO DELAYED PROGRAM BY BUILDER REFER TO SETTLEMENT AGREEMENT WITH YUANDA	Clause 8, 3017/S00002		\$724,260.76	\$0.00	\$724,260.76
1131	ON SITE MODIFICATION OF MATERIALS & ADDITIONAL WORKS REQUIRED	10, 15, 28, 69		\$264,560.00	\$231,440.00	\$33,120.00
1132	SUPPLY OF ADDITIONAL EQUIPMENT & LABOUR REQUESTED BY YUANDA REFER TO VARIATION INSTRUCTION 000344		356	\$191,440.00	\$23,054.55	\$168,385.45
1140	ADDITIONAL LABOUR & EQUIPMENT L28 COMM P/ROOM REFER ITEM 4	Item 4 agreement		\$68,527.50	\$0.00	\$68,527.50
1141	ADDITIONAL WORKS AS INSTRUCTED BY YUANDA (REFER MPX SITE INSTRUCTIONS 527,662,708,746 & 756)		527, 662, 708, 746, 756	\$179,873.37	\$0.00	\$179,873.37
CR-1141	CREDIT NOTE FOR INVOICE 1141			-\$8,385.00	\$0.00	(\$8,385.00)
1142	ACCELERATION CLAIM DUE TO DELAYED PROGRAM BY BUILDER REFER TO SITE INSTRUCTION 000475 RESIDENTIAL	VAR 015	400	\$10,107.50	\$0.00	\$10,107.50

	TOWER ALIMAK SCAR ITEM 5 ON VARIATION SCHEDULE					
CR-1142	CREDIT NOTE FOR INVOICE 1142			-\$2,332.50	\$0.00	(\$2,332.50)
1143	ON SITE ADDITIONAL WORKS REQUESTED BY YUANDA; REFER TO VAR-015, VAR-022, YUA-NCR-013, 028 & 069.	013, 028, 069, VAR 015, 022		\$318,255.00	\$0.00	\$318,255.00
CR-1143	CREDIT NOTE FOR INVOICE 1143			-\$82,800.00	\$0.00	(\$82,800.00)
1144	SUPPLY OF ADDITIONAL EQUIPMENT & LABOUR REQUESTED BY YUANDA REFER TO VARIATION INSTRUCTION 000344	21	344	\$73,960.00	\$0.00	\$73,960.00
CR-1144	CREDIT NOTE FOR INVOICE 1144			-1,620.00	\$0.00	(1,620.00)
1145	ACCELERATION CLAIM DUE TO DELAYED PROGRAM BY BUILDER REFER TO SITE INSTRUCTION 000475 RESIDENTIAL TOWER ALIMAK SCAR ITEM 5 ON VARIATION SCHEDULE & VARIATION 020		475	\$74,565.00	\$0.00	\$74,565.00
CR-1145	CREDIT NOTE FOR INVOICE 1145			-\$5,310.00	\$0.00	(\$5,310.00)
1146	PROVIDE RIGGERS TO OPERATE MAST CLIMBERS AS PER YUANDA VAR-447CS- OR0016		447CS- OR0016	\$9,172.00	\$0.00	\$9,172.00
CR-1146	CREDIT NOTE FOR INVOICE 1146			-\$262.30	\$0.00	(\$262.30)
1149	PROCURE ADDITIONAL EQUIPMENT & LABOUR - YUANDA VARIATION 021	21	344	\$50,115.00	\$0.00	\$50,115.00
1150	PROVIDE RIGGERS TO OPERATE MAST CLIMBERS AS PER YUANDA VAR-447CS- OR0016		447CS- OR0016	\$125,860.26	\$0.00	\$125,860.26
1151	SUPPLY OF ADDITIONAL LABOUR FOR LATE	10, 28, 69		\$308,072.50	\$0.00	\$308,072.50 ⁹⁶

⁹⁶ Façade conceded amount should be reduced by \$15,570 because of duplication with Invoice 1157.

	DELIVERY OF SLIDING DOORS & ADDITIONAL WORKS AS PER YUANDA VARIATIONS 022 & 024. ALSO PROVIDE LABOUR / MATERIALS FOR NCR-069, 028 & 010.					
1152	ACCELERATION CLAIM DUE TO DELAYED PROGRAM BY BUILDER REFER TO SITE INSTRUCTION 000475 RESIDENTIAL TOWER ALIMAK SCAR ITEM 5 ON VARIATION SCHEDULE & VARIATION 020	VAR 020		\$36,187.50	\$0.00	\$36,187.50
1153	ADDITIONAL LABOUR, EQUIPMENT & MATERIALS FOR THE REMOVAL OF STILLAGES VIA GOODS LIFT, SUPPLY / DRILL ANCHORS DUE TO MISSING UNISTRUTS & WORKING ON RDO'S REFER VARIATION 662, 800, 818 & 873.		662, 800, 818, 873.	\$85,217.90	\$0.00	\$85,217.90
1154	SUPPLY OF LABOUR FOR ACCELERATION WORKS TO COMMERCIAL TOWER LEVEL 28 P/ROOM, W1 LOADING BAY SCAR & MASTCLIMBER A/HOURS. REFER TO YUANDA VARIATION NO VAR 015.	VAR 015		\$5,500.00	\$0.00	\$5,500.00
1155	SUPPLY LABOUR FOR THE RELOCATION OF MATERIALS FOR MASTCLIMBER MC2 DUE TO REMOVAL OF LOADING BAYS. REFER YUANDA VARIATION 019	VAR 019		\$140,301.11	\$0.00	\$140,301.11
1156	SUPPLY OF ADDITIONAL EQUIPMENT, MATERIALS & ROPE ACCESS LABOUR TO RECTIFY L16	10, 21		\$19,255.63	\$0.00	\$19,255.63 ⁹⁷

⁹⁷ Façade conceded that amount should be reduced by \$5,520 because of duplication with Invoice 1143.
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	RESIDENTIAL TOWER EAST NOSE CONES DUE TO DESIGN ISSUE & SUPPLY COMM TOWER P/ROOM RING BEAM STEEL FIXINGS.					
1157	SUPPLY OF MATERIALS & LABOUR FOR ADDITIONAL WORKS AS PER YUANDA VARIATION 024.	24		\$76,000.00	\$0.00	\$76,000.00
1158	SUPPLY LABOUR FOR THE INSTALLATION OF AUTO SLIDING DOORS	Instructed		\$51,680.00	\$0.00	\$51,680.00
1162	Interest in previous late payments pursuant to section 12(2) of the <i>Building and Construction Industry Security of Payment Act 2002 (Vic)</i> - 10% p.a. Refer to schedule issued with this payment claim			\$64,154.37	\$0.00	\$64,154.37

Appendix 2

73 The Payment Claim was for the construction work or related goods and services referred to in the following invoices.⁹⁸

Invoices 1139 and 1148

74 By Invoice 1139 dated 26 August 2019, Façade made 'Progress Claim 14' for \$1,014,050.

75 By Invoice 1148 dated 24 September 2019, Façade made 'Progress Claim 15' for \$464,395.

76 On 2 October 2019, Yuanda paid \$1,014,050, being the amount of Invoice 1139, leaving the full amount of Invoice 1148, being \$464,395, unpaid.

77 The amount now pressed by Façade is \$426,722.75, which is in fact \$37,672.25 less than the amount claimed in Invoice 1148. Mr Callipari of Façade deposed that Yuanda was entitled to a further credit in the sum of \$37,672.25 as a result of a previous understatement of the security retention sum.

Yuanda's submissions

78 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work to which it related because of the \$37,672.25 discrepancy, which caused the amount claimed in the Payment Claim to be inconsistent with the amounts claimed in Invoices 1148 and 1139.

Conclusion

79 I reject Yuanda's submission for the following reasons:

- (a) A reasonable building practitioner in the position of Yuanda, on receiving the Payment Claim, would have understood that the Payment Claim was for the progress payments under the Contract referable to Invoices 1139 and 1148.

⁹⁸ All amounts are exclusive of GST.
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- (b) The fact that the amount claimed in the Payment Claim was less than the amounts claimed in the invoices did not mean that the Payment Claim did not identify the construction work to which the progress payments related. A difference between the amount claimed in a payment claim and the amount in the supporting material is a technical defect that will not invalidate a payment claim under s 14(2)(c).

Invoice 1099

80 By email of 11 April 2019 to Mr Bond of Yuanda, Ms Rozon of Façade said: 'As requested, please find attached all invoices for March Variation for 447 Project', and attached the following documents:

- (a) Invoice 1099 dated 11 April 2019 for \$88,252.50 which described the work as '447 CS _ Site Evacuation and Shut Down'.
- (b) Daily/Hourly Labour Records which set out the calculation of labour costs incurred for 'Site Evacuation for safety matter (April 2, 3 & 4 April 2019)'.
- (c) Site Record 422 which recorded the hours lost on each of the three days, signed by representatives of Façade and Yuanda.

81 The Payment Claim relating to Invoice 1099 claimed \$88,252.50 for the work described in the Variations Table. It referenced Invoice 1099 but, contrary to the comments in the Payment Claim, the invoice and supporting documents were not issued with the Payment Claim.

Yuanda's submissions

82 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work or related goods and services to which the progress payment related for the following reasons:

- (a) Invoice 1099 was not issued with the Payment Claim and therefore the Court could not have regard to it or the supporting documents.

- (b) It did not identify any construction work because a site evacuation and shutdown is not construction work, but rather idle time, and there was no change to the scope of the works.

83 Yuanda further submitted that this Claim Item was for an excluded amount and could not constitute a claimable variation, for the following reasons:

- (a) The Payment Claim failed to identify a request or direction by or from Yuanda.
- (b) There had been no change to the scope of the works and therefore it could only be a claim for damages for breach of contract.

Conclusion

84 For the reasons stated in paragraphs 40 and 41 of the principal reasons, I reject Yuanda's submission that, in determining whether the Payment Claim:

- (a) sufficiently identified the construction work or related goods and services to which the progress payments related; and/or
- (b) included a claim for an excluded amount,

the Court cannot have regard to the invoice referred to in the Payment Claim or the documentation supplied in support of the invoice, which had previously been provided to Yuanda.

85 In my opinion, a reasonable building practitioner in the position of Yuanda, on receiving the Payment Claim, would have understood that this Claim Item:

- (a) related to Invoice 1099 and its supporting documentation, which had been provided to Yuanda by email on 11 April 2019; and
- (b) was for a variation, arising from a direction to evacuate the site on 2, 3 and 4 April 2019,

for the following reasons:

- (a) the invoice and supporting documentation made it plain that the claim was for services within the meaning of s 6 of the Act, being the provision of labour to carry out construction work; and
- (b) the submission that the labour services provided by Façade were idle time was a matter that would have properly been the subject of an assertion in a payment schedule.

86 I am satisfied that, on its face, the Payment Claim relating to Invoice 1099 does not include a claim for an excluded amount for the following reasons:

- (a) The Payment Claim included this item under the heading 'Variations', which referred to variations under the Contract. There was no submission that a reasonable building practitioner would have considered the claim to be other than a claimable variation because of s 10A(4) of the Act or otherwise.
- (b) The email attaching Invoice 1099 referred to it as being for a variation.
- (c) A payment claim is not a pleading and it is not necessary for it to particularise the agreement, request or direction on which the variation is based. A reasonable recipient would have inferred that the site evacuation was claimed to be in accordance with a direction.
- (d) If Yuanda wished to contend that there was no agreement, request or direction or, more particularly, that it did not give any such request or direction, it could properly have raised that assertion in a payment schedule.

87 The consideration referred to in sub-paragraph (a) of the immediately preceding paragraph is applicable to each of the invoices below.

88 I reject Façade's submission that evidence to the effect that Yuanda subsequently made a request for a similar variation under its head contract with Multiplex was relevant in determining:

- (a) whether the related services to which this Claim Item referred were identified;
or
- (b) whether it included a claim for an excluded amount.

The subjective response of Yuanda, as the recipient, is irrelevant to these issues.

Invoice 1109

89 By email of 4 June 2019 to Mr Bond of Yuanda, Ms Rozon of Façade said: 'Please find attached FDI invoices for variation at 447 Collins Street'.⁹⁹ The email attached the following documents:

- (a) Invoice 1109 dated 3 June 2019 for \$20,475 which described the work as '447 CS Site Shut Down – Safety breach by other'.
- (b) Daily/Hourly Labour Records which set out the calculation of labour costs totaling \$20,475 and referenced Site Record 352, quoting the description of work contained in that site record.
- (c) Site Record 352 which set out the labour hours claimed for 21 and 22 May 2019 for 'company shut down due to F700 drop zone breach', signed by representatives of Façade and Yuanda.

90 The Payment Claim relating to Invoice 1109 claimed \$20,475 for the work described in the Variations Table. It referenced Invoice 1109 but, contrary to the comments in the Payment Claim, the invoice and supporting documents were not issued with the Payment Claim.

Yuanda's submissions

91 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1109 and included a claim for an excluded amount for substantially the same reasons as those submitted with respect to Invoice 1099.

⁹⁹ Any references to 'FDI' are a reference to Façade.
FAÇADE DESIGNS INTERNATIONAL PTY LTD v 51
YUANDA VIC PTY LTD

Conclusion

92 I reject Yuanda's submissions for substantially the same reasons as I rejected those with respect to Invoice 1099.

Invoice 1120

93 By email of 1 July 2019 to Mr Bond of Yuanda, Ms Rozon of Façade said:

Please find attached FDI Invoices for June 2019, 447 Collins Street Project. You will find Progress Claim 12 and Variations, a second email will follow completing variation for this month.

The email attached the following documents:

- (a) Invoice 1120 dated 28 June 2019 for \$35,070 which described the work as '447 CS _ Site Shutdown'.
- (b) Daily/Hourly Labour Records which set out the calculation of labour costs totaling \$35,070 and referenced Site Records 383, 323 and 304, quoting the descriptions of work contained in those site records.
- (c) Site Record 383 which set out the labour hours claimed for 20 June 2019 for 'FDI shutdown due to MPX directing F700 into our drop zone'.
- (d) Site Record 323 which set out the labour hours claimed for 26 June 2019 for 'down time due to Scan Rent winch issues after fixing twice'.
- (e) Site Record 304 which set out the labour hours claimed for 16 June 2019 for 'guys sent home due to Alimak closure (unscheduled)' and further noted 'instructed guys must be paid for a full day'.

Each of the site records was signed by representatives of Façade and Yuanda.

94 The Payment Claim relating to Invoice 1120 claimed \$35,070 for the work described in the Variations Table. It referenced Invoice 1120 but, contrary to the comments in the Payment Claim, the invoice and supporting documents were not issued with the Payment Claim.

Yuanda's submissions

95 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1120 and included a claim for an excluded amount for substantially the same reasons as those submitted with respect to Invoices 1099 and 1109.

Conclusion

96 I reject Yuanda's submissions for substantially the same reasons as I rejected those with respect to Invoice 1099.

Invoice 1128

97 The Payment Claim relating to Invoice 1128 claimed \$212,712.50 for the work described in the Variations Table. It recorded \$151,125 as paid and claimed the remaining unpaid amount of \$61,587.50. It was supported by the following documents provided with the Payment Claim:

- (a) Invoice 1128 dated 28 July 2019 for \$212,712.50 which described the work as '447 CS - Acceleration/after hours works as per PO 3017/S00001 (VAR 015)'.
- (b) Yuanda Order/Variation Requisition 447CS-0002 dated 13 August 2019 which referenced VAR 015 and noted the reason for the order as 'Variation to Contract Works - Acceleration Works'.
- (c) Daily/Hourly Labour Records which set out the calculation of labour costs and relevantly for items 3 and 4, referenced Site Records 327, 328, 330 and 487, quoting the descriptions of work contained in those site records.
- (d) Site Record 327 which described the work as 'CC1 + CC2 acceleration crew' and noted the equipment used and the labour hours on 2-6 July 2019.
- (e) Site Record 328 which described the work as 'CC1 + CC2 acceleration crew' and noted the equipment used and the labour hours on 6, 9 and 10 July 2019.

- (f) Site Record 330 which described the work as 'Alimak scar acceleration hours' and noted the equipment used and the labour hours on 10 and 12 July 2019. It further noted 'plant only being used after hours but paying hire for it to sit there for 8hrs a day'.
- (g) Site Record 487 which described the work as 'Alimak scar acceleration hour' and noted the equipment used and the labour hours on 15-17 and 20 July 2019.
- (h) Site Records 327, 328 and 330 were signed by representatives of Façade and Yuanda.

98 Invoice 1128 was originally attached to an email of 5 August 2019 to Mr Bond of Yuanda from Ms Rozon of Façade, which said: 'Please find attached Invoice 1128 for variations on 447 Collins Street Project over July 2019'.

Yuanda's submissions

99 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1128 for the following reasons:

- (a) the basis upon which it was said to be a variation was not clear;
- (b) how the works were being accelerated was not clear; and
- (c) the Daily/Hourly Labour Records did not refer to any non-conformance report.

100 Yuanda further submitted that this Claim Item included an excluded amount for the following reasons:

- (a) There was no evidence that Yuanda requested or directed the relevant works to be done because:
 - (iii) the Order/Variation Requisition postdated the invoice; and

- (iv) the site records were signed after the invoice and do not imply a request or direction.
- (b) Acceleration works do not constitute additional construction works beyond the scope of the works to be performed under the Contract, and therefore items 3 and 4 were not variations in accordance with s 4 of the Act.

Conclusion

101 I reject Yuanda's submission that the Payment Claim relating to Invoice 1128 did not sufficiently identify the relevant construction work or related goods and services. In my opinion, a reasonable building practitioner in the position of Yuanda, on receiving the Payment Claim, would have understood that the claim was for the costs of providing labour, in addition to that required by the Contract, to accelerate the construction work in accordance with a direction, for the following reasons:

- (a) The email attaching Invoice 1128 referred to it as an invoice for 'variations on the 447 Collins Street Project'.
- (b) The Payment Claim was supported by an Order/Variation Requisition which noted the reason for the order as 'Variation to Contract Works - Acceleration Works'.

102 For the same reasons, I also reject Yuanda's submission that this Claim Item was for an excluded amount. If Yuanda wanted to assert that the work had been done without a request or direction, or that acceleration work was not construction work or related goods and services within the meaning of the Act, it could have done so in a payment schedule.

Invoice 1129

103 The Payment Claim relating to Invoice 1129 claimed \$724,260.76 for the work described in the Variations Table. It was supported by the following documents provided with the Payment Claim:

- (a) Invoice 1129 dated 28 July 2019 for \$666,413.96 and \$57,846.80 which described the work respectively as 'Non Productivity Claim (Second Claim as per schedule)' and 'Plant Equipment, Static Lines'.
- (b) Yuanda Order/Variation Requisition 22072019 dated 22 July 2019 which included the following features:
 - (v) the reason for the order was noted as 'Extra/Over Cost to the contract due to Builders Site Instructions and Yuanda's NCR';
 - (vi) the value of the order was noted as \$1,435,400.34;
 - (vii) the 'Type of Order' was noted as a 'Variation Instruction';
 - (viii) the document was signed on behalf of Yuanda by Mr Nguon (Project Manager), Mr Bond (Construction Manager) and Mr Rees (Commercial Manager);
 - (ix) the provision for signature by the Managing Director was not completed; and
 - (x) the Commercial Manager's comment was recorded as 'A handwritten version of this exists which Approves \$480k only for LoP'.
- (c) A document headed 'Residential Tower - Variation costing for breach of contract, and/or change to scope of work introducing revised installation methodology and loss of productivity' ('the Residential Tower Document'). The document recorded the following:
 - (i) 'cost overrun to complete incomplete floors' which attributed \$65,142 to seven floors, totaling \$455,993.99; and
 - (ii) 'Total cost for the over run/loss in productivity' which included a total cost of \$651,419.98 for ten other floors.
- (d) A document headed 'Settlement Agreement' between Yuanda and Façade dated 10 July 2019 under which Yuanda agreed to pay Façade an additional

\$1,107,413.96 as an adjustment to the Contract. The document included the following provisions:

- (i) The introduction provided as follows:
 - A Yuanda and the Supplier are parties to a subcontract titled 'Supply and Installation Agreement' dated 27 March 2018, a copy of which is annexed to this agreement (3017/S00002).
 - B Under the Subcontract the Supplier is required to carry out façade installation works. Furthermore, the Subcontract specifically states the manner in which certain façade work were to be undertaken.
 - C Due to altered work methods required by the Head Contract and directed by Yuanda, the Supplier has not been able to carry out the majority of its work in the manner and at the rate of productivity assumed by the Subcontract and as a result has incurred, and expects to continue to incur, additional costs to complete the altered works.
 - D This agreement addresses only one specific altered work method for which Yuanda has agreed to compensate the Supplier for the additional costs it has, and will incur by way of an adjustment to the Contract Price and variation of the Subcontract in accordance with this agreement.
- (ii) Schedule 1 to the Settlement Agreement recorded the 'following altered work method (variation)' as 'fully and finally agreed and settled':

With reference to Yuanda email dated 28 Jun 2019 being a response to Piper Alderman correspondence ref DF:416128, dated 24 June 2019 and Supplier Aconex ref GCOR-000100 Yuanda acknowledged that the items indicated as variations in the afore mentioned correspondence are variations under clause 8 of the Yuanda/Supplier subcontract 3017/S00002. Yuanda confirmed work on those variations was to continue and Yuanda would value each variation in accordance with the Yuanda/Supplier subcontract 3017/S00002. Notwithstanding that the altered work method (variation) which is the subject of this agreement is still ongoing, Yuanda and the Supplier have agreed to the following:

Altered work method (variation), due to others failure to provide building screens which complied with the Subcontract, and which would have allowed the productive installation of the façade from behind the building screens, Yuanda directed the Supplier to install the Residential Tower façade up to and including level 34 from a live, or semi-live

edge (**Direction**). The adjustment to the Contract Price of \$1,107,413.96 (plus GST) provided under clause 1.3 of this agreement includes for reduced productivity of installation labour, associated costs of access and exclusion zone restrictions, live edge training; additional supervision, administration and management and additional tools and supply of plant and equipment required to comply with the Direction.

Yuanda's submissions

104 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1129 for the following reasons:

- (a) The purported Settlement Agreement was invalid because it was 'falsely backdated' and signed by a person who, to the knowledge of Façade, did not have authority to sign the document.
- (b) The Residential Tower Document included amounts that were clearly estimates, and it was not clear what percentage of the floors were complete. Mr Nguon gave evidence that he could not work out 'how you get to the end figure'.
- (c) The Order/Variation Requisition had not been approved by Mr Liu, the Managing Director of Yuanda.

105 Yuanda further submitted that this Claim Item was for an excluded amount for the following reasons:

- (a) There was no request or direction from Yuanda prior to the works being carried out and the Order/Variation Requisition postdated the start of the works.
- (b) The Settlement Agreement was not valid or binding and, even if it were binding, it could not constitute a first class variation under s 10A(2) of the Act because no time for payment of the amount was specified.

- (c) The work did not involve a change in the scope of the works. The change was only as to methodology.

Conclusion

106 I reject Yuanda's submission that the Payment Claim relating to Invoice 1129 did not sufficiently identify the relevant construction work or related goods and services. In my opinion, a reasonable building practitioner in the position of Yuanda would have understood from the Payment Claim that the work referred to in Invoice 1129 related to the supporting documents, being:

- (a) the claimed variations in Yuanda Order/Variation Requisition 22072019, signed by the Project Manager and Construction Manager of Yuanda; and
(b) the purported Settlement Agreement which expressed the work as being a variation to the Contract,

from which the recipient could have identified the construction work or related goods and services to which the progress payment related.

107 For the same reasons, I am satisfied that the Payment Claim with respect to Invoice 1129 did not include a claim for any excluded amount. This Claim Item is a claim for construction work or related goods and services based on variations which, as is apparent from the face of the supporting documents, were requested, directed or agreed by Yuanda, and are therefore claimable variations.

108 If Yuanda had wanted the claims to be investigated for the purpose of determining whether:

- (a) the construction work or related goods and services to which the Payment Claim related were not claimable variations;
(b) the work the subject of the invoice had not been completed at the time of the Payment Claim; or

(c) the Settlement Agreement was invalid;

it could have made such assertions in a payment schedule.

109 There was an extensive amount of examination and cross-examination with respect to the validity of the Settlement Agreement. In my opinion, this was not relevant for the purpose of objectively determining whether the Payment Claim sufficiently identified the construction work or related goods and services, or whether on its face, the Payment Claim included a claim for an excluded amount.

Invoice 1131

110 The Payment Claim relating to Invoice 1131 claimed \$264,560 for the work described in the Variations Table. It was supported by the following documents provided with the Payment Claim:

- (a) Invoice 1131 dated 28 July 2019 for \$264,560 which described the work as '447 CS - Variations (YUA) as per instructed (refer to VAR-018, 022)'.
- (b) Yuanda Order/Variation Requisition 447CS-OR0013 dated 23 August 2019 which referenced VAR 022 and Invoice 1119 and noted the reason for the order as 'FDI Variation to contract'.
- (c) Yuanda Order/Variation Requisition 447CS-OR0008 dated 20 August 2019 which referenced VAR 010 and noted the reason for order as 'Variation work from Yuanda NCRs'.
- (d) Daily/Hourly Labour Records which included the following descriptions of work:
 - (i) item 2 'Cutting and removal of nose cone stillages via alimak';
 - (ii) item 3 'Set up Prototype in Yard for Level 29.5 Commercial';
 - (iii) item 4 'Sliding Doors - Logistics + Labour to install + Load via alimak/goods lift';

- (iv) item 5 'Nose Cone Modification Commercial Tower Level 25, 26, 27';
 - (v) item 7 'Cut Front Sill Angles to clear opening commercial Level 26';
 - (vi) item 9 'Rotation of Panels Level 26 Commercial'; and
 - (vii) item 10 'Rotation of Panels Level 14+15, 20, 21 Residential'.
- (e) Eleven pages of site records which described the work in similar terms to the Daily/Hourly Labour Records, signed by representatives of Façade and Yuanda.

Yuanda's submissions

111 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1131 for the following reasons:

- (a) Mr Nguon gave evidence that he was aware that the claim was based on Yuanda's delayed supply of sliding doors, which required Façade to adopt a slower and more labour intensive method for moving the doors. However, the part of the costs relating to installation was within the scope of the works and should have been part of the original contract price.
- (b) The invoice did not sufficiently identify the construction work to enable those works which were outside the scope of the Contract to be valued.

112 Yuanda further submitted that this Claim Item was for an excluded amount for the following reasons:

- (a) There was no request or direction. The Order/Variation Requisitions postdated and did not refer to Invoice 1131. Accordingly, it could not be a second class variation and Façade did not refer to any agreement which could render it a first class variation.
- (b) There was no change to the scope of the works. Mr Nguon gave evidence that once the doors reached the required floor, the installation methodology remained unchanged. The descriptions in the Daily/Hourly Labour Records

of items 4, 9 and 10, which were in dispute, were works within the original scope of the works under the Contract.

Conclusion

113 I reject Yuanda's submission that the Payment Claim relating to Invoice 1131 did not sufficiently identify the relevant construction work or related goods and services. In my opinion, a reasonable building practitioner in the position of Yuanda would have understood from the Payment Claim and supporting documents that the work referred to in Invoice 1131 related to the variations referenced in the Order/Variation Requisitions and site records.

114 For the same reasons, I am satisfied that the Payment Claim with respect to Invoice 1131 does not include a claim for an excluded amount. This Claim Item is a claim for construction work or related goods and services, being the work referred to in the Order/Variation Requisitions and site records which, as is apparent from the face of the supporting documents, is alleged to have been requested, directed or agreed by Yuanda.

115 The evidence of the subjective understanding of Mr Nguon is not relevant or admissible for the purpose of determining whether the Payment Claim sufficiently identified the relevant construction work or included a claim for an excluded amount.

Invoice 1132

116 The Payment Claim relating to Invoice 1132 claimed \$191,440 for the work described in the Variations Table. It was supported by the following documents provided with the Payment Claim:

- (a) Invoice 1132 dated 28 July 2019 for \$191,440 which described the work as '447 CS - Additional Equipment & Labour as per Yuanda Variation VAR-021 & MULTIPLEX SI-000335'.

- (b) A table calculating equipment related costs for May, June and July 2019 headed 'MPX-SI-000335'.
- (c) Yuanda Order/Variation Requisition 447CS-OR0012 dated 22 August 2019 which referenced VAR 021 and noted the reason for the order as 'Variation to contract - MPX Site Instruction to procure additional plant and works'.
- (d) Multiplex Site Instruction MPX-SI-000335 dated 2 May 2019 to Yuanda and Façade which stated:

Rates you have issued via YuandAus-SUBADVICE-000356 are acceptable.

Please hire the additional equipment to assist with the recovery work.

- (e) An email chain between representatives of Yuanda, Façade and Multiplex between 25 March 2019 and 2 May 2019 with respect to the plant and equipment 'to eliminate down time caused by relocating to increase productivity during level 13-17 recovery process', culminating in Yuanda issuing a Subcontractor Advice dated 3 May 2019 stating:

As per discussed, MPX have acknowledged that they will reimburse costs of plant and equipment hire to assist with catching lost install opportunities at the east tower. Please refer Aconex MPX-CONTADV-009389 sent today.

As such, please proceed to procure plant and equipment require as instructed.

- (f) Invoices from:
 - (i) Chadwick Forklifts dated 31 July 2019 for equipment rental costs;
 - (ii) Leader Access Hire dated 31 July 2019 for hire equipment costs;
 - (iii) Mass Group dated between 7 and 28 July 2019; and
 - (iv) Daca Construction dated between 3 May 2019 and 2 August 2019 for labour hire.

Yuanda's submissions

117 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1132 for the following reasons:

- (a) The Payment Claim referenced Multiplex Site Instruction MPX-SI-000344 which did not exist (and the Invoice referred to MPX-SI-000335).
- (b) Timesheets were not provided for the labour costs, except for the table headed 'MPX-SI-000335'.
- (c) Multiplex Site Instruction MPX-SI-00035 was to 'hire the additional equipment to assist with the recovery work' and made no reference to additional labour.
- (d) Order/Variation Requisition 447CS-OR0012, which referenced VAR-021, did not refer to additional labour and did not purport to relate to Invoice 1132.

118 Yuanda further submitted that this Claim Item included an excluded amount because Multiplex Site Instruction MPX-SI-00035:

- (a) did not request or direct additional labour; and
- (b) only referred to 'recovery work' which, on its face, does not suggest that works were additional to the contractual scope of the works.

Conclusion

119 In my opinion, the Payment Claim has sufficiently identified the construction work referable to Invoice 1132 for the following reasons:

- (a) The invoice referred to the additional equipment and labour being required due to an Order/Variation Requisition and Multiplex Site Instruction.
- (b) The Order/Variation Requisition referred to it as a variation.

- (c) If Yuanda wanted to assert that the labour performed exceeded what Yuanda had requested, directed or agreed to, it could have done so in a payment schedule.

120 For the same reasons, I am satisfied that the Payment Claim with respect to Invoice 1132 does not claim any excluded amount. This Claim Item is a claim for construction work or related goods and services, being to 'hire the additional equipment to assist with the recovery work' which, as is apparent on the face of the supporting documents, is based on it being requested, directed or agreed by Yuanda.

Invoice 1140

121 The Payment Claim relating to Invoice 1140 claimed \$68,527.50 for the work described in the Variations Table. It was supported by the following documents provided with the Payment Claim:

- (a) Invoice 1140 dated 28 June 2019 for \$68,527.50 which described the work as:
- 447 Collins Street - Commercial Tower L28 Plant room additional work/Labour/required due to methodology change. Refer Item 4 of variation Schedule
- (b) Daily/Hourly Labour Records which set out the calculation of labour costs totalling \$68,527.50 and referenced Site Records 302, 374-376, 382 and 384, noting the descriptions of work respectively as:
- (i) lost time due to drop zone changes;
 - (ii) down time due to Scan Rent leaving the site without any work being completed;
 - (iii) lost time due to relocation of men due to lost zone on east Elevation Hotel; and
 - (iv) installation of loading bay scar Level 2 Plantroom Commercial (out of sequence work).

- (c) The site records referred to were not attached to the Payment Claim, but they used the same descriptions of work as contained in the Daily/Hourly Labour Records and each was signed by representatives of Façade and Yuanda.
- (d) A document headed '447 Collins Street Project - Works and Resource [sic] Requirements Schedule 24 June 2019' ('Requirements Schedule'). This document was an enclosure to a letter from Piper Alderman (the solicitors for Façade) to Yuanda dated 24 June 2019, which was itself referred to in the Settlement Agreement. The letter described the Requirements Schedule as follows:

Enclosed for your information is a spreadsheet prepared by our client setting out each of the variations it has been, or may be, required to carry out and the different categories of costs it has incurred, will continue to incur or may incur in performing those variations.

The Requirements Schedule had the following legend:

Legend: Additional work to the contract:	
a)	Loss of productivity due to change of scope
b)	Additional overtime required
c)	Additional equipment
d)	Additional or varied work requiring extra labours and equipment
e)	Cost of acceleration using new additional labour
f)	Cost of training to comply with new Live Edge requirements

122 Relevantly, the Payment Claim referred to item 4 of the Requirements Schedule which provided:

4	Commercial Plantroom				
	level 26	27	Nose Cone Installation	a)	Change of scope - floor slab been change for a ring beam
	Level 27 (5/7 to 1/8)	27	Full Façade Installation	b)	New program due to ring beam change requires FDI to install Level 28 & 29 simultaneously to maintain behind screens installation for upper floors.
	Level 28 (5/7 to 1/8)	28	Full Façade Installation	d)e)	FDI requires to install 2 levels within one floor cycle.
	Level 29	29	Nose cone Installation	c)	Additional Equipment required for additional workforce

Yuanda's submissions

123 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1140 for the following reasons:

- (a) The site records were not attached to the Payment Claim.
- (b) The Daily/Hourly Labour Records did not disclose any non-conformance reports.

124 Yuanda further submitted that the construction work referred to in Invoice 1140 included excluded amounts for the following reasons:

- (a) There was no evidence of a request or direction from Yuanda.
- (b) The work was time-related and therefore properly a damages claim.

Conclusion

125 In my opinion, the Payment Claim has sufficiently identified the construction work referable to Invoice 1140 for the following reasons:

- (a) The invoice referred to the additional labour being required due to a 'methodology change'.
- (b) The invoice referred to item 4 of the 'variation Schedule' which identified the basis of the variation claim with respect to each item, being relevantly (a) to (e) of the legend in the Requirements Schedule.
- (c) The Daily/Hourly Labour Records set out the labour claim in some detail and referenced the relevant site records, which had been executed by Yuanda.
- (d) The defence that this claim is properly characterised as a claim for damages should have been raised in a payment schedule.

126 For the same reasons, I am satisfied that the Payment Claim with respect to Invoice 1140 does not claim any excluded amount. This Claim Item is a claim for the construction work or related goods and services referred to in the site records and

item 4 of the Requirements Schedule which, as is apparent on the face of the supporting documents, is based on it being requested, directed or agreed by Yuanda.

Invoice 1141

127 The Payment Claim relating to Invoice 1141 claimed \$179,873.37 for the work described in the Variations Table, although Façade subsequently issued a credit note for \$8,385. It was supported by the following documents provided with the Payment Claim:

(a) Invoice 1141 dated 29 August 2019 for \$179,873.37 which described the work as:

447 CS - On site Variation instruction refer to Yuanda variation No VAR-019 & Var-022.

Multiplex Site Instructions 527, 662, 708, 746 & 756.

(b) Daily/Hourly Labour Records which included 19 items and referenced Multiplex Site Instructions MPX-SI-000527, 662, 708, 746 and 756, being the same site instructions referred to in the Payment Claim. The descriptions of work for these items included:

- (i) fire pipe East Tower;
- (ii) reed switches for sliding door;
- (iii) Level 28 Commercial;
- (iv) Lvl 29 Monorail;
- (v) MC2; and
- (vi) removal of stillages – East Tower.

(c) Yuanda Order/Variation Requisition 447CS-OR0009 dated 20 August 2019 which referenced VAR 019 and noted the reason for the order as 'MPX-SI to accelerate L28-29 Plantroom and relocating MC2 Materials'.

- (d) Yuanda Order/Variation Requisition 447CS-OR0013 dated 23 August 2019 which referenced VAR 022 and noted the reason for order as 'FDI Variation to contract'.
- (e) Yuanda Subcontractor Advices dated 26 June 2019, 7 and 27 August 2019.
- (f) Multiplex Site Instruction MPX-SI-000695 dated 7 August 2019.
- (g) Nineteen timesheets which referenced the items contained in the Daily/Hourly Labour Records, including the MPX site instructions, each signed by a representative of Yuanda.

Yuanda's submissions

128 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1141 for the following reasons:

- (a) VAR 022 related to Invoice 1119, rather than Invoice 1141.
- (b) VAR 019 only related to Multiplex Site Instructions 708 and 756 and accordingly items 1, 2, 12 and 16-19 of the Daily/Hourly Labour Records were not covered by VAR 019.
- (c) Items 16-19 of the Daily/Hourly Labour Records did not refer to a Multiplex site instruction.
- (d) Only two of the nineteen timesheets had been signed by a Multiplex representative, which was contrary to the following:
 - (i) Yuanda Subcontractor Advice dated 26 June 2019 which provided: 'As always, please ensure your day sheets are signed off by a member of MPX's site team';
 - (ii) Multiplex Site Instruction MPX-SI-000708 dated 7 August 2019, whereby Multiplex acknowledged and accepted additional works and

required: 'All FDI time sheets are to be confirmed and signed by a MPX staff member'; and

(iii) Yuanda Subcontractor Advice dated 27 August 2019 which provided 'please ensure a MPX staff member sight and sign off FDI's day sheets for our cost submission'.

(e) Items 3 to 11 of the Daily/Hourly Labour Records related to acceleration costs which were not a change to the scope of the works.

129 Yuanda further submitted that the claim referable to Invoice 1141 included excluded amounts for the following reasons:

(a) There was no reference to any site instruction with respect to items 16 to 19 of the Daily/Hourly Labour Records.

(b) The site instructions included with Invoice 1141, on their face, did not refer to the removal of stillages at the East Tower.

(c) The timesheets were dated after the alleged works and therefore could not constitute a request or direction by Yuanda.

(d) The Daily/Hourly Labour Records related to acceleration costs for works that were within the scope of the Contract and there was no change to the scope of the works.

(e) The fact that credit notes were issued for Invoice 1141 did not establish an agreement for the variation.

Conclusion

130 In my opinion, the Payment Claim has sufficiently identified the construction work referable to Invoice 1141 for the following reasons:

(a) The invoice referred to the Order/Variation Requisitions and Multiplex site instructions pursuant to which it was alleged that the work was performed.

- (b) The description of the work was contained in the Daily/Hourly Labour Records and the timesheets executed by Yuanda.

131 The Payment Claim did not, on its face, include a claim for an excluded amount for the following reasons:

- (a) The work was claimed as being pursuant to specified Order/Variation Requisitions and Multiplex site instructions.
- (b) The Payment Claim was expressed to be for 'additional works as instructed by Yuanda'.
- (c) Invoice 1141 described the work as 'On site Variation instruction'.

Invoice 1142

132 The Payment Claim relating to Invoice 1142 claimed \$10,107.50 for the work described in the Variations Table, although Façade subsequently issued a credit note for \$2,332.50. It was supported by the following documents provided with the Payment Claim:

- (a) Invoice 1142 dated 29 August 2019 for \$10,107.50 which described the work as:

447 CS - On Site Acceleration works after hours as instructed by Yuanda. Refer to Yuanda variation No VAR-015 & Multiplex SI-000400.

- (b) Daily/Hourly Labour Records which referenced MPX-SI-000475 and described the work as 'East Acceleration'.
- (c) Yuanda Order/Variation Requisition 447CS-0002 dated 13 August 2019 which referenced VAR 015 (which the Payment Claim also referenced) and noted the reason for order as 'Variation to Contract Works - Acceleration Works'.

- (d) Yuanda Subcontractor Advice dated 12 June 2019 which referred to Multiplex Site Instruction MPX-SI-000400.
- (e) Seven Yuanda timesheets for work located at 'East Tower Acceleration', each signed by a representative of Yuanda.

Yuanda's submissions

133 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1142 for the following reasons:

- (a) Mr Nguon said that the timesheets provided did not identify which workers were working the additional hours, and the record 'East Tower' did not sufficiently identify the part of the building.
- (b) The timesheets had not been signed by a Multiplex representative, which was contrary to the Multiplex site instruction and Yuanda subcontractor advice.

134 Yuanda further submitted that this Claim Item included excluded amounts for the following reasons:

- (a) The Yuanda subcontractor advice and Multiplex site instruction only authorised overtime works to the end of June, but the timesheets recorded works completed in July and August 2019. Mr Nguon said these works were not covered by the site instruction.
- (b) The Order/Variation Requisition was dated 13 August 2019, which was after the completion of works and could not have constituted a request or direction.
- (c) Invoice 1142 did not relate to a change in the scope of the construction work and was properly a claim for compensation due to the happening of an event.

Conclusion

135 In my opinion, the Payment Claim has sufficiently identified the construction work referable to Invoice 1142 for the following reasons:

- (a) The invoice referred to 'VAR-015 & Multiplex SI-000400' pursuant to which it was alleged that the work was performed.
- (b) The description of the work was contained in the Daily/Hourly Labour Records and the timesheets executed by Yuanda.

136 The Payment Claim did not, on its face, include a claim for an excluded amount for the following reasons:

- (a) The work was claimed as being pursuant to Order/Variation Requisition VAR 15.
- (b) The invoice was expressed to be for 'On Site Acceleration works after hours as instructed by Yuanda', and referred to 'VAR-015 & Multiplex SI-000400'.

Invoice 1143

137 The Payment Claim relating to Invoice 1143 claimed \$318,255 for the work described in the Variations Table, although Façade subsequently issued a credit note for \$82,800. It was supported by the following documents provided with the Payment Claim:

- (a) Invoice 1143 dated 29 August 2019 for \$318,255 which described the work as:
 - 447 CS -On Site Variations issued by Yuanda; Refer to Yuanda Variation No VAR-015 & VAR-022. Also refer Yuanda NCR-013,028 & 069.
- (b) Daily/Hourly Labour Records which referenced the same VAR and Yuanda NCR numbers and described the 19 items of work respectively as:
 - (i) Level 20-15-14;
 - (ii) Commercial Tower stairwell flashing;

- (iii) rope access L16 East Tower;
 - (iv) Level 27-29 Commercial;
 - (v) Level 17-18, 21-26 panel rotation – East Tower; and
 - (vi) East Tower – sliding door.
- (c) Yuanda Order/Variation Requisition 447CS-0002 dated 13 August 2019 which referenced VAR 015 and noted the reason for the order as ‘Variation to Contract Works – Acceleration Works’.
- (d) Yuanda Order/Variation Requisition 447CS-OR0013 dated 23 August 2019 which referenced VAR 022 and noted the reason for the order as ‘FDI Variation to Contract’.
- (e) Nineteen Yuanda timesheets, 11 of which were signed by a representative of Yuanda.

Yuanda's submissions

138 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1143 for the following reasons:

- (a) Invoice 1143 included claims for logistics labour and installation labour. Mr Nguon gave evidence that Façade was entitled to a variation for logistical labour for moving materials from the ground floor, but not for the labour works relating to acceleration works and installation, which did not involve a change to the scope of the works.
- (b) The Daily/Hourly Labour Records did not permit the separation of the work related to logistics from the work related to installation.
- (c) Ms Rozon gave evidence that the works included in this invoice included some work that was also included in Invoice 1156.

139 Yuanda further submitted that the claim for the work referred to in Invoice 1143 included an excluded amount for the following reasons:

- (a) The Order/Variation Requisitions were raised for Invoices 1128 and 1119 respectively and not Invoice 1143.
- (b) The timesheets were dated after the alleged works.
- (c) The costs relating to installation were within the scope of the works and therefore did not constitute a variation.

Conclusion

140 In my opinion, the Payment Claim has sufficiently identified the construction work referable to Invoice 1143 for the following reasons:

- (a) The invoice and Payment Claim referred to 'VAR-015 & VAR-022' and 'Yuanda NCR-013, 028 & 069' pursuant to which it was alleged that the work was performed.
- (b) The description of the work was contained in the Daily/Hourly Labour Records and timesheets executed by Yuanda.

141 The Payment Claim did not, on its face, include a claim for an excluded amount for the following reasons:

- (a) The work was claimed as being pursuant to Order/Variation Requisitions and Yuanda NCRs.
- (b) The Payment Claim was expressed to be for 'On site additional works requested by Yuanda'.
- (c) Invoice 1143 described the work as 'On Site Variations issued by Yuanda'.

142 The evidence of the subjective knowledge and inquiries of Mr Nguon and Ms Rozon is not admissible for the purposes of determining the validity of the Payment Claim or whether the Payment Claim, on its face, includes a claim for an excluded amount.

Invoice 1144

143 The Payment Claim relating to Invoice 1144 claimed \$73,960 for the work described in the Variations Table, although Façade subsequently issued a credit note for \$1,620. The claim was supported by the following documents provided with the Payment Claim:

- (a) Invoice 1144 dated 29 August 2019 for \$73,960 which described the work as:
447 CS - Supply of Additional Equipment & Labour as per Yuanda Variation No VAR-021 & Multiplex SI - 000344.
- (b) A table headed 'Aug-19' which set out equipment and labour costs.
- (c) Yuanda Order/Variation Requisition 447CS-OR0012 dated 22 August 2019 which referenced VAR 021 and noted the reason for order as 'Variation to contract-MPX Site Instruction to procure additional plant and works'.
- (d) Yuanda Subcontractor Advice 000344 dated 3 May 2019 which attached an email referring to MPX SI-000335, stating:

As per discussed, MPX have acknowledged that they will reimburse costs of plant and equipment hire to assist with catching lost install opportunities at the east tower. Please refer Aconex MPX-CONTADV-009389 sent today.

As such, please proceed to procure plant and equipment require as instructed.
- (e) Various invoices from Leader Access Hire, Mass Group, Chadwick Forklifts and Daca Construction.

Yuanda's submissions

144 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1144 for the following reasons:

- (a) The Payment Claim referenced Multiplex Site Instruction MPX-SI-000344 which did not exist.
- (b) Timesheets were not provided for the labour costs, except for the table headed 'Aug-19'.
- (c) Multiplex Site Instruction MPX-SI-000335 was to 'hire the additional equipment to assist with the recovery work' and made no reference to additional labour.
- (d) The Order/Variation Requisition referencing VAR 021 did not refer to additional labour and did not purport to relate to Invoice 1144.

145 Yuanda further submitted that this Claim Item included an excluded amount for the following reasons:

- (a) The site instruction only directed the hiring of additional equipment, not additional labour.
- (b) The Yuanda subcontractor advice only referred to the 'costs of plant and equipment hire to assist with catching lost install opportunities at the east tower' which, on its face, does not suggest that the works were additional to the contractual scope of the works.

Conclusion

146 In my opinion, the Payment Claim has sufficiently identified the construction work referable to Invoice 1144 for the following reasons:

- (a) The invoice referred to the additional equipment and labour being required pursuant to an Order/Variation Requisition and Multiplex site instruction.
- (b) The Order/Variation Requisition referred to it as a variation.
- (c) The fact that the Payment Claim erroneously referred to Multiplex Site Instruction MPX-SI-000344, rather than Yuanda Subcontractor Advice 000334

or Multiplex Site Instruction MPX-SI-000335, does not invalidate the Payment Claim.

- (d) Yuanda Subcontractor Advice 000334 specifically referred to the work requested.
- (e) If Yuanda wanted to assert that the labour exceeded the request, direction or agreement, it could have done so in a payment schedule.

147 For the same reasons, I am satisfied that the Payment Claim with respect to Invoice 1144 does not claim any excluded amount. This Claim Item is a claim for construction work or related goods and services based on variations which, as is apparent from the face of the supporting documents, is based on it being requested, directed or agreed by Yuanda.

Invoice 1145

148 The Payment Claim relating to Invoice 1145 claimed \$74,565 for the work described in the Variations Table, although Façade subsequently issued a credit note for \$5,310. The claim was supported by the following documents provided with the Payment Claim:

- (a) Invoice 1145 dated 29 August 2019 for \$74,565 which described the work as:
 - 447 CS - Provide Alimak Scar acceleration works after hours to Residential Tower Refer Yuanda Variation No VAR-020.
- (b) Daily/Hourly Labour Records which referenced MPX-SI-000475 and described the work as 'Alimak Scar'.
- (c) Yuanda Order/Variation Requisition 447CS-OR0010 dated 20 August 2019 which referenced VAR 020 and noted the reason for the order as 'over time work for Alimak Scar 1-3, grid 1b to 2a of East Elevation'.
- (d) Yuanda Subcontractor Advice dated 12 June 2019 which referenced MPX-SI-000475 and instructed Façade to 'provide labour after 5.30pm each night to

assist in maintaining the recovery strategy' and to 'continue with overtime works for the month of June'.

- (e) Fifteen Yuanda timesheets, each sighting MPX-SI-000475 and executed by a representative of Yuanda.

Yuanda's submissions

149 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1145 for the following reasons:

- (a) Mr Nguon gave evidence that the timesheets did not identify which workers worked the additional hours and that he could not assess the amount claimed for additional labour.
- (b) The failure to obtain the signature of a Multiplex representative on the timesheets was contrary to the Multiplex site instruction and Yuanda subcontractor advice and meant that the work was not sufficiently identified.
- (c) The claim did not identify how a request for additional labour is a change to the scope of the contractual works.

150 Yuanda further submitted that this Claim Item included an excluded amount for the following reasons:

- (a) The Multiplex site instruction and Yuanda subcontractor advice did not direct work beyond June 2019, however the timesheets related to work in July 2019.
- (b) The work was a claim for compensation due to the happening of an event, not a claim for a change to the scope of the works.

Conclusion

151 In my opinion, the Payment Claim has sufficiently identified the construction work referable to Invoice 1145 for the following reasons:

- (a) The invoice referred to the after-hours work being required due to 'Yuanda Variation No VAR-020'.
- (b) The Daily/Hourly Labour Records set out the labour claim in some detail and referenced the relevant Multiplex site instruction.
- (c) The Order/Variation Requisition confirmed the direction for overtime work.
- (d) If Yuanda wanted to assert that:
 - (i) the work was supplied outside the period it was requested;
 - (ii) the failure to obtain Multiplex's signature disentitled Façade; or
 - (iii) the work did not constitute a change to the scope of the works,it could have made such assertion in a payment schedule.

152 For the same reasons, I am satisfied that the Payment Claim with respect to Invoice 1145 does not claim any excluded amount. This Claim Item is a claim for construction work or related goods and services, being the work referred to in 'Yuanda Variation No VAR-020' which, as is apparent from the face of the supporting documents, is based on it being requested, directed or agreed by Yuanda.

Invoice 1146

153 The Payment Claim relating to Invoice 1146 claimed \$9,172 for the work described in the Variations Table, although Façade subsequently issued a credit note for \$262.30. The claim was supported by various documents, including Invoice 1146 dated 29 August 2019 for \$9,172.20 which described the work as:

447 CS - Supply of qualified Riggers to operate all Mast Climbers 1, 2, 3, 4 & 5.
Refer to Yuanda variation 447CS-OR0016.

154 Yuanda does not contest this Claim Item.

Invoice 1149

155 The Payment Claim relating to Invoice 1149 claimed \$50,115 for the work described in the Variations Table. It was supported by the following documents provided with the Payment Claim:

(a) Invoice 1149 dated 24 September 2019 for \$50,115 which described the work as:

447 Collins Street; Procure additional plant & labour refer to Yuanda Variation no VAR-021 & Multiplex SI-000334.

(b) A table headed 'INVOICE - 1149' and 'Sep-19' which set out the equipment and labour costs.

(c) Yuanda Order/Variation Requisition 447CS-OR0012 dated 22 August 2019 which referenced VAR 021 and noted the reason for the order as 'Variation to contract-MPX Site Instruction to procure additional plant and works'.

(d) Yuanda General Correspondence dated 22 August 2019 which referenced MPX-SI-000335 and VAR 021, stating:

Please refer to MPX site instruction and Yuanda confirmation of the hire of additional access equipment & 2 labourers

until level 13 -17 are complete.

(e) Various invoices from Leader Access Hire, Mass Group, Chadwick Forklifts and Daca Construction.

Yuanda's submissions

156 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1149 for the following reasons:

(a) The invoice referred to Multiplex Site Instruction MPX-SI-000334 which did not exist.

(b) No timesheets were provided with the Payment Claim and the cost calculation in the table headed 'Sep-19' was too general.

- (c) The Order/Variation Requisition referred to Invoice 1121 rather than Invoice 1149.
- (d) Multiple site instruction MPX-SI-000335 only instructed the hire of additional equipment 'to assist with the recovery work' and did not identify labour.
- (e) The claim did not identify how additional labour can constitute a change in the scope of the works. The work was a claim for compensation due to the happening of an event.

157 Yuanda further submitted that this Claim Item included excluded amounts because:

- (a) Multiplex Site Instruction MPX-SI-000334 did not exist; and
- (b) VAR 021 did not support Invoice 1149 and therefore was not a request for labour.

Conclusion

158 In my opinion, the Payment Claim has sufficiently identified the construction work referable to Invoice 1149 for the following reasons:

- (a) The Yuanda general correspondence provided in support of the invoice referred to 'the hire of additional access equipment & two labourers until level 13 -17 are complete'. The additional equipment and labour was required due to an Order/Variation Requisition and Multiplex site instruction.
- (b) The Order/Variation Requisition expressly referred to the work as 'Variation to contract - MPX Site Instruction to procure additional plant and works'.
- (c) The error in the Multiplex site instruction number did not invalidate the Payment Claim. In any event, the Multiplex note of 2 May 2019 contained in the general correspondence, which was attached to the Payment Claim, correctly referred to MPX-SI-000335.

- (d) If Yuanda wanted to assert that the additional labour exceeded the request, direction or agreement, or did not constitute a change to the scope of the works, it could have done so in a payment schedule.

159 For the same reasons, I am satisfied that the Payment Claim with respect to Invoice 1149 does not include a claim for any excluded amount. This Claim Item is a claim for construction work or related goods and services, being the hire of additional access equipment and two labourers which, as is apparent from the face of the supporting documents, is based on it being requested, directed or agreed by Yuanda.

Invoice 1150

160 The Payment Claim relating to Invoice 1150 claimed \$125,860.26 for the work described in the Variations Table. It was supported by the following documents provided with the Payment Claim:

- (a) Invoice 1150 dated 24 September 2019 for \$125,860.26 which described the work as:

447 CS -Supply of qualified riggers for the operation of all Mast Climbers 1, 2, 3, 4 & 5. Refer to Yuanda variation 447CS-OR0016.

- (b) Yuanda Order/Variation Requisition 447CS-OR0016 dated 20 September 2019 which noted the reason for the order as:

447CS-OR0016-Hiring Qualified Rigger as per Work Safe Instruction to operate M C Winch (M.C 1; 2;3;4;5)

- (c) Daily/Hourly Labour Records which referenced Site Records 554, 565-573, 579 and NCR 447CS-OR0016, and described the work respectively as '[h]ire of Maeda 285 and Crane Driver for MC3' and '[s]upply of Riggers' for MC1, MC3, MC4 and/or MC5.

- (d) Site Records 554, 565-573 and 579, signed by representatives of Façade and Yuanda.

Yuanda's submissions

161 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1150 because Mr Nguon 'understood that there [was] double claiming for the same work' and further said that 'the duplicated Site Records 0568 and 0571 record inconsistent times'.

Conclusion

162 In my opinion, Mr Nguon's evidence as to his subjective understanding is inadmissible. If Yuanda wanted to assert that the invoice involved double counting, it could have done so in a payment schedule.

Invoice 1151

163 The Payment Claim relating to Invoice 1151 claimed \$308,072.50 for the work described in the Variations Table. It was supported by the following documents provided with the Payment Claim:

(a) Invoice 1151 dated 24 September 2019 for \$308,072.50 which described the work as:

447 CS - Supply of additional labour for late delivery of sliding doors and additional works requested by Yuanda. Refer to Yuanda variation no VAR-022 & 024. Also refer to Yuanda NCR-069, 028 & 010.

(b) Daily/Hourly Labour Records which referenced:

- (xi) Site Records 560-564, 574-576, 581, 591 and 595-613;
- (xii) NCR-YUA 069, 028 and 010; and
- (xiii) VAR 022 and 024;

and described the work respectively as:

- (i) sliding doors - logistic labour to install/load/remove via Alimak/goods lift;
- (ii) rope access - fall out of sequences works level 15-16;

- (iii) East Tower Lvl 1, 2 east elevation – change in methodology;
 - (iv) rope guys and tower crane installation (Sunday work);
 - (v) Plantroom weather seal flashing level 28-29;
 - (vi) rotation of panels levels 27-30, 34, 35 – East Tower and 28-29 Comm Tower; and
 - (vii) nose cone modification L16, 21-31 East Tower.
- (c) Yuanda Order/Variation Requisition 447CS-OR0013 dated 23 August 2019 which referenced VAR 022 and noted the reason for order as ‘FDI Variation to contract’.
- (d) Yuanda Order/Variation Requisition 447CS-OR0014 dated 4 September 2019 which referenced VAR 024 and noted the reason for order as ‘MPX & YUANDA Site Instruction– FDI Variation –Install Flashing’.
- (e) Site Records 560-564, 574-576, 581, 591 and 595-613, which described the work consistently with the Daily/Hourly Labour Records.

Yuanda's submissions

164 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1151 for the following reasons:

- (a) Mr Nguon gave evidence that the only additional works he could identify were logistics, which he could not separate from the installation charges that were already part of the scope of the works under the Contract.
- (b) The supporting documents did not identify a request or direction by Yuanda to provide additional labour for the recovery program.
- (c) Mr Nguon described the descriptions on the invoice as ‘summarised and vague’ and gave evidence that he was unable to assess them.

- (d) Some works in this invoice were also included in Invoice 1157, which is conceded because Façade no longer presses an amount claimed in this invoice for \$15,570.
- (e) The Order/Variation Requisitions do not, on their face, refer to Invoice 1151. VAR 024 referenced 'install flashing' but only one item (being item 10) of the 29 items in the Daily/Hourly Labour Records referred to flashing.

Conclusion

165 In my opinion, the Payment Claim has sufficiently identified the construction work referable to Invoice 1151 for the following reasons:

- (a) The invoice referred to additional works and labour and referenced the relevant VARs and NCRs.
- (b) The Daily/Hourly Labour Records described the additional works.
- (c) The site records referenced the relevant NCRs and VARs and were each signed by a representative of Yuanda.
- (d) If Yuanda wanted to assert that the work claimed exceeded the request, direction or agreement or that there was double counting, it could have done so in a payment schedule.

166 For the same reasons, I am satisfied that the Payment Claim with respect to Invoice 1151 does not claim any excluded amount. This Claim Item is a claim for construction work or related goods and services, being the work referred to in VAR 022 and 024 and NCR 069, 028 and 010 which, as is apparent from the face of the supporting documents, is based on it being requested, directed or agreed by Yuanda.

167 It is noted that Façade conceded that \$15,570 should be reduced from this Claim Item because of a duplication with Invoice 1157.

Invoice 1152

168 The Payment Claim relating to Invoice 1152 claimed \$36,187.50 for the work described in the Variations Table. It was supported by the following documents:

(a) Invoice 1152 dated 24 September 2019 for \$36,187.50 which described the work as:

447 CS - Alimak Scar Acceleration after hours due to delay of program by builder. Refer Yuanda Variation No VAR-020.

As per site instruction.

(b) Daily/Hourly Labour Records which referenced Site Records 557-559 and MPX-SI-00475, and described the work as 'Alimak Scar - Acceleration Hours'.

(c) Yuanda Order/Variation Requisition 447CS-OR0010 dated 20 August 2019 which referenced VAR 020 and noted the reason for order as: 'over time work for Alimak Scar 1-3, grid 1b to 2a of East Elevation'.

(d) Site Records 557-559 which described the work consistently with the Daily/Hourly Labour Records and were each executed by representatives of Façade and Yuanda.

(e) Yuanda Subcontractor Advice dated 12 June 2019 which referenced MPX-SI-000475, and stated:

Please refer below MPX's SI to continue to perform after hour works for your quoting when submitting costs.

Please ensure, all those day sheets are signed by a MPX staff member for cost submission.

(f) A table headed 'summary variation invoices Sept 2019' which referred to Invoices 1149-1158.

Yuanda's submissions

169 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1152 for the following reasons:

- (a) The timesheets were not signed by a Multiplex representative, which was contrary to Yuanda subcontractor advice and Multiplex site instructions.
- (b) Mr Nguon said the timesheets did not record the time of day that the works were completed and so he could not assess whether the work was completed in overtime hours.
- (c) The documents did not identify how the additional labour was a change to the scope of the works.

170 Yuanda further submitted that this Claim Item included excluded amounts for the following reasons:

- (a) VAR 020, Multiplex Site Instruction MPX-SI-000475 and Yuanda subcontractor advice only related to overtime works in May and June, but the timesheets provided in support of the Payment Claim recorded overtime work in September 2019.
- (b) Mr Nguon gave evidence that the acceleration claim was due to a change in the installation access, which was a claim for compensation due to the happening of an event.

Conclusion

171 In my opinion, the Payment Claim has sufficiently identified the construction work referable to Invoice 1152 for the following reasons:

- (a) The work was identified by reference to VAR 020 and MPX-SI-000475.
- (b) The work was described in the Payment Claim and the invoice as after-hours acceleration works.
- (c) The fact that the timesheets were not signed by a Multiplex representative may have constituted a defence, which could have been raised in a payment schedule.

- (d) The site records referenced MPX-SI-00475 and VAR 020 and were signed by a representative of Yuanda.
- (e) If Yuanda wanted to assert that the claim:
 - (viii) was for work that exceeded a request, direction or agreement;
 - (ix) did not constitute a change to the scope of the works; or
 - (x) was a claim for compensation,it could have done so in a payment schedule.

172 For the same reasons, I am satisfied that the Payment Claim with respect to Invoice 1152 does not claim any excluded amount. This Claim Item is a claim for construction work or related goods and services, being acceleration works which, as is apparent from the face of the supporting documents, is based on it being requested, directed or agreed by Yuanda.

Invoice 1153

173 The Payment Claim relating to Invoice 1153 claimed \$85,217.90 for the work described in the Variations Table.

174 Yuanda takes no issue with respect to this invoice.

Invoice 1154

175 The Payment Claim relating to Invoice 1154 claimed \$5,500 for the work described in the Variations Table.

176 Yuanda takes no issue with respect to this invoice.

Invoice 1155

177 The Payment Claim relating to Invoice 1155 claimed \$140,301.11 for the work described in the Variations Table. It was supported by the following documents provided with the Payment Claim:

- (a) Invoice 1155 dated 24 September 2019 for \$140,301.11 which described the work as:

447 CS - For the Removal Re-Loading bay of MC2 materials due to restricted access by builder & Acceleration of Commercial Tower Level 28-29 Plantroom. Refer Yuanda variation no VAR-019.

As per SI-000756

- (b) Daily/Hourly Labour Records which referenced Site Records 555 and 556 and Multiplex Site Instruction MPX-SI-000756, and described the work respectively as:

(i) 'Removal/Loading of MC2 (Labour)'; and

(ii) 'Removal/Loading of MC2 (Material & supply of equipment/plant)'.

- (c) Yuanda Order/Variation Requisition 447CS-OR0009 dated 20 August 2019 which referenced VAR 019 and noted the reason for the order as 'MPX -SI to accelerate L28-29 Plantroom and relocating MC2 Materials'.

- (d) Multiplex Site Instruction MPX-SI-000756 dated 14 August 2019.

- (e) Yuanda Subcontractor Advice dated 15 August 2019 which requested the completion of works in accordance with the provided site instruction.

- (f) Letter from Façade to Yuanda dated 15 August 2019 which submitted the 'budget price for the relocation of materials to designated levels and logistics yard as per MPX site instruction SI-000756'.

- (g) Multiplex Site Instruction MPX-SI-000756 dated 14 August 2019 which stated:

As per our meeting today regarding MC2 loading please provide the following :

- Dollies to load materials up the Alimak and spread onto floors.
- Provide ply protection to currently installed ASP flooring.

Please provide material costs to us for review as per normal process.

Please commence the delivery and movement of this material from 15/08/19 .

- (h) Site Record 555 signed by representatives of Façade and Yuanda.
- (i) Four invoices from Total Tools dated 29 and 30 August and 6 and 19 September 2019.

Yuanda's submissions

178 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1155 because the supporting timesheet, being Site Record 555, was not signed by Multiplex as required. As a result, Mr Nguon gave evidence that he could not approve the claim.

Conclusion

179 In my opinion, the Payment Claim sufficiently identified the construction work referable to Invoice 1155. Whether Multiplex's signing of timesheets was a pre-requisite for liability was a matter that ought to have been raised by Yuanda in a payment schedule.

Invoice 1156

180 The Payment Claim relating to Invoice 1156 claimed \$19,255.63 for the work described in the Variations Table. It was supported by the following documents provided with the Payment Claim:

- (a) Invoice 1156 dated 24 September 2019 for \$19,255.63 which described the work as:
 - 447 CS - Level 16 Residential Tower requires Rope Access due to nose cone manufacture defect. Refer to Yuanda variation No 010 & 021.
- (b) Daily/Hourly Labour Records which referenced Invoice 1156 and NCR YUA-010 and described the work as 'Required Rope Access Guys due to nose cone manufacture issues'.

- (c) Yuanda Order/Variation Requisition 447CS-OR003 dated 15 August 2019 which referenced VAR 010 and noted the reason for the order as: 'Big panels need tools - Spreader Beam to lift and install'.
- (d) Yuanda Order/Variation Requisition 447CS-OR0012 dated 22 August 2019 which referenced VAR 021 and noted the reason for the order as: 'Variation to contract-MPX Site Instruction to procure additional plant and works'.
- (e) Invoices from:
 - (xi) Waynes High Access dated 11 September 2019;
 - (xii) Total Tools dated 23 September 2019;
 - (xiii) Sergi Mobile Crane Solutions dated 30 September 2019;
 - (xiv) Grimleys dated 1 and 7 August 2019; and
 - (xv) Leader Access Hire dated 17 September 2019.
- (f) Site Record 578 which referred to VAR 022 and was unsigned.

Yuanda's submissions

181 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1156 for the following reasons:

- (a) Mr Nguon gave evidence that the Daily/Hourly Labour Records were incomplete and confusing in a number of respects and that no signed timesheets were provided in support of the claim.
- (b) Ms Rozon gave evidence that Façade reduced this claim by \$5,520 because the same work was also included in Invoice 1143.

182 Yuanda further submitted that this Claim Item included excluded amounts for the following reasons:

- (a) VAR 021 and 010, which were referred to in the invoice, did not relate to this invoice. VAR 021 expressly referred to Invoice 1121.
- (b) The descriptions contained in the Order/Variation Requisitions were not consistent with the descriptions of the works contained in the invoice.
- (c) VAR 010 and 021 were dated 15 and 22 August 2019 respectively. Many of the costs recorded in the supporting documents were charged before those dates and therefore the documents could not constitute a request or direction to complete such works.

Conclusion

183 In my opinion, the Payment Claim has sufficiently identified the construction work referable to Invoice 1156 for the following reasons:

- (a) The work was described in the Payment Claim and the invoice as works performed in accordance with Order/Variation Requisitions VAR 010 and 021.
- (b) The site records referenced VAR 022 and described the work as 'Hire of Nifty Boom to install WL 14-15 Panels East Tower'.
- (c) If Yuanda wanted to raise issues such as double counting or inconsistencies in the descriptions, it could have made such assertions in a payment schedule.

184 For the same reasons, I am satisfied that the Payment Claim with respect to Invoice 1156 does not claim any excluded amount. This Claim Item is a claim for construction work or related goods and services, being the works referred to in VAR 010 and 021 which, as is apparent from the face of the supporting documents, is based on it being requested, directed or agreed by Yuanda.

185 The evidence of the subjective understanding of Mr Nguon or Ms Rozon is not relevant or admissible for the purpose of determining whether the Payment Claim

sufficiently identified the construction work or included a claim for an excluded amount.

Invoice 1157

186 The Payment Claim relating to Invoice 1157 claimed \$76,000 for the work described in the Variations Table. It was supported by the following documents provided with the Payment Claim:

(a) Invoice 1157 dated 24 September 2019 for \$76,000 which described the work as:

447 CS - Supply of Labour & Materials for additional works required by Yuanda. Refer to Yuanda Variation 024.

(b) Daily/Hourly Labour Records which referenced Invoice 1157, NCR PO 3017/S00001 and described the work as 'MPX & YUA Site Instruction - Installation of flashing'.

(c) Email of 9 September 2019 to Façade from Yuanda which stated:

Please find attached approved PO to proceed with the following FDI quotations,

- 447CS-LLGS(A) - MPX-SI-000817 (L4-16 Lift lobby MPX defect rectifications)
- 447CS-Flash(A) - L28/29 Plantroom weather seal flashings (YC-NCR)
- 447CS-BP(A) - MPX-SI-000707 (L01H Back pan, covert vision into spandrel panels)

(d) Yuanda Order/Variation Requisition 447CS-OR0014 dated 4 September 2019 which referenced VAR 024 and noted the reason for the order as 'MPX & YUANDA - Site Instruction-FDI Variation -Install Flashing'.

(e) Letter from Façade to Yuanda dated 3 September 2019 which attached 'budget costing for defect rectification to loft lobby, Level 4 to 16 ... as per Multiplex site instruction' for \$48,750 plus GST, together with supporting documents.

- (f) Letter from Façade to Yuanda dated 3 September 2019 which attached 'budget costing for supply and install of flashing for West Tower Level 28/29 ... as per Yuanda specifications' for \$18,500 plus GST, together with supporting documents.
- (g) Letter from Façade to Yuanda dated 3 September 2019 which attached 'budget costing for supply and install of folded aluminium sheets to Level 01H ... as per Multiplex site instruction' for \$8,750 plus GST, together with supporting documents.

Yuanda's submissions

187 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1157 for the following reasons:

- (a) Mr Nguon gave evidence that the Daily/Hourly Labour Records were incomplete and that there was no breakdown of hours charged or the rates used to calculate the cost of each item.
- (b) Ms Rozon said that there was double claiming and works included in this invoice were also included in Invoice 1151. Accordingly, Façade no longer intends to press for the amount of \$15,570, which was also claimed in Invoice 1151.

188 Yuanda further submitted that that this Claim Item included excluded amounts for the following reasons:

- (a) There were no timesheets or site records supporting the Daily/Hourly Labour Records.
- (b) There were no documents showing that the work had been completed.

Conclusion

189 In my opinion, the Payment Claim has sufficiently identified the construction work referable to Invoice 1157 and I am satisfied that the Payment Claim does not include

a claim for any excluded amount for substantially the same reasons as those applicable to Invoice 1156.

Invoice 1158

190 The Payment Claim relating to Invoice 1158 claimed \$51,680 for the work described in the Variations Table. It was supported by the following documents provided with the Payment Claim:

(a) Invoice 1158 dated 24 September 2019 for \$24,480 and \$27,200 which described the work respectively as:

447 CS - Installation of 9 off Dorma's auto operator
447 CS - Installation of auto door sashes 10 off

(b) Email of 23 August 2019 from Yuanda to Façade, which stated:

As per discussed (sic), please submit costing to install the following,

- Dorma's auto operators (9 off)
- Install auto door sashes (10 off doors)

As advised, please submit asap for our PO approval submission.

Yuanda's submissions

191 Yuanda submitted that the Payment Claim did not sufficiently identify the construction work relating to Invoice 1158 because of Mr Nguon's evidence that he was unable to assess the claim as it was not substantiated and he did not know how the amount claimed was calculated.

192 Yuanda further submitted that this Claim Item included excluded amounts for the following reasons:

(a) The email of 23 August 2019 was only a request for a costing to be submitted and was not a request or direction to complete works.

(b) There was no reference to any contractual provision or why the work was additional to the scope of the works under the Contract. The claim was a claim for compensation for time-related costs.

- (c) Mr Nguon gave evidence that the works claimed by Invoice 1158 had not been completed.

Conclusion

193 In my opinion, the Payment Claim has sufficiently identified the construction work referable to Invoice 1158, being the work in respect of which Yuanda requested Façade submit a costing in its email of 23 August 2019.

194 I am satisfied that the Payment Claim does not include an excluded amount for the following reasons:

- (a) The claim is for the construction work in respect of which Yuanda requested Façade submit a costing, presumably because it considered that the work was a variation that did not fall within the scope of the works.
- (b) If the Payment Claim for the variation referred to in Invoice 1158 was not requested or directed or the work was not completed, then Yuanda would have been entitled to raise those defences in a payment schedule.

Invoice 1162

195 The Payment Claim relating to Invoice 1162 claimed \$64,154.37 for interest on previous late payments pursuant to s 12(2) of the Act.

196 On its face, this is not a claim for interest arising out of or under the Contract. It is therefore a claim for an excluded amount within the meaning of s 10B(2)(d).

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