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

Not Restricted

S ECI 2016 0024

V601 DEVELOPMENTS PTY LTD (ACN 082 670 595) Plaintiff

v

PROBUILD CONSTRUCTIONS (AUST) PTY LTD (ACN 095 250 945) Defendant

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JUDGE:	DIGBY J
WHERE HELD:	Melbourne
DATE OF HEARING:	11–14, 19–21 and 25–28 February, 4–6 and 12 March and 13–14 June 2019
DATE OF JUDGMENT:	22 December 2021
CASE MAY BE CITED AS:	V601 v Probuild
MEDIUM NEUTRAL CITATION:	[2021] VSC 849

BUILDING CONTRACT – Building and engineering project – Claims for extensions of time in relation to project delays – Whether Project Manager lacked independence – Practical completion – Extension of time claims – Separable portions of the Work under the Contract – Applicable approach to delay analysis – Applicability of prevention principle – Contractor's delay damages – Separate Portions – Apportionment of delay damages – Entitlement to bonus – Proprietor's claim for Certified Liquidated Damages – Claim for variations.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr E N Magee QC with Mr P T Baker and Ms J L Dodd	Baker McKenzie
For the Defendant	Mr N Hopkins QC with Mr B Mason	Maddocks

TABLE OF CONTENTS

HIS HONOUR:

The Proceeding

1 In this proceeding, the plaintiff, V601 Developments Pty Ltd (V601), is the Principal and special purpose vehicle of the plaintiff for the development and construction of a project known as The Precinct and associated works at 601 Victoria Street, Abbotsford, Victoria (the Precinct Project). The defendant, Probuild Constructions (Aust) Pty Ltd (Probuild), is the Contractor engaged to construct that project for the plaintiff.

The Contract

2 On or about 23 May 2011, V601 and Probuild entered into a Contract for the design and construction of the Precinct apartments development at 601 Victoria Street, Abbotsford in the State of Victoria (the Site) for the lump sum price of $115,864,529 (the Contract).[1]

3 The Contract is generally in the form of the Australian Standard Contract (AS4902–2000) with the usual Annexures, as specifically amended for the Precinct Project. This includes the Contract Program at Annexure 5A.[2]

The Precinct Project

4 The Precinct Project is a mixed-use development of both commercial and residential premises at 601 Victoria Street, Abbotsford, Victoria.

5 The Precinct Project comprised five separate buildings, a swimming pool, a road extension, significant landscaping works, and comprised 467 apartments. The five buildings are:

(a) Building A, a three-storey building comprising ground-floor retail premises and a residential space consisting of 21 apartments;

(b) Building B, a residential building including 181 apartments and car parking;

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1 FCB0053–0606.
2 FCB0285–0289.

(c) Building C, a five-storey residential and commercial building including 34 apartments;

(d) Building D, a four-storey residential building with 41 apartments with associated car parking; and

(e) Building E, an eight-storey residential building with associated car parking.

6 The Site occupies 2.5 acres in size. It is surrounded by adjoining properties to the north, Victoria Street to the south, Flockhart Street to the east, and Grosvenor Street to the west. The extension of Shamrock Street (which was part of the WUC) ran across the middle of the Site, dividing the Site into two areas.

7 Under the WUC, Probuild was responsible for tasks related to the design and specification of the WUC. This scope of work included the preparation of design documents and, if required by the Proprietor's project requirements, a preliminary design. Thereafter, Probuild was responsible for constructing the Work in accordance with this design.

8 Under the Contract, the WUC was to be completed:

(a) for a fixed-sum Contract Price, subject to certain contractual adjustments;

(b) in eight Separate Portions, each with its own contractually specified completion date; and

(c) in accordance with the Planning Permit and Preliminary Design included in the Contract.

9 The Precinct Project's eight (8) Separable Portions are as follows:

(a) SP 1 – Building A1: Retail building and associated car parking;

(b) SP 2 – Building C1: Commercial component of Building C;

(c) SP 3 – Building D: Residential building and associated car parking;

(d) SP 4 – Building E: Residential building and associated car parking;

(e) SP 5 – Building C2: Residential component of Building C and associated car parking;

(f) SP 6 – Building B: Residential building and associated car parking;

(g) SP 6A – Building A2: Residential component of Building A and associated car parking; and

(h) SP 7 – Practical Completion: Practical Completion of the Project.

10 The Precinct Project works were generally described as the Works Under Contract (WUC) in the Contract.

11 The main works for the Precinct Project, defined as the WUC, were preceded by certain works (the Early Works) required to prepare and construct the elements necessary for the WUC, to the point at which Probuild's main works under the Design and Construction Contract could be commenced in full.

12 The Early Works were to be carried out by Probuild pursuant to the Precinct Apartments – Early Works Agreement entered into on 20 April 2011 (the Early Works Contract).[3]

General background to the Proceeding

13 V601 commenced these proceedings seeking recovery of liquidated damages entitlements under the Contract, relying on certificates issued by the Project Manager, First Urban Pty Ltd (First Urban), which purported to certify that liquidated damages were due and payable by Probuild to V601 for each day after the agreed Dates for Practical Completion, until the actual Dates of Practical Completion, for each of the Separable Portions of the WUC.

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[3] FCB0001–0052.

14 In response to V601's claim for liquidated damages, Probuild filed counterclaims alleging that First Urban failed to allow Probuild's claims entitlement to extensions of time under the Contract, which Probuild asserts were sufficient to extinguish V601's liquidated damages entitlement.

15 By its counterclaim, Probuild also claims delay damages under the Contract, bonus payments, and the cost of accelerating work, due to breaches of Contract alleged to have been committed by V601. Probuild additionally makes a claim for an unpaid variation in relation to the façade of the Project.

16 First Urban was appointed by V601 as the Project Manager under the Contract. The Project Management Agreement was between V601 and First Urban. Mr John Nave (Nave), a Director and Principal of First Urban, undertook the role of Project Manager under the Contract.[4]

Key terms of the Contract

17 The Instrument of Agreement attached to the Contract, which was also signed on 23 May 2011, contained the following terms:

> 9. The *Contract* comprises the following documents, to which the following order of precedence applies to the interpretation of any discrepancies:
> (a) Instrument of Agreement;
> (b) General Conditions of Contract and Annexure Part A;
> (c) Appendix 1 (Contract Sum and Provisional Sums);
> (d) Appendix 2 (Principal's Project Requirements);
> (e) Appendix 3 (Specifications);
> (f) Appendix 4 (Preliminary Design);
> (g) Appendix 5B (Site Plan);
> (h) Annexure Part C (Subcontractor Deed of Novation);
> (i) Appendix 6 (Sales Contract);
> (j) Appendix 7 (Pro Forma Statutory Declaration);
> (k) Annexure Part D (Consultant's Deed of Novation);
> (l) Appendix 8 (Contractor's Management Plans);
> (m) Appendix 9 (Warranty Items and Warranty Periods);
> (n) Appendix 10 (Form of Subcontractor Warranty);
> (o) Appendix 11 (DBC Act);
> (p) Appendix 12 (Notice explaining the Effects of Cost Escalation clauses);

[4] FCB0762–0812.

(q) Appendix 13 (Schedule of Rates);
(r) Annexure Part B (Approved form of Unconditional Undertaking); and
(s) Annexure Part E (Deletions, Additions and Amendments).

10. Notwithstanding cl 9 above, the parties agree that in the event of a discrepancy between the *Schedule of Clarifications* and the *Contract Documents*, the *Schedule of Clarifications* shall prevail over all other *Contract Documents*.

Other relevant terms of the Contract

18 The contractual provisions of particular relevance to the claims and defences in this proceeding include the following:

The Early Works and Design and Construction Contract

Early Works – Precinct Apartments

19 Part B of the Precinct Apartment – Early Works Contract[5] provides:

> General Description – the works that Probuild will be managing on behalf of the Principal
>
> The management of any and all works associated with the Early Works (EW) of the project that are required to prepare and construct the necessary elements up to the point at which Probuild's main Works Under the Contract (WUC) can be commenced in full. These works may include, but are not limited to trade specific works, design consultancy works, Authority works and preliminaries activities. The WUC for any separable portion commences after the completion of the site clearance, site preparation, basement retention system, bulk excavation to within +/- 25mm from underside of the lowest basement slab on ground and the retention works structure up to and including capping beam. The EW will therefore include these activities, and in addition will include the management of any uncompleted works remaining from the Principal's prior works.

The Design and Construction Contract – Precinct Apartments

20 The Design and Construction Contract[6] definitions provide:

> **1. Interpretation and construction of Contract**
>
> In the *Contract*, except where the context otherwise requires:[7]
>
> '*Contract Document*' means those documents listed in paragraph 9 of the instrument of agreement;

5 FCB0001–0052.
6 FCB0053–0606.
7 Selected definitions only.

'*Contractor's Program*' means the document set out in Appendix 5A or such replacement document referred to in clause 32;

'*Date for Practical Completion*' means:

(a) where *Item* 7(a) provides a date for *Practical Completion*, the date;

(b) where *Item* 7(b) provides a period of time for *Practical Completion*, the last day of the period,

but if any *EOT* for *Practical Completion* is directed by the *Project Manager* or allowed in any dispute resolution process adapted by the parties pursuant to clause 42 or litigation, it means the date resulting therefrom;

'*Date of Practical Completion*' means:

(a) the date evidenced in a *Certificate of Practical Completion* as the date upon which *Practical Completion* was reached; or

(b) where another date is determined in any dispute resolution process adapted by the parties pursuant to clause 42 or litigation as the date upon which *Practical Completion* was reached, that other date;

'*Early Works*' means the early works carried out on behalf of the Principal, in respect of which the Contractor has separately been appointed as a construction manager, including demolition, excavation, piling and other associated early works;

'*Practical Completion*' is that stage in the carrying out and completion of *WUC* when:

(a) *the Works* are complete except for minor *Defects*:

  (i) which have been listed by the *Contractor* and approved by the *Project Manager* as not required to be rectified at *Practical Completion*;

  (ii) which, in the *Project Manager's* opinion, do not prevent *the Works* from being reasonably capable of being used for their intended purpose;

  (iii) which the *Project Manager* determines the *Contractor* has reasonable grounds for not promptly rectifying; and

  (iv) the rectification of which will not prejudice the convenient use and/or lawful occupation of *the Works*;

(b) those *Tests* which are required by the Contract to be carried out and passed before *the Works* reach Practical Completion, have been carried out and passed;

(c) all docmnents [sic] and other information required under the *Contract* which, in the *Project Manager's* opinion, are reasonably required for the use, operation and maintenance of *the Works* have been supplied in draft (which documents shall be finalised within 28 days after the *Date of Practical Completion*);

(d) certificates have been provided from each *Key Consultant* engaged in respect of the *WUC* confirming that the part of the Works the subject of that *Key Consultant's* design has been carried out in accordance with the *Contract* and the *Endorsed Design Documents*;

(e) all relevant approvals, including but not limited to those required under the *Building Act*, which are to enable use of the whole of *the Works* (including the original certificate of occupancy (or occupancy permit) issued by a licensed building surveyor and any other

certificate, approval or authorisation which must be issued or given by an *Authority* to lawfully occupy or use *the Works*), have been obtained by the *Contractor* and given to the *Project Manager*;

(f) the *Contractor* has supplied the *Project Manager* the following:
  (i) a certificate by a licensed surveyor identifying *the Works* and confirming that there are no encroachments by *the Works* upon adjoining lands;
  (ii) a certificate from an independent consultant confinning [sic] that the fire services function under normal and simulated emergency operating conditions and in accordance with the *Contract*;
  (iii) a copy of all fire rating certificates required under the *Contract* in respect of materials forming part of *the Works*;
  (iv) a compliance certificate as required under section 221ZH of the *Building Act*;

(g) all plant and equipment forming part of *the Works* has been installed, commissioned and tested and function under normal and simulated emergency operating conditions and in accordance with the *Contract*;

(h) all rubbish, surplus material, *Temporary Works*, plant, equipment and hoarding has been removed from the *Site* so as to leave the *Site* in a clean and tidy condition, except for those items which the *Project Manager* agrees in writing are required during the *Defects Liability Period*;

(i) without limiting paragraph (a) above, the following items forming part of *the Works* have been completed:
  (i) all appliances and fittings have been installed and are fully operational;
  (ii) all work on areas of common property;
  (iii) all landscaping which the *Project Manager* reasonably determines should be finished;
  (iv) any parts of the *Works* which the *Contractor* has used in the course of construction, including lifts and light globes, have been restored or replaced, as applicable; and
  (v) the whole of *the Works* has been professionally cleaned;

'*Project Manager*' means the person stated in Item 5 as the *Project Manager* or other person from time to time appointed in writing by the *Principal* to be the *Project Manager* and notified as such in writing to the *Contractor* by the *Principal* and, so far as concerns the functions exercisable by a *Project Manager's Representative*, includes a *Project Manager's Representative*.

'*Qualifying Cause of Delay*' means:

(a) any act, default or omission of the *Project Manager*, the *Principal* or their consultants, agents;

(b) a *Variation* under clause 36, excluding a *Variation* under clause 36.5;

(c) any Melbourne Metropolitan state wide or nation wide industrial relations dispute except where such industrial relations dispute is solely and directly connected to the Contractor in undertaking its usual business, or is specific to the *Site*;

(d) a change in *Legislative Requirement* described in clause 11.2(a) (except those *Legislative Requirements* described in clause 11.2(a)(v));

(e) a *Force Majeure Event*;

(f) suspension of *the Works* pursuant to clause 33.l(a)(i) or 33.l(c);
(g) delay caused by a headworks contractor or any other separate contractors directly and exclusively controlled by the *Principal* or the *Project Manager* on behalf of the *Principal* (including *Other Contractors*);
(h) a *Latent Condition*;
(i) delay caused by municipal, public or statutory authorities not caused by the *Contractor*;
(j) testing, treatment and/or removal of Contaminated Soil by the *Principal* in accordance with clause 25.3; and
(k) delay caused by compliance with clauses 24.3;

'*Site*' means the lands and other places to be made available and any other lands and places made available to the *Contractor* by the *Principal* for the purpose of the *Contract* as described in Appendix 5B;

'*the Works*' means the whole of the *WUC* to be carried out and completed in accordance with the *Contract*, including *Variations* provided for by the *Contract* which by the *Contract* is to be handed over to the *Principal*;

'*WUC*' (from Work under the Contract) means the *Work* which the Contractor is or may be required to carry out and complete under the *Contract* and includes the *Contractor's Design Obligations, Variations,* remedial *Work, Construction Plant, Temporary Works* and the *Work* the subject of the *Schedule of Clarifications*.

21 Clause 4 of the Contract provides:

4. Separable Portions
(a) *Separable Portions* may be directed by the *Project Manager*, at any time, who shall clearly identify for each, the:
(i) portion of *the Works*;
(ii) *Date for Practical Completion*; and
(iii) respective amounts for *Security*, liquidated damages and delay damages (all calculated pro-rata according to the ratio of the *Project Manager's* valuation of the *Separable Portion* to the *Contract Sum*).
(b) The interpretations of:
(i) *Date for Practical Completion*;
(ii) *Date of Practical Completion*; and
(iii) *Practical Completion*,
and clauses 2, 14, 24, 27, 32, 34, 35, 36 and 46 shall apply to each *Separable Portion* and references within those clauses to *the Works* and to *WUC* shall mean so much of *the Works* and *WUC* as is comprised in the relevant *Separable Portion*.

22 Clause 9A (Construction Management of Early Works) of the Contract provides:

9A Construction Management of Early Works
(a) The parties, acknowledge that the *Contractor* has separately been appointed by the *Principal* as construction manager in respect of the *Early Works*.

(b) Despite any other provision of this *Contract* the *Contractor* shall not commence the *WUC* until:
  (i) the *Early Works* have achieved completion in accordance with the construction management agreement and respective trade contracts ('*Early Works* Completion');
  (ii) the *Early Works* in respect of that part of the *Site* (or affecting access to that part of the *Site*) have achieved *Early Works Completion*;
  (iii) any other commencement date (or staggered dates as the case may be) agreed in writing by the parties; or
  (iv) a *Direction* to carry out a *Variation* is issued by the *Principal* in accordance with Clause 9A(d).

(c) Notwithstanding clause 34, the *Dates for Practical Completion* under the *Contract* shall be extended for each day after the **7th October 2011** that *Early Works Completion* has not been achieved.

(d) During the performance of the *Early Works*, the *Project Manager* may identify portions of the *Site* where it believes the *WUC* can commence and give the *Contractor* written notice of a proposed *Variation* in accordance with Clause 36.2. Subject to the *Contractor's* response in accordance with Clause 36.2 the *Principal* may then issue a *Direction* to carry out a *Variation* to commence the *WUC* in accordance with Clause 36.1(b)(vi).

23 Clause 20 of the Contract provides:

20 Project Manager

20.1 Agent functions

(a) The *Principal* shall ensure that at all times there is a *Project Manager*.

(b) The *Principal* has appointed the *Project Manager* as its agent under the *Contract* in relation to the following functions and any other function which the *Principal* notifies the *Contractor* of in writing from time to time but in each case, in advance of the exercise of such function by the *Project Manager*:
  (i) assessing the value of *work*;
  (ii) certification of moneys due and owing as between the *Contractor* and *Principal* by way of the issue of a *Payment Schedule* under clause 37.2 or a *Final Certificate* under clause 37.4;
  (iii) directing *Variations* under clause 36.1; and
  (iv) any determination required as to the quality of any *work*.

(c) The *Principal* shall ensure that in the exercise of the *Project Manager's* functions as the *Principal's* agent under the *Contract*, the *Project Manager*:
  (i) acts honestly; and
  (ii) acts within the time prescribed under the *Contract* or where no time is prescribed, within a reasonable time,

but is not, as the *Principal's* agent, required to act independently or impartially.

20.2 Independent functions

(a) In addition to the *Project Manager's* functions as the *Principal's* agent as

set out in clause 20.1, the *Project Manager* shall also act as assessor and certifier in respect of:

(i) whether the *Contractor* is entitled to an *EOT*;

(ii) whether the *Contractor* has achieved *Practical Completion*;

(iii) whether the *Contractor* is entitled to delay damages pursuant to clause 34.9; and

(iv) in the assessment of the price of a *Variation* in accordance with clause 36.4.

(b) In relation to the four functions described in clause 20.2(a):

(i) the *Project Manager* shall act independently of the parties and neither party shall be entitled to give *Directions* to the *Project Manager*;

(ii) the *Project Manager* is entitled to consult with either one of or both parties but is not obliged to consult with both parties; and

(iii) the *Project Manager* shall act reasonably in exercising the identified functions and shall have regard to the express requirements of the *Contract* and not the commercial interests of either party.

20.3 Project Manager's directions

(a) The *Project Manager* shall be entitled to give *Directions* to the *Contractor* from time to time with reference to the *WUC* and the *Contract* generally, and the *Contractor* shall comply with all such *Directions*.

(b) Except where the *Contract* otherwise provides, the *Project Manager* may give a *Direction* orally but shall as soon as practicable confirm it in writing. If the *Contractor* in writing requests the *Project Manager* to confirm an oral *Direction*, the *Contractor* shall not be bound to comply with the *Direction* until the *Project Manager* does so. The *Contractor* acknowledges and agrees that if it acts or relies upon any documentation without:

(i) promptly requesting the *Project Manager* to confirm the documentation as a *Direction* in writing; or

(ii) receiving the *Project Manager's Direction* in writing confirming the documentation,

it does so at its own risk and cost.

(c) If a *Direction* under clause 20.3(a), conflicts with a *Legislative Requirement* the *Contractor* will inform the *Project Manager*, and to the extent of the conflict, the *Contractor* is not required to comply with the *Direction*.

24 Clause 21 of the Contract provides:

21 Project Manager's Representative

The *Project Manager* may from time to time appoint individuals to exercise delegated *Project Manager's* functions, provided that:

(a) no aspect of any function shall at any one time be the subject of delegation to more than one *Project Manager's Representative*;

(b) delegation shall not prevent the *Project Manager* exercising any function;

(c) the *Project Manager* forthwith gives the *Contractor* written notice of respectively:

(i) the appointment, including the *Project Manager's Representative's* name and delegated functions; and
(ii) the termination of each appointment.

(d) if the *Contractor* makes a reasonable objection to the appointment of a *Project Manager's Representative*, the *Project Manager* shall terminate the appointment subject to first receiving the *Principal's* consent to any such termination which shall not be reasonably withheld.

25 Clause 25 of the Contract provides:

25.3 Contaminated Soil Risk

(a) Should the *Contractor* locate what it believes to be *Contaminated Soil* within the *Site*, it shall notify the *Project Manager* immediately. The *Project Manager* will arrange for testing of the soil to be performed to determine whether the soil is *Contaminated Soil*. The *Project Manger* shall arrange such testing with as little disruption to the *Contractor's program* as possible and the costs of such testing shall be to the *Principal's* account.

(b) The *Contractor* agrees to provide the *Principal* with whatever assistance is necessary to effect the testing of the soil. If compliance with the *Contractor's* obligations under this clause 25.3(b) causes the *Contractor* to incur additional direct costs, such costs shall be assessed by the *Project Manager* and added to the *Contract Sum*. Should the relevant soil be confirmed to be *Contaminated Soil*, the *Principal* will be responsible for the classification, treatment, burial and/or removal of the *Contaminated Soil*. The *Principal* shall determine the appropriate method of dealing with the *Contaminated Soil* in its sole discretion, provided that such method complies with all relevant *Legislative Requirements*.

(c) The *Contractor* shall take all reasonable measures to resequence *WUC* whilst any potential *Contaminated Soil* is being tested and while any *Contaminated Soil* is being treated and/or removed by the *Principal* and shall not have any claim arising solely out of the need to resequence *WUC*. However, this clause 25.3(c) shall not limit the *Contractor's claim* under clause 25.2 in respect of any delay, disruption, additional *Work*, cost or expense which cannot be avoided through such resequencing.

(d) If the *Contractor* is no longer required to remove parts of the soil from the *Site* because it is found to be *Contaminated Soil* in accordance with this clause 25.3, there will be a deemed *Variation*, priced by the *Project Manager* using the rates for removal of clean soil contained in the *Schedule of Rates*.

26 Clause 32.3 of the Contract provides:

32.3 Initial program approval and program updates

(a) The initial *Contractor's Program* is set out in Appendix 5A.

(b) The *Project Manager* may from time to time direct the *Contractor* to give to the *Project Manager* an updated *Contractor's Program* for approval within the time and in the form directed by the *Project Manager*. Such an updated *Contractor's Program* shall have regard to the progress of execution of *WUC* (including anticipated start and finish dates of

activities and percentage completion of current activities) and take into account any *Variations* and any *EOT* actually granted.

(c) Any updated *Contractor's Program* submitted for approval by the *Project Manager* shall also be accompanied by a separate written list of the *Contractor's Program* amendments introduced by the updated *Contractor's Program* for comparison purposes, and shall, include:

(i) activities introduced, activities deleted and activities rescheduled;

(ii) revised activity durations;

(iii) revisions to interconnecting logic between activities;

(iv) the reasons for the amendments; and

(v) a precise description of any alleged delay event including details as to when and how the alleged event is said to have occurred,

and thereafter may be approved by the *Project Manager* and become an *Approved Contractor's Program*.

(d) The *Project Manager* may, in the event that the progress of the *WUC* falls behind that provided for in the *Approved Contractor's Program*, direct the *Contractor* to provide an updated *Contractor's Program* to show how the *WUC* will be carried out to recover lost time and achieve *Practical Completion* by the *Date for Practical Completion*.

(e) Any review, comment, approval or *Direction* by the *Project Manager* in relation to an updated *Contractor's Program* or an accompanying list of amendments to the *Contractor's Program* submitted by the *Contractor* shall not constitute any approval by the *Project Manager* of the *WUC*, the *Contractor's* performance and execution of the *WUC* nor the occurrence of any *Qualifying Cause of Delay*.

(f) The initial *Contractor's Program* and any *Approved Contractor's Program* are not a *Contract Document* and do not form part of the *Contract*, but will be used by the *Project Manager* as a basis for administering the *Contract* (to the extent possible) and for assessing any *EOT* claims.

(g) The *Contractor* shall not, without reasonable cause, depart from the *Approved Contractor's Program*.

(h) The provision of a *Contractor's Program*, any updated *Contractor's Program* and any review, comment, approval or *Direction* by the *Project Manager* under this clause 32.3 in relation to the same shall not relieve the *Contractor* from its obligation to complete the *WUC* by the *date for Practical Completion* and in accordance with this *Contract*. Without limiting the *Contractor's* rights elsewhere in the *Contract*, the *Contractor* acknowledges and agrees that its submission of the initial *Contractor's Program* and any amendments to the *Approved Contractor's Program* in accordance with this clause 32, whether in response to a *Direction* or not, shall not, in itself, entitle the *Contractor* to:

(i) an *EOT*; or

(ii) any increase in the *Contract Sum*.

27 Clause 32.5 of the Contract provides:

32.5 Acceleration

If the *Project Manager* gives a *Direction* to the *Contractor* under clause 32.4:

(a) the *Contractor* shall accelerate *WUC* to overcome or minimise the

extent and effect of some or all of the delay as directed, including, if required, in order to achieve *Practical Completion* by the *Date for Practical Completion*;

(b) if the *Contractor* would, but for the *Direction*, have been entitled to an *EOT*, the *Contractor* shall be entitled to claim its reasonable and necessary additional direct costs and expenses directly arising directly as a result of accelerating *WUC*, valued by the *Project Manager* in accordance with clause 36.4; and

(c) the *Contractor* is not entitled to any other compensation or to make any claim for loss in respect of or arising out of the cause of the delay and the *Direction* to accelerate except as provided in clause 32.5(b).

28 Clauses 34 of the Contract provides:

34 Time and progress

34.1 Progress

The *Contractor* shall ensure that *WUC* reaches *Practical Completion* by the *Date for Practical Completion*.

34.2 Notice of delay

A party becoming aware of anything which will probably cause delay to *WUC* shall promptly give the *Project Manager* and the other party written notice of that cause and the estimated delay.

34.3 Claim

(a) Subject to clause 34.4, the *Contractor* shall be entitled to such *EOT* as the *Project Manager* assesses, if the *Contractor* is or will be delayed in reaching *Practical Completion* by a *Qualifying Cause of Delay*.

(b) As soon as the *Contractor* becomes aware or suspects that the progress of *WUC* will be delayed (and in any event within 5 *Business Days* after the occurrence of the event causing the delay), it shall notify the *Project Manager* in writing giving details of the relevant event and the anticipated extent of the delay.

(c) The *Contractor* shall take all reasonable measures to preclude the occurrence of the event causing the delay, and to minimise the resulting delay to *WUC*.

(d) If the cause of the delay is a *Qualifying Cause of Delay* and the *Contractor* wishes to claim an *EOT* then as soon as the *Contractor* can ascertain or estimate with reasonable accuracy, the extent of the delay, and in any case not later than 10 *Business Days* after the occurrence of the *Qualifying Cause of Delay*, the *Contractor* shall make a written claim to the *Project Manager* for an *EOT*, giving details of:

(i) the *Qualifying Cause of Delay*;

(ii) the nature and extent of the delay, or likely delay to *WUC*; and

(iii) the *EOT* claimed.

(e) The *Contractor* shall promptly provide any further information requested by the *Project Manager* in relation to a claim for an *EOT*.

34.4 Assessment

(a) When both non-qualifying and *Qualifying Causes of Delay* overlap, the *Project Manager* shall apportion the resulting delay to *WUC* according

to the respective causes' contribution.

(b) The *Contractor* is not entitled to an *EOT* unless:

(i) it has made an *EOT* claim in accordance with the requirements of clause 34.3 (and in this regard time is of the essence);

(ii) the delay has affected an activity which is, in the reasonable opinion of the *Project Manager*, on the critical path of the *Approved Contractor's Program* as it existed at the time of the occurrence of the *Qualifying Cause of Delay*; and

(iii) the *Contractor* has taken all reasonable measures to preclude the occurrence of the *Qualifying Cause of Delay* and to minimise the resulting delay including resequencing or reprogramming the performance of *WUC* where it is reasonably practicable to do so.

34.5 Extension of time

(a) Within 10 *Business Days* after receiving the *Contractor's* claim for an *EOT*, or if the *Project Manager* has requested further information from the *Contractor* in relation to an *EOT* claim, then after receipt of that further information, the *Project Manager* shall assess the *EOT* claim and notify the *Contractor* and the *Principal* in writing of the *EOT* (if any) granted so assessed.

(b) Notwithstanding that the *Contractor* is not entitled to or has not claimed an *EOT*, the *Project Manager* may, in the *Project Manager's* sole and unfettered discretion, at any time and from time to time before issuing the *Final Certificate* direct an *EOT*. The *Project Manager* is not required to exercise its discretion under this clause 34.5(b) for the benefit of the *Contractor*.

(c) A delay or failure of the *Project Manager* or the *Principal* to grant an *EOT* within the period specified in clause 34.5(a), or at all, will not cause the *Date for Practical Completion* to be set at large.

34.6 Practical Completion

(a) The *Contractor* shall give the *Project Manager* at least 10 *Business Days* written notice of the date upon which the *Contractor* anticipates that *Practical Completion* will be reached.

(b) When the *Contractor* is of the opinion that *Practical Completion* has been reached, the *Contractor* shall in writing request the *Project Manager* to issue a *Certificate of Practical Completion*. Within 10 *Business Days* after receiving the request, the *Project Manager* shall give the *Contractor* and the *Principal* either a *Certificate of Practical Completion* evidencing the *Date of Practical Completion* or written reasons for not doing so.

(c) If the *Project Manager* is of the opinion that *Practical Completion* has been reached, the *Project Manager* may issue a *Certificate of Practical Completion* even though no request has been made.

34.7 Liquidated damages

(a) If *WUC* does not reach *Practical Completion* by the *Date for Practical Completion*, the *Project Manager* shall progressively certify, as due and payable to the *Principal*, liquidated damages in *Item 29* for every day after the *Date for Practical Completion* to and including the earliest of the *Date of Practical Completion* or termination of the *Contract* or the *Principal* taking *WUC* out of the hands of the *Contractor*.

(b) If an *EOT* is directed after the *Contractor* has paid or the *Principal* has set off liquidated damages, the *Principal* shall forthwith repay to the *Contractor* such of those liquidated damages as represent the days the subject of the *EOT*.

(c) The payment or set off of liquidated damages under this clause 34.7 shall not relieve the *Contractor* from its obligations to reach *Practical Completion* or from any of its other obligations and liabilities under the *Contract*.

(d) The *Contractor* acknowledges and agrees that:

(i) the amount of liquidated damages specified in *Item 29* is a genuine pre-estimate of the loss and damage that the *Principal* may suffer if *Practical Completion* is not reached by the *Date for Practical Completion*; and

(ii) it shall not raise any argument that the amount of liquidated damages in *Item 29* is a penalty or otherwise unenforceable either by way of a claim or defence in relation to the *Contractor's* obligation to pay, or the *Principal's* right to set off, liquidated damages.

(e) The *Principal's* entitlement to be paid liquidated damages under this clause shall be the *Principal's* sole remedy arising out of or in connection with *WUC* not reaching *Practical Completion* by the *Date for Practical Completion*, whether under this *Contract* or otherwise.

34.8 Bonus for early practical completion

If the *Date of Practical Completion* is earlier than the *Date for Practical Completion* the *Project Manager* shall certify as due and payable to the *Contractor* the bonus payment in Item 30.

34.9 Delay damages

(a) For every *Working Day* the subject of an *EOT* for a cause described in paragraph (a), (b), (f), (g), (h), (i) or (j) of the definition of *Qualifying Cause of Delay* and for which the *Contractor* gives the *Project Manager* a claim for delay damages pursuant to clause 41.1, damages certified by the *Project Manager* under clause 41.3 shall be due and payable to the *Contractor* in the amount which the *Project Manager* certifies is the *Contractor's* and any of its subcontractor's, employees' or agents' reasonable and necessarily incurred direct on-site time-related costs including on-site preliminaries costs (but excluding all other overhead costs, any allowance for profit or loss of profit and all consequential losses), up to the maximum amount per *Working Day* stated in *Item* 31A which damages are capped in aggregate at the maximum amount recoverable by the Contractor for delay damages stated in Item 31B.

(b) The *Contractor* shall, at the request of the *Project Manager*, make access available to its primary records and books at any pre-arranged time for the audit and checking by the *Project Manager* of the *Contractor's costs* in support of any claim by the *Contractor* for delay damages under this clause 34.9.

(c) The *Contractor* acknowledges and agrees that any entitlement of the *Contractor* under the *Contract* to delay damages in accordance with this clause 34.9 is the sole entitlement of the *Contractor* for any delay or disruption to the *WUC* and the *Contractor* shall have no entitlement to any other damages, costs or other compensation whatsoever from the

Principal whether under the *Contract*, in tort (including negligence), equity, under statute or otherwise.

29 Clause 36.1(c) of the Contract provides:

> **36.1 Directing Variations**
>
> …
>
> (c) If the *Contractor* receives a *Direction* from the *Project Manager* which, although not stated to be a *Direction* to carry out a *Variation*, the *Contractor* considers it to be a *Direction* to carry out a *Variation*, the *Contractor* shall:
>
> (i) immediately notify the *Project Manager* that it considers the *Direction* to be a *Variation*;
>
> (ii) as soon as reasonably practicable but in any case not later than 10 *Business Days* after receipt of the *Direction*, provide the *Project Manager* with a detailed quotation for the proposed *Variation* supported by measurements or other evidence of cost; and
>
> (iii) not commence or proceed with any works on *Site* in connection with the *Direction* until a further written *Direction* to do so is received from the *Project Manager*.

30 Clause 36.2 of the Contract states that the Project Manager may issue a written notice of a proposed Variation, in relation to which Probuild is required within the time specified (or otherwise within 10 Business Days) to provide the Project Manager with an estimate of the:

> (i) effect on the Approved Contractor's Program (including the Date for Practical Completion); and
>
> (ii) cost (including all warranties and time-related costs, if any) of the proposed *Variation*.

31 Clause 36.4 sets out the process for pricing a Variation and specifically states that:

> (i) the *Contractor* shall not carry out a *Variation* unless and until a price for the *Variation* has been agreed between the *Project Manager* and the *Contractor*, or determined by valuation …; and
>
> (ii) if the *Contractor* carries out a *Variation* prior to the price being agreed or determined, the *Contractor* shall not be entitled to any additional payment, or any *EOT*, for carrying out that *Variation*.[8]

32 Clause 37.5 of the Contract provides:

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[8] V601 Closing Submissions, 12 June 2019, [341]–[343].

37.5 Interest

Interest in *Item* 35 shall be due and payable after the date of default in payment.

33 Clause 41 provides:

41 Notification of claims

41.1 Communication of claims

(a) The *Prescribed Notice* is a written notice of the general basis and quantum of the claim which includes detailed particulars of all of the following:
  (i) the breach, act, omission, *Direction*, approval or circumstances on which the claim is or will be based;
  (ii) the provision of the *Contract* or other basis for the claim or proposed claim; and
  (iii) the quantum or likely quantum of the claim.

(b) Except where another time is stipulated elsewhere in another clause in the *Contract*, the *Contractor* shall give to the *Principal* and to the *Project Manager* the *Prescribed Notice* or a notice of *Dispute* under subclause 42.1 within 20 *Business Days* of the event occurring on which a claim by the *Contractor* is based.

41.2 Liability for failure to communicate

The *Contractor* shall not have any right to submit any claim, initiate any action or proceedings against the *Principal*, and shall release and discharge the *Principal* in respect of any matter, fact or thing whatsoever arising out of or in connection with or under the *Contract* or the *WUC* unless the *Contractor* has complied strictly with the time limits and requirements stipulated in clause 41.1 above.

41.3 Project Manager's decision

(a) If within 20 *Business Days* of giving the *Prescribed Notice* the party giving it does not notify the other party and the *Project Manager* of particulars of the claim, the *Prescribed Notice* shall be deemed to be the claim.

(b) Within 40 *Business Days* of receipt of the *Prescribed Notice* the *Project Manager* shall assess the claim and notify the parties in writing of the decision. Unless a party within a further 20 *Business Days* of such notification gives a notice of dispute under clause 42.1 which includes such decision, the *Project Manager* shall certify the amount of that assessment to be moneys then due and payable.

34 Clause 42.1 and 42.2 provides:

42 Dispute resolution

42.1 Notice of dispute

(a) If a difference or dispute (together called a '*Dispute*') between the parties arises in connection with the subject matter of the *Contract*, including a *Dispute* concerning:

(i) a *Project Manager's Direction*; or
(ii) a *claim*,
then either party shall, by hand or by registered post, give the other and the *Project Manager* a written notice of dispute adequately identifying and providing details of the *Dispute*.

(b) Notwithstanding the existence of a *Dispute*, the parties shall, subject to clauses 39 and 40 and clause 42.4, continue to perform the *Contract*.

42.2 Conference

(a) Within 10 *Business Days* after receiving a notice of *Dispute*, the parties shall confer at least once to resolve the *Dispute* or to agree on methods of doing so. At every such conference each party shall be represented by a person having authority to agree to such resolution or methods. All aspects of every such conference except the fact of occurrence shall be privileged.

(b) If the *Dispute* has not been resolved within 20 *Business Days* of service of the notice of *Dispute*, then either party may institute court proceedings to resolve the *Dispute*.

35 Annexure Part 'A' of the Contract provides:

30	Bonus for practical completion (clause 34.8)	Refer to Annexure Part A Separable Portions	
31A	Delay Damages	Period of Project	Maximum Amount
		1. Period without cranes and hoists	$31,985 per day
		2. Period with cranes but without hoists	$41,909 per day
		3. Period with cranes and hoists	$49,220 per day
31B	Cap on delay damages	Maximum amount (in the aggregate) of delay damages recoverable by the Contractor is 17 weeks at the amount stated in Item 31A.	

Separable portions of the works

36 The approximate value of each of the eight Separable Portions and its percentage of the total Contract price is as follows:[9]

Separable Portion – Building	Contract Value	% of Contract
SP1 – Building A1 (retail portion)	$2,942,553	2.5
SP2 – Building C1 (commercial portion)	$3,840,514	3.3
SP3 – Building D	$9,370,626	8.1
SP4 – Building E	$40,718,373	35.1
SP5 – Building C2 (residential portion)	$8,785,562	7.6
SP6 – Building B	$45,997,199	39.7
SP6A – Building A2 (residential portion)	$3,859,702	3.3

[9] V601 Submissions, 6 February 2019, [26].

SP7 – Common areas	$350,000	0.3

The Principal Issues in the Proceeding

Probuild's primary case

37 Pursuant to cl 34 of the Contract, V601 revised the Date for Practical Completion for each of the Separable Portions as follows (the original Dates for Practical Completion are below in parentheses):[10]

Separable Portion	Revised Date for Practical Completion
SP1 – Building A1 (retail portion)	(16 January 2013) 3 May 2013
SP2 – Building C1 (commercial portion)	(21 January 2013) 18 February 2013
SP3 – Building D	(29 March 2013) 17 July 2013
SP4 – Building E	(6 May 2013) 16 September 2013
SP5 – Building C2 (residential portion)	(10 May 2013) 21 August 2013
SP6 – Building B	(23 May 2013) 20 September 2013
SP6A – Building A2 (residential portion)	(23 May 2013) 20 September 2013
SP7 – Common areas	(31 May 2013) 20 September 2013

38 First Urban certified the Date of Practical Completion for the following buildings on the dates shown below:[11]

Separable Portion	Date of Practical Completion
SP3 – Building D	17 December 2013
SP4 – Building E	17 December 2013
SP5 – Building C2 (residential portion)	21 November 2013
SP6 – Building B	27 November 2013
SP6A – Building A2 (residential portion)	12 November 2013
SP7 – Common areas	17 December 2013

39 Probuild's primary case is that it was delayed in achieving Practical Completion in respect of Separable Portions 1, 3, 4, 5, 6, 6A, and 7, and is entitled to substantial extension of time and associated delay costs.

V601's primary case

40 V601's primary case is that, on 13 September 2013, because of Probuild's delay in

10 Amended Statement of Claim, 20 February 2019, [6].
11 Amended Statement of Claim, 20 February 2019, [7].

reaching Practical Completion in respect of Separable Portions 3 and 5, First Urban contractually and appropriately issued Liquidated Damages Certificate Number 1 pursuant to cl 34.7 of the Contract, which certified as follows:[12]

Separable Portion	Revised Date for Practical Completion	Days Late as at 31 August 2013	Rate for Liquidated Damages	Certified Liquidated Damages to 31 August 2013
3	17 July 2013	45	$4,727	$212,715
5	21 August 2013	10	$4,124	$41,240
Total Liquidated Damages to Date				**$253,955**
Previously Certified Liquidated Damages				**$0**
Amount Certified in Liquidated Damages (Certificate 1)				**$253,955**

41 V601 asserts that Probuild was late in achieving Practical Completion in relation to Separable Portions 4, 6, 6A, and 7, and, as a result of delay in reaching Practical Completion of Separable Portions 3 and 5, on 11 October 2013, First Urban purported to issue Liquidated Damages Certificate Number 2 pursuant to cl 34.7 of the Contract which certified in summary that:[13]

Separable Portion	Revised Date for Practical Completion	Days Late as at 30 September 2013	Rate for Liquidated Damages	Certified Liquidated Damages to 30 September 2013
3	17 July 2013	75	$4,727	$354,525
4	16 September 2013	14	$21,515	$301,210
5	21 August 2013	40	$4,124	$164,960
6	20 September 2013	10	$22,025	$220,250
6A	20 September 2013	10	$2,504	$25,040
7	20 September 2013	10	$1	$10
Total Liquidated Damages to Date				**$1,065,995**
Previously Certified Liquidated Damages				**$253,955**
Amount Certified in Liquidated Damages (Certificate 2)				**$812,040**

12 Amended Statement of Claim, 20 February 2019, [8].
13 Amended Statement of Claim, 20 February 2019, [9].

42 Further, V601 asserts that Probuild was delayed achieving Practical Completion in relation to Separable Portions 3, 4, 5, 6, 6A and 7, and on 6 November 2013, First Urban purported to issue Liquidated Damages Certificate Number 3 pursuant to cl 34.7 of the Contract which certified in summary that:[14]

Separable Portion	Revised Date for Practical Completion	Days Late as at 31 October 2013	Rate for Liquidated Damages	Certified Liquidated Damages to 31 October 2013
3	17 July 2013	106	$4,727	$501,062
4	16 September 2013	45	$21,515	$968,175
5	21 August 2013	71	$4,124	$292,804
6	20 September 2013	41	$22,025	$903,025
6A	20 September 2013	41	$2,504	$102,664
7	20 September 2013	41	$1	$41
Total Liquidated Damages to Date				**$2,767,771**
Previously Certified Liquidated Damages				**$1,065,995**
Amount Certified in Liquidated Damages (Certificate 3)				**$1,701,776**

43 V601 also asserts that Probuild was delayed achieving Practical Completion in relation to Separable Portions 3, 4, 5, 6, 6A and 7, and on 13 November 2013, First Urban purported to issue Liquidated Damages Certificate Number 4 pursuant to cl 34.7 of the Contract which certified in summary that:[15]

Separable Portion	Revised Date for Practical Completion	Days Late as at 30 November 2013	Rate for Liquidated Damages	Certified Liquidated Damages to 30 November 2013
3	17 July 2013	136	$4,727	$642,872
4	16 September 2013	75	$21,515	$1,613,625
5	21 August 2013	92	$4,124	$379,408
6	20 September 2013	68	$22,025	$1,497,700
6A	20 September 2013	53	$2,504	$132,712

14 Amended Statement of Claim, 20 February 2019, [10].
15 Amended Statement of Claim, 20 February 2019, [11].

7	20 September 2013	71	$1	$71
Total Liquidated Damages to Date				**$4,266,388**
Previously Certified Liquidated Damages				**$2,767,771**
Amount Certified in Liquidated Damages (Certificate 4)				**$1,498,617**

44 Finally, V601 asserts that Probuild was delayed in achieving Practical Completion of Separable Portions 3, 4, 5, 6A and 7, and on 18 December 2013, First Urban purported to issue Liquidated Damages Certificate Number 5 pursuant to cl 34.7 of the Contract which certified in summary that:[16]

Separable Portion	Revised Date for Practical Completion	Date of Practical Completion	Days Late	Rate for Liquidated Damages	Certified Liquidated Damages
3	17 July 2013	17 December 2013	153	$4,727	$723,231
4	16 September 2013	17 December 2013	92	$21,515	$1,979,380
5	21 August 2013	22 November 2013	92	$4,124	$379,408
6	20 September 2013	28 November 2013	68	$22,025	$1,497,700
6A	20 September 2013	13 November 2013	53	$2,504	$132,712
7	20 September 2013	17 December 2013	88	$1	$88
Total Liquidated Damages to 17 December 2013					**$4,712,519**

45 Liquidated Damages Certificate Number 5 in the sum of $4,712,519 is the last and final Liquidated Damages Certificate issued by the Project Manager in respect of Liquidated Damages.

V601's claim of liquidated damages

46 Accordingly, V601 claims the following certified Liquidated Damages and associated interest and declarations:[17]

1. The sum of $4,712,519.

2. Interest under the Contract:
   (a) from 13 September 2013 in respect of interim Liquidated Damages Certificate No 1;

16 Amended Statement of Claim, 20 February 2019, [12].
17 Amended Statement of Claim, 20 February 2019, 12–13.

(b) from 11 October 2013 in respect of interim Liquidated Damages Certificate No 2;
(c) from 6 November 2013 in respect of interim Liquidated Damages Certificate No 3;
(d) from 4 December 2013 in respect of interim Liquidated Damages Certificate No 4;
(e) from 18 December 2013 in respect of the final Liquidated Damages Certificate No 5;

totalling $885,451.58 as at 5 June 2015.

2A. Alternatively, declarations that:
(a) the Dates for Practical Completion are as follows:
(i) Separable Portion 3 – 17 July 2013;
(ii) Separable Portion 4 – 16 September 2013;
(iii) Separable Portion 5 – 21 August 2013;
(iv) Separable Portion 6 – 20 September 2013;
(v) Separable Portion 6A – 20 September 2013;
(vi) Separable Portion 7 – 20 September 2013;
(b) the Dates of Practical Completion are as follows:
(i) Separable Portion 3 – 17 December 2013;
(ii) Separable Portion 4 – 17 December 2013;
(iii) Separable Portion 5 – 21 November 2013;
(iv) Separable Portion 6 – 27 November 2013;
(v) Separable Portion 6A – 12 November 2013;
(vi) Separable Portion 7 – 17 December 2013; and
(c) liquidated damages are payable by Probuild in accordance with the above findings.

2B. Alternatively, declarations that:
(a) the Dates for Practical Completion and the Dates of Practical Completion are such other dates as the Court determines; and
(b) liquidated damages are payable by Probuild in accordance with such dates as the Court determines.

3. Costs.

4. Any other order the Court thinks appropriate.

47 It is to be noted that V601 does not, in the alternative to the Liquidated Damages claim referred to above, claim common law damages for delay against Probuild.

48 I also note that Probuild asserts that the following issues are apparently abandoned by V601:[18]

1. That the Project Manager participated in formulating, and implementing, V601's strategy to address Probuild's EOT2A and EOT3 claims, which involved the Project Manager issuing a draft determination regarding those claims on which V601 would rely

[18] Probuild's list of V601's abandoned issues (handed up in Court on 13 June 2019); T1663.15–17.

when seeking to negotiate a commercial compromise with Probuild.[19]

2. The 'SP1 Side Agreement'.[20]

3. That Probuild failed to provide the necessary Notices of Dispute for its claims.[21]

4. That the factors giving rise to Probuild's EOT6 and EOT7 claims do not constitute Qualifying Causes of Delay.[22]

5. That Probuild does not own the float in any programming analysis.[23]

6. That Probuild's claims are global.[24]

7. That the multitude of allegedly concurrent delays identified in V601's lay and expert evidence (except for wet weather),[25] including:
   (a) installing the piling bench;[26]
   (b) tower crane;[27]
   (c) work to slab B7;[28]
   (d) resourcing of Probuild's excavations subcontractor, HWM Contractors;[29]
   (e) addressing the risks arising from the Soft Spots;[30]
   (f) replacing Caelli with I&D as the in situ structure subcontractor;[31]
   (g) Probuild's request for sign-offs of the vapour barrier's design.[32]

8. That Probuild failed to take the steps a reasonable design and construct contractor would have taken to minimise the effect of the Soft Spots.

9. That Lyall's analysis regarding EOT2A did not include the 9 working days' extension awarded for EOT1.[33]

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19 Probuild Closing Submissions, 11 June 2019, [85]–[88].
20 Probuild Closing Submissions, 11 June 2019, [58], [208]–[209] (regarding EOT2A) and [269] (regarding EOT7).
21 Probuild Closing Submissions, 11 June 2019, [64]–[70], [193]–[194] (regarding EOT2A), [206]–[207] (regarding EOT3), [231]–[233] (regarding EOT6), and [265]–[268] (regarding EO7).
22 Probuild Closing Submissions, 11 June 2019, [217]–[219] (regarding EOT6) and [242]–[247] (regarding EOT7).
23 Probuild Closing Submissions, 11 June 2019 [71]–[72].
24 Probuild Closing Submissions, 11 June 2019, [152]–[155].
25 Probuild Closing Submissions, 11 June 2019, [152]–[155], [160]–[161], [169]–[192] (regarding EOT2A) and [200]–[205] (regarding EOT3).
26 Probuild Closing Submissions, 11 June 2019, [173]–[175].
27 Probuild Closing Submissions, 11 June 2019, [176]–[177].
28 Probuild Closing Submissions, 11 June 2019, [178]–[180].
29 Probuild Closing Submissions, 11 June 2019, [181]–[183].
30 Probuild Closing Submissions, 11 June 2019, [184]–[189].
31 Probuild Closing Submissions, 11 June 2019, [201]–[203].
32 Probuild Closing Submissions, 11 June 2019, [204]–[205].
33 Probuild Closing Submissions, 11 June 2019, [168].

10. That Probuild failed to preclude the delay the subject of its EOT6 claim.[34]

11. That Probuild had sufficient information to place an order for the Project's glazing 'prior to and at the date of the contract'.[35]

12. That Probuild should not be awarded the declaratory relief it seeks because the delay periods identified in its programming expert's reports were not those originally submitted to the Project Manager for his consideration.

13. That the evidence of V601's programming expert, Abbott, is inadmissible, and that Abbott's evidence lacked objectivity, delved into contractual interpretation, was premised on a theoretical analysis, contained methodological errors, and contained purported determinations on matters of fact and law.[36]

14. The rates Probuild's quantum expert, Cox, applied in his analysis (such as a supervision on-cost of 30%), except to the extent they concern the crane, crane crews and Alimaks.[37]

15. In relation to the Façade Variation, that Probuild failed to discharge the responsibilities of a 'design and construct contractor'.

Materials relied upon

V601 materials

49 In support of the relief sought, V601 relied on the following material:

(a) Witness Statements of:

(i) James Maitland dated:[38]

- 29 August 2016 (Maitland First Witness Statement); and
- 3 February 2019 (Maitland Second Witness Statement); and

(ii) John Nave, the Principal of the Project Manager, dated 3 February 2019 (Nave Witness Statement).[39]

(b) Expert Reports in support of V601's case:

34 Probuild Closing Submissions, 11 June 2019, [229]–[230].
35 Probuild Closing Submissions, 11 June 2019, [259]–[260].
36 Probuild Closing Submissions, 11 June 2019, [104]–[134].
37 Probuild Closing Submissions, 11 June 2019, [314].
38 Tendered at T134.14–T135.26.
39 Tendered at T340.9–T341.29.

(i) Stephen Abbott (Programming Expert) dated:[40]

- 12 September 2018 (Abbott First Report); and
- 17 October 2018 (Abbott Second Report);

(ii) Neil Birchall (Quantum Expert) dated:[41]

- 21 September 2018 (Birchall First Report);
- 5 October 2018 (Birchall Second Report);
- 17 October 2018 – Addendum to Birchall Second Report (Birchall Third Report);

(c) Joint Expert Reports (Programming) of:

(i) Programming Experts' Joint Report 1: Stephen Abbott and Peter Picking dated 5 February 2019;[42]

(ii) Programming Experts' Joint Report 2: Stephen Abbott and James Lyall dated 8 February 2019;[43]

(iii) Programming Experts' Joint Report 3: Stephen Abbott and James Lyall dated 15 February 2019 (Programming Experts' Joint Report 3);[44]

(d) Joint Expert Reports (Quantum)[45] of:

(i) Quantum Experts' Joint Report 1: Mike Cox and Neil Birchall dated 5 February 2019;

(ii) Quantum Experts' Joint Report 2: Mike Cox and Neil Birchall dated 13 February 2019;

(e) Written submissions of V601:

40 Tendered at T1172.9–23.
41 Tendered at T1578.2–27 and T1578.22–27.
42 T1528.18–T1529.9.
43 T1180.24–T1181.13.
44 T1180.24–T1181.13.
45 T1575.9–24 and T1578.22–27.

(i) V601 Amended Opening Submissions dated 6 February 2019 (and Aide Memoire);

(ii) V601 Closing Submissions dated 12 June 2019;

(iii) V601 Further Closing Submissions dated 17 June 2019;

(iv) V601 Submissions dated 7 August 2019 (on its application to further amend its Amended Reply and Defence to Counterclaim); and

(v) V601 Submissions dated 10 October 2019 (re *White Constructions Pty Ltd v PBS Holdings Pty Ltd* [2019] NSWSC 1166).

50 During the interlocutory stages of the proceeding, V601 also filed a witness statement of Mr Colin Mackenzie (Mackenzie), V601's Development Director, dated 3 February 2019 (Mackenzie Witness Statement). However, on the day of the hearing when Mackenzie was scheduled to give evidence and be available for cross-examination, V601 elected not to call him.[46]

51 I note that Mackenzie was the Development Director on the Precinct Project for V601 and contemporaneous documents establish that he also supported the Project Manager, Nave. Further, it is clear from the Project correspondence addressed at trial by other witnesses, including Nave, the Project Manager, and Mr Matthew Bready, who was Probuild's Construction Manager, that Mackenzie was deeply involved on behalf of V601 in many of the on-site issues, problems, and claims which are the subject of this proceeding.

52 Further, I note that as a result of what appeared to be a last minute decision by V601 not to call and rely upon Mackenzie's evidence, a very considerable amount of the detailed evidence of Bready referred to below in relation to on-site activities, facts, delays, discussions, and communications in issue in these proceedings, are not addressed and not traversed by V601, save to the extent that Mr James Maitland

46 T106.31–T107.3 and T129.27–29.

(Maitland), the General Manager at Salvo Property Group (SPG), and Mr John Nave (Nave), the Project Manager, purport to deal with such matters in their evidence.

53 Furthermore, I also observe that it is clear from the project communications, including emails between the parties in relation to site-related matters, including many matters in issue in this proceeding, that Mackenzie was a potential witness likely to be able to give evidence on most of the main issues in dispute between the parties, and other than Nave (the Project Manager) appears to be V601's employee best placed to speak directly from his own knowledge about the matters in dispute in these proceedings, and in particular Probuild's delay and other claims.

54 In the circumstances I have outlined above, given that in my view V601 provided no satisfactory explanation for failing to call MacKenzie to give evidence, I infer that MacKenzie's evidence on matters in dispute would have been unfavourable to V601.

55 I also observe that in contrast to Mackenzie who was not called by V601, Maitland's area of responsibility with SPG was in relation to the overall strategy, direction, operations, and financial management of SPG and its subsidiaries. Maitland is a Chartered Accountant by profession. Further, in his role as General Manager, Maitland was responsible for the overall business carried out by V601, particularly sales, financing, and overall strategic direction. Maitland was not responsible for the management on Site, in particular workface issues.

56 At trial, V601 adduced evidence from James Maitland, John Nave, Stephen Abbott, and Neil Birchall.

Probuild materials

57 In support of the relief sought, Probuild relied on the following material:

(a) Witness Statements of Matthew Bready dated 26 February 2019:[47]

Amended Witness Statement (Bready First Witness Statement);

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47 Tendered at T923.13–T925.12.

Amended Reply Witness Statement (Bready Second Witness Statement);

Amended Supplementary Reply Witness Statement (Bready Third Witness Statement);

(b) Witness Statement of Giuseppe (Joe) Cirianni dated 23 February 2018 (Cirianni Witness Statement);[48]

(c) Witness Statements of Rebeca Lunardello dated:[49]

23 February 2018 (Lunardello First Witness Statement); and

16 October 2018 (Lunardello Second Witness Statement);

(d) Expert Reports in support of Probuild's case of:

(i) James Lyall (Programming Expert) dated:[50]

- 12 April 2018 (Lyall First Report);
- 4 May 2018 (Lyall Second Report); and
- 20 December 2018 (Lyall Third Report);

(ii) Peter Picking (Programming Expert) dated:[51]

- 16 October 2018 (Picking First Report); and
- 20 December 2018 (Picking Second Report);

(iii) Mike Cox (Quantum Expert) dated:[52]

- 8 June 2018 (Cox First Report);
- 26 October 2018 (Cox Second Report); and
- 20 December 2018 (Cox Third Report);

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48 At T129.28–T130.14. Counsel for V601 advises that the witness statement can be admitted into evidence without the need for the witness to be called for cross-examination.

49 At T129.28–T130.14. Counsel for V601 advises that the witness statements can be admitted into evidence without the need for the witness to be called for cross-examination.

50 Tendered at T1170.28–T1172.1.

51 Tendered at T1527.22–T1528.14.

52 Tendered at T1573.16–T1575.4 and T1578.22–27.

(e) Joint Expert Reports (Programming) of:

(i) Programming Experts' Joint Report 1: Stephen Abbott and Peter Picking dated 5 February 2019;[53]

(ii) Programming Experts' Joint Report 2: Stephen Abbott and James Lyall dated 8 February 2019;[54]

(iii) Programming Experts' Joint Report 3: Stephen Abbott and James Lyall dated 15 February 2019;

(f) Joint Expert Reports (Quantum)[55] of:

(i) Quantum Experts' Joint Report 1: Mike Cox and Neil Birchall dated 5 February 2019;

(ii) Quantum Experts' Joint Report 2: Mike Cox and Neil Birchall dated 13 February 2019;

(g) Written submissions of Probuild:

(i) Probuild Opening Submissions dated 7 February 2019 (and Aide Memoirs);

(ii) Probuild Closing Submissions dated 11 June 2019;

(iii) Probuild Reply Closing Submissions dated 12 June 2019;

(iv) Probuild Further Reply Closing Submissions dated 18 June 2019;

(v) Probuild Submissions dated 9 August 2019 (re V601's application to further amend its Amended Reply and Defence to Counterclaim); and

(vi) Probuild Submissions dated 18 October 2019 (re *White Constructions Pty*

53 Tendered at T1528.18–T1529.9.
54 Tendered at T1180.24–T1181.13.
55 Tendered at T1575.9–24 and T1578.22–27.

Ltd v PBS Holdings Pty Ltd [2019] NSWSC 1166).

58 At trial, Probuild adduced evidence from Matthew Bready, James Lyall, Peter Picking, and Mike Cox.

Summary of evidence

V601

James Maitland

59 Mr James Maitland (Maitland) was the General Manager of the Salvo Property Group (SPG). V601 is a member of SPG. Maitland is a Chartered Accountant who joined SPG in late 2010.

60 As General Manager at SPG, Maitland was responsible for the overall strategy, direction, operations, and financial management of the group, including all subsidiary businesses. He was also responsible for the overall business carried out by V601, particularly sales, financing, and overall strategic direction.

Maitland First Witness Statement (29 August 2016)

61 In his first witness statement dated 29 August 2016, Maitland stated that in or about 23 May 2011, V601 and Probuild (as the Contractor) entered into the Design and Construction Contract for the 456 unit 'Precinct' apartment development with ancillary retail, office, and storage spaces for the lump sum of $115,864,529.

62 Maitland's evidence addresses aspects of ProBuild's delay claim in relation to the Early Works Contract [EOT1].

63 In his evidence, Maitland dealt with the Project Manager's issuance of Notices of Practical Completion in respect of the Separable Portions and the WUC, and the Project Manager's purported certifications fixing sums of liquidated damages for late completion of the Separable Portions of the Project.

64 Maitland's evidence established that Probuild did not pay the liquidated damages

which the Project Manager had purported to certify as due and payable by Probuild to V601.

65 Maitland's evidence also highlighted that cl 37.5 of the Contract provides for interest to be due and payable on overdue amounts at a rate of 12% per annum.

66 Maitland's evidence was that the interest payable by Probuild from the date of each of the Liquidated Damages Certificates, up to the day that these proceedings were commenced, was (at the date when he addressed the calculation of interest) $1,268,401.82. V601 updated this figure to June 2019, and revised the total certified sum claim to $4,712,519.

Maitland Second Witness Statement (3 February 2019)

67 By his second witness statement dated 3 February 2019, Maitland referred to FDG Developments Pty Ltd (FDG), a company within the Salvo group of companies, which entered into a contract of sale to purchase the land on 18 July 2008 and, on 23 April 2010, was granted a planning permit in respect of 601 Victoria Street, Abbotsford to construct the 'Precinct' mixed-use residential, retail, and office development on this land.

68 The Precinct was to comprise a large high-density urban renewal project on an old industrial site and ultimately consisted of a three-level basement carpark and five individual buildings including:

(a) 467 residential apartments;

(b) 6-storey childcare centre;

(c) 1,127 square metre ground floor retail shop;

(d) ground floor café; and

(e) associated amenities and landscaped complex grounds.

69 Maitland states that FDG commenced selling the apartments in the Project under an off the plan contract of sale in 2010.

70 Maitland also states that, under a development agreement dated 28 April 2011, FDG appointed V601 to carry out the development of the Project. Under this agreement, V601 was responsible for:

(a) development and construction in accordance with the approved planning permit, including any amendments required to complete the project;

(b) financing; and

(c) marketing for the Project.

71 The agreement provided for the Project to be completed, at that stage, in seven different separable portions, each with its own separate forecast date for completion.

72 Maitland's statement also refers to V601 having entered into a facility agreement with Precinct Australia Pte Ltd (CapitaLand) on 28 March 2011 for the financing of the Project. Under the facility agreement, subject to V601 initially satisfying numerous conditions, CapitaLand would finance the majority of the progress payments payable to the Contractor of the Project.

73 Maitland refers to the above financing agreement being varied a number of times during the project, and also explains that CapitaLand was a wholly-owned subsidiary of the Singapore publicly listed company, CapitaLand Limited. He stated that, as part of the financing arrangements, V601 was required to:

(a) enter into a building contract with a Contractor;

(b) contribute equity into the Project such that, at all times, the costs to complete the development in its entirety were equal to or less than the undrawn facility amount; and

(c) complete the project before the expiry date of the facility.

74 In its closing submissions, V601 submitted that the majority of Maitland's evidence had not been contested, and also submitted that in relation to the alleged 9A Agreement, which gives rise to one issue between the parties, Maitland had no more than his attention drawn to an email dated 9 May 2012[56] which V601 claims supports its case that the agreement to commence main works on 22 December 2011 concluded the contractual mechanism of granting Site access, and the amended dates for PC. V601 also asserts that this agreement included that no further adjustment under cl 9A(c) was to occur after 21 December 2011, and that subsequent delays were to be treated as EOTs under cl 34 the Contract.[57]

75 V601 also submitted that other than the above, Maitland was primarily cross-examined in relation to the Project Manager's independence, which V601 asserts is irrelevant to the issues in this proceeding. V601 submitted that Maitland's credibility has not been undermined in any meaningful way during the course of this proceeding and, in any event, his uncontested evidence should be accepted by this Court.

76 Probuild submitted that the Court should treat Maitland's evidence with caution.

77 Probuild submits that Maitland's second witness statement is largely irrelevant to the issues before the Court.

78 Under cross-examination, Probuild submitted that Maitland was reluctant to directly answer the questions put to him and sought to qualify answers depending on the meaning of ordinary words,[58] to avoid matters put to him by seeking to proffer answers to different questions,[59] or by having recourse to 'context' to avoid

56 FCB2865–2869.
57 T254.21–T260.4.
58 T197.29–T198.10 (regarding 'commercial interests'), T259.18–28 (regarding 'accurate'), T281.11–17 (regarding 'independence'). and T291.5–9 (regarding 'substantial').
59 See, for example, T195.3–22, T172.19–T173.22 and T280.1–16.

answering questions that reflected poorly on V601.[60] Probuild submits that the context referred to by Maitland was often irrelevant and contradicted the plain text of the correspondence in issue, and did not respond to the question asked.

79 For example, early in his cross-examination, Maitland was taken to a significant document in the proceeding, namely a letter from SPG to Probuild dated 7 September 2012. The letter in question came into existence after Probuild submitted its EOT2A and 3 claims. The letter enclosed the Project Manager's draft determination about those Probuild claims, and a 'Mitigation Actions' report prepared by programming and time extension consultants, Tracey Brunstrom & Hammond (TBH).[61] Maitland's evidence confirmed his involvement in drafting the covering letter, and also confirmed that he had signed that letter on SPG's behalf.[62] Maitland was cross-examined as to how it was that the Project Manager's draft determination came to V601. In response, Maitland sought to provide 'background' evidence about Mr Mehrten (Mehrten) (Probuild) and SPG seeking to settle Probuild's claims.[63]

80 However, in my view, the 'background', as Maitland sought to characterise this aspect, does not square with the letter of 7 September 2012 which does not reflect that it was sent as part of an effort to compromise Probuild's claims.

81 Further, as Probuild points out, V601 sought to claim privilege in respect of the 7 September 2012 letter and attachments. As a result, Mr Anthony Nolan QC was appointed as a Special Referee in this proceeding. Mr Nolan held that V601's letter of 7 September 2012 was not part of a process of negotiation to resolve the underlying dispute between V601 and Probuild, and was therefore not privileged.[64]

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60 See, for example, T230.22–T231.22, T234.16–26, T263.3–8, T264.8–16, and T301.9–25.
61 FCB4263.
62 T167.15–19 and T174.21–23.
63 T172.19–22.
64 Special Referee's Report, 13 August 2018, [58]; Transcript of the directions hearing on 23 October 2018, T7.3.

82 I consider that Maitland's evidence, including for the above reasons, was frequently unsatisfactory and astute to present and support V601's case and to avoid accepting or conceding facts which he perceived might be harmful or unhelpful to V601.

83 For the above reasons I have ascribed less weight to Maitland's evidence in relation to matters in issue, unless corroborated or unequivocally supported by other evidence, or uncontradicted.

John Nave

84 Mr John Nave (Nave) gave evidence that he is a Director of First Urban, a project management, development management, and construction management company.

85 Nave's qualifications principally include:

(a) Bachelor of Architecture (Hons);

(b) Bachelor of Building (Deakin University); and

(c) Registered Commercial Builder.

86 Nave's evidence was that he has 20 years' experience acting as director, construction manager, project manager, and project coordinator in the commercial construction industry.[65]

87 Nave also stated that First Urban is engaged as development management, project manager, construction manager, and contract superintendent for residential and residential mixed-use projects, and commercial fit-out works.

88 Nave's evidence was that First Urban was appointed as Project Manager under the Contract on 3 February 2011.

89 Nave's witness statement (dated 3 February 2019) explained that in relation to the Precinct Project, he was the Project Manager's Representative under the Contract

65 Nave Witness Statement, 3 February 2019, [3] (Nave Witness Statement).

and that he exercised the delegated powers of the Project Manager on behalf of First Urban. Nave states that he was assisted in performing this function by various other members of the team at First Urban, including his assistant, Ms Josie Coraci (Coraci), and Wei Lim. However, Nave's evidence was that all directions and determinations issued by First Urban were made by him and were his responsibility. Nave stated that, as Project Manager, he had various roles under the Contract which are described in cl 20.

90 Nave also stated that it was his practice to attend the Site weekly, or every other week, to see the status of the works, as well as to attend various other meetings at the Probuild Site office which was located on the corner of Grosvenor Street and Victoria Street. Other members of his team would also attend the Site, approximately twice weekly.

91 Nave stated that he would generally attend the following Precinct project meetings:

(a) Project Control Group (PCG) meetings:

These meetings were held monthly with V601, Probuild, and others as required for the relevant stage of the Works. Prior to each PCG meeting, Probuild would circulate a draft report in a form which had been agreed upon earlier. Nave would sometimes provide comments on that draft. Probuild produced the Minutes of these meetings and circulated those Minutes to the attendees;

(b) Construction Meetings:

These meetings were usually held weekly with Probuild. Minutes of these meetings were also produced by Probuild and circulated to attendees;

(c) Design Meetings:

These meetings were held weekly with Probuild and the Consultant team.

Minutes of these meetings were also produced by Probuild and circulated to the attendees; and

(e) various other meetings as required on an ad hoc basis.

92 Nave's statement explains that project communications with Probuild were usually by way of Aconex communications.

93 V601 submitted that Nave was a patently honest witness, who was subject to a vigorous and lengthy cross-examination, and gave honest answers to all questions. V601 submitted that there was no significant matter in relation to which he had been shown to have been dishonest.

94 V601 seeks to explain that Nave was in a challenging situation because he had a client and a contractor, both of whom engaged with him and, at times, questioned whether he had the required ability to manage the project. V601 submits that Nave's situation was made more difficult, because he was trying to administer a Contract in circumstances where Probuild was deliberately withholding the information required for him to make relevant decisions.

95 V601 submits that much of Probuild's cross-examination to impugn Nave's independence was irrelevant to the issues in this proceeding. It further submits that, in any event, Nave's evidence was consistent with his witness statement and demonstrates knowledge of the project, as well as his frustration at both parties' attempts to convince him to side with them in relation to the claims. V601 also submits that Nave was not challenged on his evidence, and that both parties placed significant pressure on him during his analysis of the extensions of time.[66]

96 V601 argues that Probuild has criticised Nave for trying to conceal the involvement of TBH and V601's lawyers, Baker McKenzie, in the time extension assessment process.[67] V601 also asserts that contemporaneous emails between Probuild

66 T442.24–T443.21.
67 Probuild Closing Submissions, 11 June 2019, [11].

employees demonstrate a full awareness of the roles played by TBH and V601's lawyers, prior to Nave making his assessment of EOT2A and EOT3.[68] In this regard, V601 observes that Probuild had also subpoenaed Nave in 2017 and had access to the documents produced by Nave from that time, including documents which revealed his interactions with TBH and with V601's lawyers.

97 In its submissions, V601 notes Probuild's suggestion that Nave's proposal of a profit-sharing arrangement somehow tarnished his role as Project Manager.[69] V601 says that this suggestion is rebutted by Nave's unequivocal evidence that the profit-sharing arrangement was never agreed to; that it was proposed well before the Contract being entered into; and that the Contract ultimately entered into between Nave and SPG was an AS4122-2000, pursuant to which Nave was paid a flat fee for project management services.[70]

98 V601's overarching submission is that Nave was an honest witness who tried his best to explain his conduct in very difficult circumstances and that his evidence should be accepted.

99 Probuild however submits that Nave was a most unsatisfactory witness and that the Court should attach no weight to his evidence, unless it is corroborated by contemporaneous records.

100 Probuild submits that Nave's witness statement was not designed to assist the Court in fully understanding how he acted as Project Manager. In setting out his 'process' for dealing with Probuild, and for making purported 'determinations', Probuild submits that Nave deliberately chose not to make reference to his numerous interactions with V601, its lawyers, or TBH. Probuild also strenuously submits that this was a major omission, particularly given Nave's assertion that he made the assessments; that he made them independently;[71] and that his assessments were

68 FCB5166–5167; FCB5168–5170.
69 Probuild Closing Submissions, 11 June 2019, [80].
70 T357.1–T360.21.
71 See, for example, T459.15–16.

'correct'.[72]

101 Probuild maintains that Nave did not reveal his interactions with V601, V601's lawyers, and TBG during the Project, and submits that Nave chose not to reveal those interactions when compiling his witness statement. Probuild submits that Nave's witness statement gives a false impression about how he interacted with both V601, chiefly with Maitland, and Mackenzie, the Development Director supporting the Project Manager, in relation to key project decisions and Probuild.

102 Probuild's submissions include that, at no stage, did Nave understand what it meant to be independent in his Project Manager role of assessor and certifier of the Contractor's entitlements under the Contract, and therefore it is unsurprising that he did not act independently.

103 Probuild further submits that Nave's lack of independence was not an innocent error.

104 Probuild highlights and submits that V601's year-long but unsuccessful effort to claim privilege over hundreds of documents relating to the true factual situation, and the story that these documents ultimately revealed, is very relevant.

105 During the trial, Probuild compiled and filed a document setting out the 'indicia' on which it relies to establish that the Project Manager lacked independence in his role as assessor and certifier.[73] That document, Annexure 2 to Probuild's Closing Submissions dated 11 June 2019, identifies the evidence establishing each indicium of the Project Manager's lack of independence and explains the evidence relied on by Probuild.[74]

106 I note, however, that V601 did not specifically address, or even in my view seriously attempt to rebut, Probuild's Annexure 2 evidence. This is not an isolated observation

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72 Nave Witness Statement, [358].
73 T702.12–T703.10.
74 T491.5–T492.4.

concerning V601's case and is one that can also be made in respect of various other bodies of specific and very significant evidence relied upon by Probuild, as identified below, including in relation to Probuild's Anneuxre 2 and in relation to the evidence given by Bready, Probuild's Project Manager.

107 Although I deal in more detail with Nave's evidence below, at this point it is convenient to make the general observation and findings below.

108 I am unpersuaded by Nave's evidence in relation to issues relevant to his independence, examples of which are included below.

109 I do not accept Nave's denial that he sought advice from V601's lawyers in relation to Probuild's assertions regarding his independence as Project Manager. Nave was cross-examined about whether he had sought such advice from V601's lawyers. His answer was, 'No, I didn't'.[75] However, Nave's email to V601's lawyers dated 22 October 2012 sought such advice.[76]

110 Neither do I accept Nave's evidence that he did not recall meetings with V601's lawyers during the Project. In cross-examination, when this was put to him, Nave stated, 'Possibly, I just can't recall how many.'[77] However, I find that Nave had many critical meetings with V601 and its lawyers, including to discuss V601's tactics and strategy for dealing with Probuild's claims.[78]

111 Nave, in substance, denied that the Project Manager had engaged TBH.[79] I find that First Urban, in fact, initially engaged TBH in or about April/May 2012.

112 Similarly, I do not accept Nave's denial of being aware that V601's financiers had refused drawdowns, because Probuild's delay claims were resolved.[80] On 25 May

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75 T434.1–2; T434.24–29.
76 FCB4485.
77 T350.10–21.
78 See, for example, FCB2837, FCB2835, FCB4004, FCB 4204, FCB 4859.
79 T344.1–2; FCB2782; FCB2880.
80 T386.27–29 and T542.4–7.

2012, Nave received an email from Maitland which stated: 'See below update from CapitaLand confirming no more draws until EOT's [sic] resolved with Probuild as discussed.'[81]

113 I also reject the suggestion that Nave's statements in First Urban's email, dated 12 June 2012,[82] were other than the communication by Nave of his prejudgement and predetermination in relation to his rejection of Probuild's Façade Variation, irrespective of how Probuild sought to justify and substantiate that claim.[83]

114 Furthermore, I do not accept Nave's evidence that he signed a 'draft' of the determination of Probuild's EOT2A and EOT3 claims of 15 August 2012. That draft determination accepted and adopted the dates in TBH's report on the initial analysis of the EOT2 and EOT3 claims.[84] In cross-examination, Nave asserted that the draft determination was not provided to V601 because he was not satisfied that it was accurate.[85]

115 V601 received a copy of the Project Manager's draft determination in relation to EOT2A and EOT3 on 7 September 2012.[86] Nave conceded that he knew the draft determination had been sent to V601, even though it was inaccurate.[87]

116 I do not accept Nave's evidence that he was unaware of V601's strategy of issuing draft determinations communicated to Probuild in relation to Probuild's contractual claims, as part of a process facilitated by V601 and the Project Manager pursuant to which V601 sought to delay certification of Probuild's contractual entitlement to extensions of time and obtain leverage in V601's negotiation to defeat or reduce Probuild's claims.[88]

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81 FCB2920; see also FCB3688.
82 FCB3518.
83 T445.12–18.
84 T474.13–22 and T494.5–T495.11.
85 T475.1–31.
86 FCB4214 and FCB4083.
87 T539.16–27.
88 T542.10–13. See also T544.15–29.

117 In this regard, I am satisfied that the Project Manager's determination of 7 September 2012 was not a true reflection of the Project Manager's opinions and that V601 used the second draft determination in relation to the claims then being dealt with as part of its efforts to procure a settlement with Probuild of Probuild's subject time extension claims.[89]

118 On 6 September 2012, Nave participated in a telephone conversation with TBH, Mackenzie, and Alison Ashford of V601's lawyers.[90] A file note of that conversation records the discussion being concerned with 'want[ing] to identify where Probuild is going and whether things are getting worse', and 'when Probuild & V601 meet tomorrow what do we give them and why'. The note also states that 'Mario [Salvo] wants document to provide at meeting', which included the list of documents in 'John's determination' and the 'TBH summary'. Under cross-examination, Nave conceded that he 'knew there was a negotiation that was about to occur'.[91] Despite Nave acknowledging that the 7 September 2012 draft determination did not reflect his opinion and that he would never sign it,[92] Nave failed to inform Probuild that the draft determination did not reflect his opinion, nor did he take any steps to correct this position.

119 As a result of the matters that I have referred to and the further matter concerning the Project Manager's conduct outlined below, I am comfortably satisfied that although Nave occupied the position of the Project Manager which under the contract was charged with the independent role of assessor and certifier, Nave was working in concert with V601 to have Probuild believe that the Project Manager's determination would be that contained in the draft letter of 7 September 2012, in order to place V601 in a more advantageous position to negotiate a settlement with Probuild, and at a time which V601's financiers refused further drawdowns.

89 FCB4263; T481.16–23.
90 FCB4204.
91 T542.25–29.
92 T481.19–T482.4, T501.8–9 and T541.8–12.

However, Nave denied that this was the case.[93]

120 Furthermore, I do not accept Nave's evidence that he was not involved with V601 in devising a strategy to delay and minimise Probuild's contractual entitlements.[94] I find that he was so involved. This I consider is clearly established by the file notes of meetings involving the Project Manager and V601's lawyers, addressed below. Those contemporaneous notes comfortably satisfy me that Nave actively participated, without objection or demur, in meetings with V601 and its lawyers to develop, agree and implement a strategy and tactics to delay and minimise Probuild's contractual claims for extensions of time.[95]

121 I am also comfortably persuaded that at the time Nave gave evidence under cross-examination in these proceedings, he would have been most unlikely to have forgotten the fact and nature of meetings like the one with V601's lawyers on 16 August 2012.

122 In the Nave Witness Statement, at [581], Nave stated unequivocally that Probuild's request for Practical Completion was not properly made because it was not compliant with cl 34.6(b) of the Contract. Under cross-examination, Nave agreed that the point made by him about Probuild's non-compliance was suggested to him by V601's lawyers; that he thought the point was 'highly technical'; and that he did not agree with it. Notwithstanding his views, Nave sent Probuild the letter drafted by V601's lawyers to Probuild raising the above point as to non-compliance.[96]

123 Beyond the above examples of Nave's unacceptable, inaccurate, and unpersuasive evidence, Nave was also cross-examined suggesting that his assessment of Probuild's EOT2A and EOT3 claims (made on 15 August 2012, 7 September 2012, and 20 September 2012) were similarly inappropriately and unduly influenced by V601, and its advisers. In response Nave attempted to substantiate the processes by

93 T543.19–T544.14.
94 See, for example, T437.7–29, T438.14–16 and T532.10–31.
95 FCB4004–9; FCB4094.
96 T843.17–T848.8; FCB4955-4956; refer also to FCB4943.

which he had assessed Probuild's delay claims.

124 Ultimately, I consider that the processes engaged in by the Project Manager to assess the above Probuild EOT and completion claims amounted to the Project Manager doing little more than simply adopting V601's preferred position, via its programming and time extension consultant, TBH, and its analysis in relation to Probuild's claims.[97]

125 Nave also gave evidence that his purported determinations did not take into account the mitigation measures that TBH had identified;[98] however, First Urban's purported determination dated 20 September 2012 reveals that the extensions of time awarded for SP2 and SP5 'incorporated the mitigation strategies set out in the Annexure to this letter'.[99]

126 For the reasons referred to above, in relation to the examples highlighted to this point, I find that Nave's evidence demonstrated his significantly impaired understanding and appreciation of the required level of independence which the Contract imposed on the Project Manager in relation to the assessment and certification of the Contractor's entitlements.

127 Further, for the above reason, and for the reasons outlined below, including in relation to Annexure 2 of Probuild's closing submissions, on any disputed subject matter, save when supported by other reliable evidence or contemporaneous documentation, I give very little or no weight to Nave's evidence and the Project Manager's purported assessments and certifications under the Contract or its communications generally in relation to the Precinct Project.

Stephen Abbott

128 Mr Stephen Abbott (Abbott) is an expert witness instructed by V601's lawyers to

97 T474.13–22 and T494.5–T495.11 (regarding the purported 15 August 2012 determination), T501.12–T502.21 (regarding the purported 7 September 2012 determination), and T741.24–T472.6 (regarding the purported 20 September 2012 determination).

98 T526.20–31.

99 FCB4363–4364 (last paragraph).

prepare an independent expert report in relation to programming, delay, and time extension issues.

129 Abbott's evidence included that he is the Managing Director and Principal of SJA Construction Services Pty Ltd, which he formed in 1999 to provide specialist services to stakeholders of the building, construction, and engineering industries including: construction consulting including independent expert services; quantity surveying/cost planning services; project management services; and planning and programming services.

130 Abbott has 39 years' experience in the building, construction, and engineering industries. During this time, he has performed roles ranging from carpenter to senior management positions for some of the largest construction organisations in Australia. Abbott has spent many years working on both small and major construction projects, in various hands-on roles including Project Manager, Construction Manager, and many years in senior managerial roles within the Australian construction industry. Abbott's evidence was that he has had direct hands-on experience with many of the various forms of project delivery used within the Australian building and construction industry. Abbott has also had direct involvement in many major construction projects in the role of construction consultant/expert and, in that capacity, with many significant construction projects.

131 Abbott's experience has also involved the provision of expert witness services for arbitrations and mediations in jurisdictions that include the Local, District, and Supreme Courts of various Australian states, where he has dealt with construction-related issues including the analysis of delay and disruption (expert advice, reporting, and expert witness services related to construction planning and programming) and the assessment of claims/quantum assessments (expert advice, reporting, and expert witness services related to assessment of construction costs, variations, delay/disruption costs, and other quantum claims).

132 Abbott holds a Bachelor of Commerce Degree with a Management Major from the University of Western Sydney, and has completed many relevant construction, management, and specialist training courses. He is also a Fellow of the Australian Institute of Project Management; a Fellow of the Australian Institute of Management; a Fellow of the Australian Institute of Building; a Member of the Resolution Institute (formally the Institute of Arbitrators and Mediators Australia); a Member of the Society of Construction Law; a Member of the Chartered Institute of Arbitrators (UK); and a Certified Practicing Project Manager with the Australian Institute of Project Management.

Abbott First Report (12 September 2018)

133 Abbott was instructed to provide expert opinions as detailed in two letters of instruction from V601's lawyers dated 14 June 2018 and 12 August 2018. Abbott, in preparing his first expert report dated 12 September 2018, was instructed by Baker McKenzie and V601 to review the materials and documents included in his brief, and then prepare a report commenting on the methodology used by Probuild's Programming delay and time extension expert, Mr James Lyall (Lyall), in relation to Lyall's reports dated 12 April 2018 and 4 May 2018, as well as providing responses to three key questions in relation to claims by Probuild against V601 for delay and how the Contractor should seek to minimise the impact of delay.

Abbott Second Report (17 October 2018)

134 By letter of instruction from V601's lawyers dated 16 October 2018, Abbott was further instructed by V601 to prepare a supplementary report in relation to delay and time extension-related matters concerning Probuild's claims, and in relation to Probuild's entitlements to extensions of time.

Programming Experts' Joint Report 1

135 Abbott and Peter Picking (Picking), the latter an Expert engaged by Probuild, also produced a joint report entitled Programming Experts' Joint Report 1 (5 February 2019). In this report, Abbott and Picking summarise the points of agreement and

disagreement in relation to programming issues, including what actions a reasonable design and construct contractor would take to minimise the impact of delays.

Programming Experts' Joint Reports 2 and 3

136 Abbott and Lyall also produced joint reports entitled Programming Experts' Joint Report 2 (8 February 2019) and Programming Experts' Joint Report 3 (15 February 2019).

137 The Programming Experts' Joint Report 2 principally addresses Abbott's and Lyall's positions in relation to prospective and retrospective analyses of delay.

138 The Programming Experts' Joint Report 3 further addresses Abbott's and Lyall's programming conclusions in the Programming Experts' Joint Report 2.

Neil Birchall

139 Mr Neil Birchall (Birchall) is an Expert Quantity Surveyor and Estimator engaged by V601's lawyers to provide evidence in these proceedings, including in relation to Probuild's evidence from its quantum expert, Mr Bill Cox. Birchall is employed by SJA Construction Services Pty Ltd in the capacity of Area Manager Construction Consulting.

140 Birchall's qualifications include a Higher National Diploma in Building, an Honours Degree in Law, a Post-Graduate Diploma in Vocational Training for the Bar (England and Wales). Birchall also states that he was called to the Bar in 2006 and is a non-registered member of the Bar of England and Wales, as well as a Member of the Chartered Institute of Arbitrators and a Member of the Society of Construction Law Australia.

141 Birchall states that he has been employed in the construction industry for over 30 years and, during that time, he has worked for contractors, subcontractors, consultants, suppliers, and owners/principals, including in positions as Estimator/Surveyor, Quantity Surveyor, Managing Quantity Surveyor, and Commercial Manager. Birchall was previously the Associate Director of an

international quantity surveying practice, and a self-employed contracts and commercial consultant. He has been instructed both as a party-appointed expert and as a court-appointed expert.

Birchall First Report (21 September 2018)

142 By letter of instruction dated 14 June 2018, Birchall was instructed by V601's lawyers, Baker McKenzie, to provide his opinion as to whether he concurred with the opinions stated in the Cox Report, Probuild's Quantum Expert, in respect of Probuild's quantum evidence.

Birchall Second Report (5 October 2018)

143 By letter of instruction dated 5 October 2018 from V601's lawyers, Baker McKenzie, Birchall was further instructed to provide an opinion on the assessment of Probuild's entitlement to delay damages in relation to its EOT2/2A, EOT3, EOT6 and EOT7 extension of time claims, including in respect of Probuild's extension of time entitlements, as assessed by the Project Manager and Probuild's expert programmer, Lyall.

Birchall Third Addendum Report (17 October 2018)

144 By letter of instruction dated 16 October 2018, Birchall was further instructed to provide an opinion on the assessment of Probuild's entitlement to delay damages, in relation to its EOT2/2A, EOT3, EOT6 and EOT7 time extension claims. This Third Birchall Report was particularly directed to assessing the quantum of delay damages in relation to Probuild's EOT claims EOT2/2A, EOT3 and EOT6.

Quantum Experts' Joint Reports 1 and 2

145 Birchall and Cox also produced joint experts' reports entitled Quantum Experts' Joint Report 1 (5 February 2019) and Quantum Experts' Joint Report 2 (13 February 2019).

Probuild

Matthew Bready

146 Probuild's principal witness of fact, Mr Matthew Bready (Bready), stated that he had worked as a Construction Manager for Probuild since 1994, including in the roles of estimating assistant, estimator, contract administrator, project manager, senior project manager, project director, and construction manager, and in these roles had worked on various commercial, fit-out, retail, and residential developments.[100]

147 Bready's evidence was that his qualifications included a Certificate of Technology (Advanced Building Construction) (1993) and an Advanced Certificate in Building Construction (1993), both from Swinburne University of Technology.

148 Bready gave evidence that he was Probuild's Construction Manager for almost the duration of Probuild's involvement on the Precinct Project, initially in a limited role, because he was working for Probuild to complete another project in Southbank.

149 Bready's evidence was that, in his role as Construction Manager, he was responsible for planning and monitoring construction-related matters during the Project's construction phase. These responsibilities included obtaining input from subcontractors and suppliers, as well as providing programming and buildability advice. Bready was supported in his roles by Probuild's Site management, supervision, contracts administration, and direct labour teams, and by Probuild's commercial, finance, environmental health and safety, and human resources and quality teams based in its head office.

150 Bready stated that he started working on the Project on a full-time basis in late 2011 and before that, he would typically attend the Site two or three times a week to monitor the progress of the Early Works, and was based at the Site from late 2011 until around February 2014.

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100 Bready First Witness Statement, [3] (also referred to as 'Bready 1').

Bready Witness Statements

151 Probuild relies on three Witness Statements from Bready.

152 Bready's evidence on the events on-site and key communications between the significant persons involved in the performance of the Early Works, and then the WUC, is very detailed and I consider objective, very accurate and reliable and in respect of almost all factual matters to do with the Works and communications and decision concerning the Works, substantiated by contemporaneous project documentation and similar materials.

153 Probuild submits that Bready's evidence should be wholly accepted. Probuild submits that Bready's evidence demonstrates the breadth of his knowledge about the Project and his extensive experience as a construction manager. He was a truthful witness, and gave succinct, direct answers to the questions asked in cross-examination. The vast majority of his evidence was not challenged, either in V601's lay witness statements, expert reports, or in cross-examination. I accept each of Probuild's submissions and assertions referred to in this paragraph.

154 As I have earlier separately noted, in respect of most of the detail of the events and occurrences on-site during the performance of the Early Works and the WUC, Bready's contemporaneous first-hand evidence is not rebutted by a comparable V601 witness who was able to give evidence in relation to events and occurrences affecting the works. Bready's evidence is also almost always supported by contemporaneous documents or other contemporaneous materials. As to these matters, I have found Bready's evidence very reliable, and very persuasive and most helpful.

155 On the few occasions where Bready's evidence was challenged, Bready convincingly justified his position and the version of the relevant facts he deposed to or, where appropriate, made concessions.

156 Probuild submits that Bready's evidence should be accepted, on the basis that he has

'demonstrated the breadth of his knowledge about the Project and his extensive experience as a construction manager'.[101] I wholly accept that submission for the reasons I have outlined.

157 V601, however, submits that in cross-examination, Bready was found to have engaged in improper conduct to advance his employer's commercial interests at the expense of V601. V601 asserts that Bready has now admitted to making multi-million-dollar claims:

(a) without conducting a critical delay analysis — being the primary foundation for any extension of time under the Contract;

(b) knowing that various dates listed in the claims were incorrect and/or could never have actually been achieved by Probuild;

(c) while maintaining strict control over the programs that supposedly substantiated those claims; and

(d) without providing the Project Manager with any of the further information requested as part of his attempts to analyse those claims.

158 V601 submits that Bready also made statements that cannot be accepted, such as:

(a) he was unaware that the VCAT application only related to 15 apartments; and

(b) he had no expertise in critical path analysis.

159 As a result of the above, V601 submits that Bready was only honest in his evidence once he was found out. V601 submits that Probuild's representation of Bready as an avuncular figure, who could be trusted and relied on by the Court, is contradicted by the above matters.

160 For the reasons I have outlined above, and also for the reasons concerning Bready's

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101 Probuild Closing Submissions, 11 June 2019, [8].

evidence separately outlined below, I wholly reject V601's submissions in the preceding paragraphs.

Giuseppe (Joe) Cirianni

161 Mr Giuseppe (Joe) Cirianni's (Cirianni) evidence was that he was the Site Operations Manager on the Precinct Project employed by Probuild since February 2009. Cirianni stated that his relevant work experience since 1983 included work for Westfield between 2007 and 2008 on the construction of the South Morang Shopping Centre, and prior to that, work for Brookfield Multiplex from 1995 until 2007.

162 Cirianni stated that his qualifications include a Certificate in Construction from Swinburne University of Technology and Preston TAFE (1987); a Certificate IV in Business (2005); and a Certificate III in Occupational Health and Safety from the Master Builders Association (2009).

163 Cirianni became Probuild's Site Operations Manager in November 2017.[102]

164 As Site Operations Manager, Cirianni is assisted by a team of Site supervisors who also work on-site and are responsible for managing a particular trade or area of work.

165 During his career, Cirianni stated he has worked on various commercial, fit-out, retail, and residential developments.[103]

Cirianni Witness Statement (23 February 2018)

166 In his witness statement dated 23 February 2018, Cirianni stated that he maintained the daily Site diary for the Precinct Project and that he prepared the Minutes of the meeting with HWM Contractors Pty Ltd, the earthworks contractor for the Early Works.

167 V601 agreed to the Cirianni Witness Statement being tendered and did not require

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102 Cirianni Witness Statement, [2]–[3].
103 Cirianni Witness Statement, [5].

Cirianni for cross-examination.[104] I have considered and accept Cirianni's evidence.[105]

Rebeca Lunardello

168 Ms Rebeca Lunardello (Lunardello) is an experienced assistant accountant and Payroll Manager employed by Probuild since 2000.

169 Lunardello's qualifications include a bachelor's degree in International Business from Instituto Tecnologico de Monterrey, a Mexican university.

Lunardello Witness Statements (23 February 2018 and 16 October 2018)

170 In her witness statements dated 23 February 2018, Lunardello explains the Precinct Project payment and cost recording system, including Probuild's detailed cost reports generated on Probuild's 'BLU' accounting software.

171 V601 agreed to the Lunardello Witness Statements being tendered and did not require Lunardello for cross-examination.[106] I have considered and accept Lunardello's evidence.[107]

James Lyall

172 Mr James Lyall (Lyall) provided expert programming, delay, and time extension-related evidence in support of Probuild's delay claims. Lyall is employed as a Partner-Delay Expert Services by HKA, a specialist contract and commercial consultancy to the building, construction, and engineering industries.

173 Lyall has over 17 years' experience of planning in construction and engineering projects. He is a Member of the Chartered Institute of Arbitrators and a Practicing Member of the Academy of Experts. Lyall's qualifications include a Master's Degree in Construction Law and Dispute Resolution awarded by King's College London (2012), and a Bachelor's Degree in Building, Management and Technology awarded

104 T129–T130 and T1396.
105 T129.29–T130.1; T1396.10–25.
106 T129–T130 and T1396.
107 T129.29–T130.1; T1396.10–25.

by the University of Liverpool (2001).

Lyall First Report (12 April 2018)

174 By letter of instruction dated 23 December 2016, Probuild's lawyers requested that Lyall, amongst other things:

(a) prepare a report setting out his expert opinion as to whether the delay events which were the subject of Probuild's EOT claims 1, 2A, 3, 4, 6 and 7 affected an activity on the critical path of the Approved Contractor's Program, as it existed at the time of the occurrence of the cause of delay and, if so, to what extent;

(b) with respect to Probuild's EOT claims 1, 2A, 3, 4, 6 and 7, provide an expert opinion as to whether Probuild took all reasonable measures to minimise the delay incurred, including by resequencing or reprogramming the performance of WUC where it was reasonably practicable to do so; and

(c) with respect to Probuild's EOT claims 1, 2A and 3, provide an expert opinion as to whether the delay events delayed or disrupted Probuild, and, if so, to what extent, identifying all critical and non-critical delays and disruptions.

175 A summary of the claims made by V601 and Probuild in the Proceeding on which Lyall was asked to provide his expert opinion are as follows (by way of extract from Probuild's lawyers' instructions to Lyall):

> 3.1 V601 claims an entitlement to liquidated damages in the sum of $4,712,519 as a result of Probuild's alleged failure to achieve Practical Completion for certain Separable Portions by the relevant Date for Practical Completion under the Contract;
> 3.2 Probuild (amongst other things):
> 3.2.1 denies that any liquidated damages are due and payable to V601; and
> 3.2.2 alleges an entitlement to delay damages, bonus payments and/or acceleration payments;
> on account of EOTs to which Probuild was entitled under the Contract; and
> 3.3 Probuild also claims an entitlement to be paid a Variation, relating to the construction of the façade return walls in

precast concrete.

4. A 'staging plan' depicting the location of each of the buildings forming part of the Project on the Site (Staging Plan) is included in the Contract.

5. The 'Works' comprised eight separable portions (SPs), as follows:
   5.1 Building A1 (SP 1). This is a retail building and associated car parking area at the southern end of the Site facing onto Victoria Street, as depicted in red on page 1 of the Staging Plan;
   5.2 Building C1 (SP 2). This is the commercial component of Building C, and associated car parking areas, as depicted in light blue at page 2 of the Staging Plan;
   5.3 Building D (SP 3). This is a residential building, and associated car parking, as depicted in dark blue at page 3 of the Staging Plan;
   5.4 Building E (SP 4). This is another residential building and associated car parking, as depicted in green at page 4 of the Staging Plan;
   5.5 Building C2 (SP 5). This is the residential component of Building C, and associated car parking areas, as depicted in orange at page 5 of the Staging Plan;
   5.6 Building B (SP 6). This is another residential building with associated car parking areas, as depicted in purple at page 6 of the Staging Plan;
   5.7 Building A2 (SP 6A). This comprises the residential areas of Building A with associated car parking areas, as depicted in purple at page 6 of the Staging Plan; and
   5.8 Practical Completion (SP 7).

6. The Project Manager under the Contract was First Urban Pty Ltd.

7. Probuild entered into a separate contract with V601 as construction manager for 'early works' on the Site including demolition, excavation, piling and other associated early works (Early Works Contract).

Dates for Practical Completion

8. The parties agreed that for the purposes of clause 9A(b)(iii) of the Contract the WUC would commence on 22 December 2011; and
   8.2 **The Dates for Practical Completion for each Separable Portion were changed from the dates in Annexure Part A of the Contract to the following dates**:

Separable Portion	**Description**	**Contract Date for Practical Completion**	**Changed Date for Practical Completion [see letter 16/2/18 Probuild's lawyers to Lyall]**

Building A1 (SP1)	Retail & car parking	16 Jan 2013	18 April 2013 [see letter 16/2/18 Probuild's lawyers to Lyall]
Building A2 (SP6A)	Residential	23 May 2013	9 August 2013
Building B (SP6)	Residential & car parking	23 May 2013	9 August 2013
Building C1 (SP2)	Commercial & car parking	21 Jan 2013	11 April 2013
Building C2 (SP5)	Residential & car parking	10 May 2013	29 July 2013
Building D (SP3)	Residential & car parking	29 Mar 2013	18 June 2013
Building E (SP4)	Residential & car parking	6 May 2013	23 July 2013
PC (SP7)	Practical Completion	31 May 2013	20 August 2013

Summary of Probuild's EOT claims

19. In essence, the EOT claims by Probuild in the Proceeding are:.

EOT 1 — 'soft start'

20. As set out above, Probuild carried out some Early Works at the Site under a separate Early Works Contract.

21. In the Proceeding, Probuild claims an EOT under clause 9A and/or 34 of the Contract for the period up to the date on which Early Works Completion was actually achieved.

EOTs 2A and 3 — soft spots, contamination and vapour barrier

22. 'EOT 2A' relates to delays caused by the discovery of unstable subsoil conditions in the area of the Site to the north of Shamrock Street (Soft Spots).

23. Probuild asserts that the Soft Spots meant that it was necessary:
    23.1 for contractors performing the Early Works to install a piling platform to enable access by piling rigs and sheet piling for the core to Building E; and
    23.2 for Probuild to redesign the piling and retention works in the area of the Site to the north of Shamrock Street on account of the Soft Spots.

24. 'EOT 3' relates to the discovery of petrochemical contamination of the ground in the south-west corner of the Site (Contamination). Upon discovering the existence of Contamination, it was necessary for contractors performing the Early Works to design and install a vapour barrier.

EOT 6 — Childcare

27. In respect of 'EOT 6', Probuild claims that it was delayed as a result of the following:
    27.1 in around mid-2012, V601 notified Probuild that it intended to alter the designated use of part of Building C from commercial space to space allocated for a childcare centre;
    27.2 between mid-2012 and 13 February 2013, V601 did not make a decision and, or alternatively, did not notify Probuild of any decision, to alter the designated use of part of Building C from commercial space to space allocated for a childcare centre; and/or
    27.3 on or about 13 February 2013, the Project Manager directed Probuild to vary the WUC by altering the designated use of part of Building C from commercial space to space allocated for a childcare centre.

EOT 7 — town planning - glazing

28. Probuild claims that:
    28.1 V601 did not obtain town-planning approval in relation to the glazing performance criteria, including acoustic requirements, for the windows to be incorporated into the Works until about 14 December 2012; and
    28.2 it was delayed in completing the glazing matrix for the windows to be included in the works until town-planning approval had been obtained in relation to the glazing performance criteria, such that:
        28.2.1 it could not take steps to procure the glazing or window frames to be included in the works in accordance with its obligations under clause 11.1(c) of the Contract before about 14 December 2012; and/or
        28.2.2 the glazing or window frames were not available for incorporation in the works in accordance with Probuild's obligations under clause 11.1(c) of the Contract.

176 By letter of instruction dated 16 February 2017, Probuild's lawyers further requested that Lyall:

(a) provide expert opinion as to whether in relation to Probuild's EOT claims 1, 2A, 3, 4, 6 and 7, Probuild took all reasonable measures to minimise the delay incurred, including by resequencing or reprogramming the performance of WUC where it was reasonably practicable to do so; and

(b) provide expert opinion as to whether in relation to Probuild's EOT claims 1, 2A and 3, the delay events delayed or disrupted Probuild, and, if so, to what

extent. In answering this question, please identify all critical and non-critical delays and disruptions.

Lyall Second Report (4 May 2018)

177 By letter of instruction dated 24 April 2018, Lyall was requested by Probuild's lawyers to provide a supplementary report including:

(a) A visual representation (for example, in the form of a gantt chart or program) showing:
  (i) the assessed critical delay periods from your Report in:
    A. calendar days; and
    B. Working Days;
  for each delay event so that the extent of any cross-over between events can easily be seen; and
  (ii) the period(s) of time (in both calendar and Working Days) when:
  A. cranes were on site; and
  B. hoists were on site; and

(b) a separate calculation of the assessed critical delay periods from your Report (expressed in both calendar days and Working Days), having regard to any period of overlap between delay events (i.e. so that where 2 Separable Portions are in delay on a given Working Day, that Working Day is counted only once).

178 By further letter of instruction dated 13 December 2018, Probuild's lawyers requested that Lyall:

(a) provide a supplementary report which responds to the two reports provided by Abbott dated 12 September 2018 and 17 October 2018, and provides a prospective assessment of EOTs 2A, 3, 4, 6 and 7; and

(b) provide further instructions:

  (i) in addition to preparing a report which replies to the expert report of Mr Steve Abbott dated 12 September 2012 (First Abbott Report), you are instructed to prepare a report which replies to those aspects of Mr Abbott's report dated 17 October 2012 (Second Abbott Report) that you consider warrant a response or clarification;

(ii) in particular, at section 6.2.1 of the report of Steve Abbott dated 17 October 2018 (Second Abbott Report), Mr Abbott asserts that clause 34 of the Contract requires that there be a prospective form of delay analysis of the Extensions of Time the subject of the proceeding; and

(iii) we note in your first report that you say a retrospective analysis is appropriate in this case. However, for the purpose of this reply report, you are instructed to make the assumption that a prospective analysis is required by clause 34 of the Contract. Accordingly, could you please undertake such an analysis in respect of EOTs 2A, 3, 4, 6 and 7.

Programming Experts' Joint Reports 2 and 3

179 Lyall and Abbott also produced joint reports entitled Programming Experts' Joint Report 2 (8 February 2019) and Programming Experts' Joint Report 3 (15 February 2019).

Peter Picking

180 Peter Picking (Picking) gave expert evidence in support of Probuild's Project management expert. Picking is a Consultant with Advisian Pty Ltd, having worked for Advisian since April 2014, with prior extensive experience in various roles with general contractors, a developer, and a specialist contractor, in respect of design management and delivery of a diverse range of projects.

181 Picking's experience includes his employment with Abigroup Contractors, responsible for the design and construction of the Multi-Use Arena (MUA) Contract in Sydney. This project incorporated the Sydney SuperDome PPP BOOT project, which was developed for the Olympic Games and which was to be operated by an Abigroup entity. The MUA works included the preparation of the existing Site civil works, the design and construction of the arena, the largest carpark in the southern hemisphere, and significant public domain landscaping.

182 Picking's qualifications include an Associateship Diploma of Building, Royal Melbourne Institute of Technology. He was the President, Master Builders Association of Victoria (2015–2016), immediate past President and Director of the Master Builders Association of Victoria, and a Fellow of the Australian Institute of Building.

Picking First Report (16 October 2018)

183 By letter of instruction dated 3 October 2018, Probuild's lawyers asked Picking to address a number of issues, including three questions in relation to the Probuild claim 'EOT 7 — glazing/town planning', namely:

> (a) Was Probuild provided with sufficient information to place the order for the windows prior to and at the date of the Contract.
>
> (b) During the progress of the works, Probuild was informed that there was a proposed change to the design of some windows on the façade of the building on 15 of the 467 apartments to be constructed. Would that event prevent Probuild from:
> (i) placing the order; and
> (ii) installing;
> the balance of the windows for the 452 apartments that were not affected by this change.
>
> (c) Assume for the purposes that the effect of the variation was to prevent Probuild from ordering all the windows, what steps would a reasonable design and construct contractor take by way of temporary works or otherwise to mitigate the impact of the variation.

Picking Second Report (20 December 2018)

184 By a further letter of instruction dated 23 November 2018, Probuild's lawyers requested Picking to deal with:

> EOT 2A: Discovery of soft spots
>
> 1. The Golders Report dated 30 June 2011 and 17 August 2011, 20 August 2011, 22 November 2011, 16 December 2011 and 18 January 2012 reveals the presence and extent of fill material over part of the Site. Golder's opine that the relevant area identified had a limited bearing capacity and would need to be reinforced to allow heavy machinery to operate on the identified area of the Site. In light of those reports:
> (a) what steps should a reasonable D&C Contractor have taken to minimise the impact of the soft spots on the program?; and
> (b) give your opinion as to whether Probuild took adequate steps

to minimise the impact of the soft spots on the program.

2. Assume that Probuild made a decision in early April 2012 to relocate the ramp from Building C so as to encroach on Building E so as to make Building C available.
   (a) Would a reasonable D&C Contractor have made such a decision in all the circumstances?
   (b) Would a reasonable D&C Contractor have moved the ramp so as to prevent the completion of slab B8?

185 Probuild's lawyers also requested that Picking:

8.1 review the Abbott Supplementary Report, and

8.2 set out your expert opinion in response to the matters raised in the Abbott Supplementary Report relating to project management. Where you disagree with any of the conclusions reached by Mr Abbott, please explain why your opinion differs.

Programming Experts' Joint Report 1

186 Picking and Abbott also produced a joint report entitled Programming Experts' Joint Report 1 (5 February 2019).

Mike Cox

187 Mike Cox (Cox) gave evidence in support of Probuild's quantum case. Cox is a Chartered Quantity Surveyor with Currie & Brown, with over 35 years' experience in the construction industry, and has extensive experience in the preparation of estimates, cost planning, managing construction works, and finalising accounts, on various types of projects including residential and mixed-use developments.

188 Cox is a member of the Royal Institute of Chartered Surveyors (RICS). He holds an Advanced Professional Award in Expert Witness Evidence and is a member of the RICS Oceania Expert Witness Registration Scheme.

Cox First Report (8 June 2018)

189 By letter of instruction dated 14 December 2017, Probuild's lawyers requested that Cox provide his expert opinion on Probuild's entitlement to delay damages, bonus payments, and/or an acceleration payment, as well as Probuild's entitlement to be paid a variation relating to the façade return walls.

190 Cox was also instructed to provide his opinion on Probuild's acceleration claims, in relation to which he was instructed as follows:

> **Summary of Acceleration Claim**
>
> 33. Probuild asserts that it 'accelerated' the performance of WUC in an attempt to reduce or overcome one or more of the delay events the subject of Probuild's EOT claims 1, 2A, 3, 4, 6 and 7, or alternatively in an attempt to achieve Practical Completion by the Date for Practical Completion certified by the Project Manager.
>
> 34. Probuild claims to be entitled to recover from the Plaintiff the costs that Probuild incurred in accelerating the performance of the WUC by reason of (amongst other things) the Project Manager:
>
> 34.1 failing, refusing or neglecting to approve updated versions of programs submitted by Probuild to the Project Manager during the course of the Project; and/or
>
> 34.2 failing to grant in full extensions of time to the Dates for Practical Completion which Probuild was entitled to receive.
>
> **Summary of Prevention Principle claim**
>
> 35. Probuild alternatively asserts that the Contract's mechanism for awarding extensions of time does not apply to its EOT claims 1, 2A, 3, 4, 6 and 7, and that it was prevented from achieving Practical Completion by the Dates for Practical Completion by the events giving rise to those EOT claims.
>
> 36. Probuild therefore claims to be entitled to recover from the Plaintiff the additional costs it incurred by reason of the delay or disruption caused by the events referred to above.
>
> **Summary of Façade Variation**
>
> 37. Appendix 2 to the Contract contains the Principal's Project Requirements in relation to the Project (PPR). There is a 'Schedule of Clarifications' at the back of the PPR.
>
> 38. Item 14 of the Schedule of Clarifications provides that:
>
> > 'The extent of precast concrete façade panels included in the Contract Sum is to be in accordance with the drawings marked up and included in the Preliminary Design.'
>
> 39. Probuild alleges that it was:
>
> 39.1 only obliged under the Contract to construct the façade panels referred to in Tender Addendum 4 from precast concrete, but there was no requirement to the effect that the return walls to those panels also to be constructed from precast concrete (and therefore it was permissible for Probuild to construct the return walls using a lightweight material); and
>
> 39.2 later directed to vary the WUC by constructing the façade

return walls in precast concrete (Façade Variation).

Cox Second Report (26 October 2018)

191 By letter of instruction dated 21 September 2018 from Probuild's lawyers, Cox was provided with the following further instructions:

> We have recently received correspondence from the Plaintiff's solicitors, in which they assert that Probuild must apportion its delay damages claims by reference to Separable Portions the subject of each extension of time (EOT) claim. This correspondence is enclosed for your reference.
>
> It is a legal question as to whether delay damages are required to be apportioned in the manner asserted by the Plaintiff's solicitors. However, we anticipate that at the trial of this Proceeding, the Plaintiff will make the 'apportionment' argument it has foreshadowed in recent correspondence.
>
> Accordingly, on the assumption that the Plaintiff's apportionment argument is correct, we request that you prepare a supplementary expert opinion which addresses the following:
>
> (a) What is a reasonable methodology for apportioning Probuild's reasonable and necessarily incurred direct on-Site time-related costs, including on-Site preliminaries costs, to each Separable Portion the subject of an EOT claim, having regard to clause 34.9 of the Contract. In answering this question, please discuss why your methodology is preferred; and
>
> (b) Having regard to your answer to the above question, and using your preferred methodology with respect to each EOT claim as identified in the reports prepared by James Lyall of HKA and dated 12 April 2018 and 4 May 2018, please apportion to each Separable Portion Probuild's reasonable and necessarily incurred direct on-Site time-related costs, including on-Site preliminaries costs.

Cox Third Report (20 December 2018)

192 By letter of instruction dated 13 December 2018, Cox was further instructed by Probuild's lawyers to prepare a report which replies to those aspects of Birchall's reports dated 21 September 2012 (Birchall First Report) and 5 October 2012 (Birchall Second Report) that he considered warranted a response or clarification. Birchall presented expert evidence for V601 in relation to quantum.

Quantum Experts' Joint Reports 1 and 2

193 Cox and Birchall also produced joint reports entitled Quantum Experts' Joint Report 1 (5 February 2019) and Quantum Experts' Joint Report 2 (13 February 2019).

The Joint Expert Reports (Programming)

194 By an Order made in the proceeding on 23 October 2018, the parties' Programming Experts, with the assistance of a Facilitator (Dr Donald Charrett, an experienced Engineer and practising Barrister), prepared Joint Expert Reports summarising their respective expert opinions in relation to programming, delay, and time extension entitlement issues in this proceeding.

The Joint Expert Reports (Quantum)

195 By an Order made in the proceeding on 23 October 2018, the parties' Quantum Experts, with the assistance of a Facilitator (Dr Donald Charrett), prepared Joint Expert Reports on quantum-related issues which summarised each Expert's respective views.

196 The Quantum Experts' Joint Report 1 (5 February 2019) does not consider the quantum of costs arising from any extensions of time determined by the Programming Experts. The Quantum Experts' Joint Report is therefore confined to those quantum issues that do not involve the valuation of any time extension costs.

197 By the Quantum Experts' Joint Report 2 (13 February 2019), Cox and Birchall report that they met in conference on 13 February 2019, chaired by the Facilitator, Dr Donald Charrett, and assessed the extension of time costs claimed by Probuild.

General disputes

198 Two overarching general disputes between the parties may conveniently be determined before turning to a number of issues about the proper interpretation and application of the Contract (mainly in connection with the operation of the time extension provisions of the Contract); and then to V601's claim for liquidated damages and Probuild's claims for extensions of time, its related claims for delay costs, and the claims in relation to the façade Variation and the bonus that Probuild seeks for early completion.

199 Those two overarching general disputes arise in relation to:

(a) the attack by Probuild on the independence of the Project Manager, who was engaged by V601 and charged with both administrative obligations under the Contract, and to act as the independent assessor and certifier under the Contract including, in particular, in relation to the Contractor's extension of time claims under cl 34 of the Contract; and

(b) the dispute between the parties as to the requirements of cl 34 of the Contract, in particular cl 34.4(b)(ii), and as to which program and programming analysis is required or permissible to establish delay on the critical path in respect of a relevant delay.

The Project Manager's role and the question of independence

200 As the plaintiff in this proceeding, V601 seeks liquidated damages in the sum of $4,712,519. In this claim, V601 relies upon the Certificate issued by the Project Manager, Nave. V601's case is that the certified sum and Liquidated Damages is due and payable by Probuild under the Contract. Therefore V601's claim in relation to Liquidated Damages is in the nature of a claim for a debt arising on 18 December 2013, and created by Liquidated Damages Certificate 5.

201 V601 submits, as its primary submission in response to Probuild's case impugning the Project Manager's independence, that:[108]

> The first is the issue of independence, which V601 says is irrelevant to these proceedings. As a matter of fact, V601 concedes that all of the Project Manager's determinations are the subject of a Notice of Dispute under clause 42.1 and, in accordance with clause 42.2, Probuild has now instituted Court proceedings to resolve those disputes.

202 V601 also submitted, in relation to the Project Manager's obligations under cl 20 and in response to Probuild's arguments seeking to impugn the Project Manager, that Probuild misunderstands the concept of 'independence' under the Contract. V601 contends that the Project Manager is not required to comply with the requirements relating to independence in cl 20.2 of the Contract in relation to extensions of time

108 V601 Closing Submissions, 12 June 2019, [2]–[3].

granted pursuant to cl 34.5(b), or in relation to all aspects of a Contractor's claim for Variation under the Contract.

203 V601 contends in summary that:

(a) Probuild's case alleging that the Project Manager lacked independence only superficially deals with cls 20.2 and 34 of the Contract, and in doing so, misstates their effect. V601 also asserts that Probuild has ignored the provisions of cls 20(b)(ii) and 20.1 of the Contract in relation to the Project Manager;

(b) Probuild has failed to identify how the conduct asserted by Probuild has breached cls 20.2 and 34 of the Contract, and the Court cannot be confident as to how Probuild puts its case, especially when, as part of its case in relation to the Project Manager's independence, it reflects on the professional and personal integrity of Nave;[109]

(c) V601 adds that Probuild's submissions on the independence of the Project Manager have placed V601 in an impossible position, whereby V601 would have to analyse the Contract and discuss the alleged breaches of it, thus effectively placing a reverse onus on V601 by forcing it to defend a case which has not been put or articulated.[110]

204 V601 claims that, as a result of the above, it has elected to simply submit the effect of the Contract in relation to the Project Manager's role and not traverse the factual matters relied upon by Probuild, in Probuild's Indicia Schedule, as evidence impugning the Project Manager's lack of independence and breaches in that regard.[111]

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109 V601 Closing Submissions, 12 June 2019, [10]–[12].
110 V601 Closing Submissions, 12 June 2019, [13].
111 Probuild Closing Submissions, 11 June 2019, [14].

V601's submissions in relation to the Project Manager's role

205 V601 submits that, pursuant to cl 20 of the Contract, the Project Manager has been charged with a dichotomous role, which V601 characterises as encompassing two 'identities'. V601 submits that one role and identity is as the principal's agent under cl 20.1 of the Contract, which relates to a range of administrative matters (Agents Functions).[112] The other role and identity is that of assessor and certifier under cl 20.2 of the Contract (Independent Functions).

206 V601 submits that Probuild's attack on the Project Manager's independence has failed to identify and maintain the distinction between the Project Manager's Agent Functions and its Independent Functions. Further, that Probuild has overstated and exaggerated the Independence Functions, and has applied the Project Manager's obligations in relation to its Independent Functions to all of the Project Manager's conduct;[113] thereby failing to appreciate the limited nature of the Project Manager's obligations under cl 20.2 of the Contract.

207 V601 submits that, pursuant to cl 20(a) of the Contract, in substance, the Project Manager is the Principal's agent in respect of every function to be undertaken by the Project Manager, except those Project Manager functions exhaustively listed in cl 20.2 of the Contract. Further, V601 submits that, as a result, the Project Manager's 'default' role under the Contract is to act as the Project Manager's agent.[114]

208 V601, however, accepts that in respect of the Project Manager's Agent Functions, it is obliged to ensure that the Project Manager acts honestly and within the contractual time limits; alternatively, within a reasonable time frame.[115]

209 V601 also submits, as a matter of contractual interpretation, that the Project Manager's Independent Functions are exhaustively listed in cl 20.2(a) of the

112 V601 Closing Submissions, 12 June 2019, [15].
113 V601 Closing Submissions, 12 June 2019, [16].
114 V601 Closing Submissions, 12 June 2019, [18].
115 V601 Closing Submissions, 12 June 2019, [20].

Contract.[116]

210 V601 submits that the Project Manager is only required to comply with cl 20.2 in relation to the limited scope of the various Independent Functions. V601 also submits that the Project Manager is not required to comply with cl 20.2 (the Independent Functions) in every respect, in relation to Probuild's claims for extensions of time, delay damages, and variation claims under the Contract.[117]

211 On this aspect, V601 submits:[118]

> Each of these specific functions utilises the wording of a particular provision in the Contract and, as such, can be traced to the performance of a function under that particular provision. Accordingly, a proper reading of the Contract demonstrates that the Independent Functions are limited in scope. The Project Manager is only required to comply with clause 20.2 in the context of these functions and not, as Probuild has submitted, in every respect relating to Probuild's claims for an EOT, delay damages and Variations.

212 V601 also submits that cl 20.2(b) of the Contract sets out the Project Manager's rights and obligations in relation to exercising each of the Independent Functions and:

(a) does not impose any unconstrained obligation upon the Project Manager to act 'independently', but only restricts the Project Manager's interaction with the parties;

(b) cl 20.2(b)(i) only restrains the Project Manager's interaction with the parties, thereby requiring the Project Manager to maintain independence from Probuild and V601, however;

(c) cl 20.2(b)(i) removes all constraints on the Project Manager's right to consult with the parties; and

(d) cl 20.2(b)(ii) removes any constraints on the Project Manager's right to consult with the parties.

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116 V601 Closing Submissions, 12 June 2019, [21]–[22].
117 V601 Closing Submissions, 12 June 2019, [22].
118 V601 Closing Submissions, 12 June 2019, [22].

213 V601 contends that the overall operation of cl 20.2, as outlined above, results in cl 20.2(b)(i) only requiring that the Project Manager maintain independence from V601 and Probuild, and that the effect of cl 20.2(b)(ii) is that the Project Manager is entitled to consult with either of the parties. Put another way, V601 submits that there is no basis upon which to conclude that cl 20.2 of the Contract prevents the Project Manager from consulting with third parties.

214 V601 also argues that cl 20.2(b)(ii) of the Contract places no restriction on the Project Manager's right to consult either Probuild or V601 and does not limit the extent of consultation with those parties. Therefore, V601 submits that the Contract permits the Project Manager to consult with only one of the parties to the Contract on a matter, or matters, and also submits that, by implication, the Project Manager is not obliged to consult equally with both parties.

V601's submissions on Probuild's entitlement to extensions of time

215 V601 submits that cl 34 of the Contract requires the Project Manager to adopt two different roles when considering Probuild's claims for extension of time. Those different roles relate to considerations as to whether Probuild has made its extension of time claim in accordance with cl 34.4(b) of the Contract (the claim requirement); and whether the delay has affected an activity which, in the opinion of the Project Manager, is on the Critical Path of the Approved Contractor Program as it existed at the time of delay (the critical path requirements), and whether Probuild has taken all reasonable measures to preclude and minimise delay (the mitigation requirement).[119]

216 V601 accepts that the Project Manager undertakes the above tasks pursuant to cls 20.2 and 34.4(b) of the Contract and, accordingly, in undertaking the tasks referred to in the preceding paragraph, the Project Manager is determining whether Probuild is 'entitled' to an extension of time. By undertaking these tasks, V601 appears to accept that the Project Manager's Independent Function obligations are applicable.[120]

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119 V601 Closing Submissions, 12 June 2019, [25]–[26].
120 V601 Closing Submissions, 12 June 2019, [26]–[27].

217 V601 submits that once Probuild can establish (or fails to establish) an entitlement to an extension of time, the Project Manager has a separate function to discharge under cl 34.5; namely, under cl 34.5, in the assessment of whether Probuild is entitled to an extension of time under cl 34.4, the Project Manager may:

(a) assess the extent of the extension of time to which Probuild is entitled under cl 34.5(a) of the Contract; and

(b) in certain circumstances, the Project Manager may direct an appropriate extension of time under cl 34.5(b), even if Probuild has not claimed an extension of time, or has claimed an extension of time but not established that it is entitled to an extension of time.[121]

218 V601 also submits that in granting or directing an extension of time under cl 34.5, the Project Manager is not subject to cl 20.2 of the Contract.[122]

219 V601 submits that:

(a) '[the] [g]ranting or directing of an extension of time under clause 34.5 is not subject to clause 20.2. Probuild's case is fundamentally misconceived. What Nave in fact did, as the evidence reveals, was, finding himself in a position where he could not be satisfied that Probuild were entitled to an extension of time, because he had not been provided with the appropriate program (which is now admitted), Nave determined to exercise his sole and unfettered discretion to grant an extension of time. The exercise of that discretion was not subject to the clause 20.2'. V601 submits that the 'whole of Probuild's case on independence fails at that point'.[123]

(b) V601 submits, on the above basis, that the whole of Probuild's case has misunderstood what the Project Manager has done.

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121 V601 Closing Submissions, 12 June 2019, [28].
122 V601 Closing Submissions, 12 June 2019, [22], [23], [28], and [29].
123 V601 Closing Submissions, 12 June 2019, [29].

220 V601 submitted that the determination of 20 September 2012 was a direction, rather than an assessment and notification, and therefore did not therefore fall under cl 20.2 (independent functions of the Project Manager),[124] thus avoiding the requirement of independence and impartiality by the Project Manager.[125]

221 V601 earlier submitted that cl 20.2 'imposes the obligation of [the] independent function in relation to 20.2(a)(i), Entitlement to an EOT',[126] and reiterated its submissions on what it contends is the 'distinction [being] maintained throughout the document, between an assessment and an entitlement'.[127] V601 enlists that suggested distinction to support its thesis that cl 20.2(a)(i) relates to the exercise of determining an *entitlement* to an EOT, but does not inform the Project Manager's exercise of power under cl 34.5(b) of the Contract (including directing an EOT).[128]

222 Further, V601 submits that in assessing and certifying an entitlement to an EOT claim, the Project Manager is not constrained by cl 20.2, and therefore 'doesn't have to act independently in doing that'.[129] V601 accepted that it was 'not an immediately attractive submission' and dismissed the notion of an implied term, stating:

> If you say there's an implied term, no place to imply a term here. As a matter of construction, well, shall we do violence to the language by saying, 'Well, entitled means what we actually – it means assessment as well'.[130]

223 On the basis of V601's above interpretation of the Contract, V601 asserts that the Project Manager, in determining whether Probuild is entitled to an extension of time, can:

(a) under cls 20.2(b)(ii) and 34.4(b)(i), may consult with either or both of the parties (and is not precluded from consulting with anyone else) in relation to whether Probuild's claim has been made in accordance with the requirements

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124 T1826.
125 T1827.
126 T1826.
127 T1828.
128 T1828; see also T1829–T1832 and T1834.
129 T1833.
130 T1834.

of cl 34.3;

(b) the parties must be taken to have agreed that the Project Manager is entitled to obtain third party advice as to the operation of the express provisions of the Contract.

V601 points out that there may be grave consequences for either party if the Project Manager misinterprets the Contract. V601 submits that cl 20.2 does not constrain the Project Manager's ability to obtain advice from appropriate third parties, including suitably skilled lawyers;

(c) by virtue of cls 20.2(b)(ii), 34.4(b)(i), and 34.4(b)(ii), the Project Manager is entitled to consult with either or both of the parties (and is not precluded from consulting with anyone else), in relation to whether Probuild's claim complies with cl 34.3 of the Contract, and as to whether the activity which Probuild claims was delayed was on the critical path of the Approved Contractor's Program. V601 submits in the subject circumstances that it was reasonable for the Project Manager to consult with TBH where 'Probuild failed or refused to provide a program that complied with cl 32 to support its claims'.[131]

Further, the Project Manager was entitled to rely on TBH, and to give input or material from TBH such weight as he considered appropriate.

224 V601 ultimately contends that the Project Manager acted independently and honestly, and otherwise in accord with the requirements of the Contract, and further that the Project Manager's Certificates, in particular Certificate 5 in relation to Liquidated Damages is valid and enforceable.

Probuild's submissions on the Project Manager's lack of independence

225 Probuild submits that the Project Manager's independence was compromised prior,

131 V601 Closing Submissions, 12 June 2019, [37].

and in relation to the issue of Certificate 5; and as a consequence, the Project Manager's Certificates, including Liquidated Damages Certificate 5, are void and should be set aside.

226 Probuild also contends that Certificate 5, which was issued by the Project Manager to certify the Liquidated Damages claimed by V601, is, in any event, erroneous because it does not take into account Probuild's entitlements to extensions of time under the Contract.

227 Further, Probuild impugns the Project Manager's conduct in relation to the role it undertook, in assessing and determining Probuild's entitlement under the Contract, and in particular Probuild's entitlements to extensions of time and associated delay costs.

228 Probuild submits that it is well recognised that a certifier's determination may be ignored if the person purporting to certify fails to conduct themselves in accordance with the empowering contract, or fails to conduct themselves to the required standard. This may occur:

(i) where the decision-maker has a special interest in the result;

(ii) in the case of fraud or collusive conduct;

(iii) in the case of improper pressure, influence or interference by a principal;

(iv) where the principal's breach of contract, or other act or omission, prevents the contractor from obtaining a decision;

(v) where the decision-maker unreasonably refuses to consider the matter; and

(vi) where the decision-maker takes improper considerations into account.

Probuild submits that the above circumstances, which are not exhaustive, also include the decision-maker's conduct in failing to satisfy the proper standard of

fairness, independence and impartiality.[132]

229 Probuild submits that there may be a relevant interference with a superintendent's independence 'where there is an attempt to lead the superintendent astray in the interests of the principal', or where there are communications between the principal and superintendent 'of an improper character'.[133]

230 Probuild also submits that the Project Manager is in breach of its cl 20.2 duties if it communicates unilaterally with the principal on matters antithetical to the Contractor's entitlements under the Contract, in respect of which the Project Manager is required to act as certifier.

Probuild's submissions in relation to cls 20.1 and 20.2 of the Contract

The Project Manager's relevant duties and obligations

231 Although set out earlier, it is convenient to again refer to cl 20 of the Contract, which provides:

> **20 Project Manager**
>
> **20.1 Agent functions**
> (a) The *Principal* shall ensure that at all times there is a *Project Manager*.
> (b) The *Principal* has appointed the *Project Manager* as its agent under the *Contract* in relation to the following functions and any other function which the *Principal* notifies the *Contractor* of in writing from time to time but in each case, in advance of the exercise of such function by the *Project Manager*:
> (i) assessing the value of *work*;
> (ii) certification of moneys due and owing as between the *Contractor* and *Principal* by way of the issue of a *Payment Schedule* under clause 37.2 or a *Final Certificate* under clause 37.4;
> (iii) directing *Variations* under clause 36.1; and
> (iv) any determination required as to the quality of any *work*.
> (c) The *Principal* shall ensure that in the exercise of the *Project Manager's* functions as the *Principal's* agent under the *Contract*, the *Project Manager*:
> (i) acts honestly; and

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132 *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd* [2003] FCA 174, [89]. See also *Hickman & Co v Roberts* [1913] AC 229; *Kell & Rigby Holdings Pty Ltd v Lindsay Bennelong Developments Pty Ltd* [2010] NSWSC 777, [57].

133 *Kane Constructions Pty Ltd v Sopov* (2006) 22 BCL 92, [624].

(ii) acts within the time prescribed under the *Contract* or where no time is prescribed, within a reasonable time,

but is not, as the *Principal's* agent, required to act independently or impartially.

232 Further, the provision concerning independent functions at cl 20.2 of the Contract, provides:

20.2 Independent functions

(a) In addition to the *Project Manager's* functions as the *Principal's* agent as set out in clause 20.1, the *Project Manager* shall also act as assessor and certifier in respect of:
  (i) whether the *Contractor* is entitled to an *EOT*;
  (ii) whether the *Contractor* has achieved *Practical Completion*;
  (iii) whether the *Contractor* is entitled to delay damages pursuant to clause 34.9; and
  (iv) in the assessment of the price of a *Variation* in accordance with clause 36.4.

(b) In relation to the four functions described in clause 20.2(a):
  (i) the *Project Manager* shall act independently of the parties and neither party shall be entitled to give *Directions* to the *Project Manager*;
  (ii) the *Project Manager* is entitled to consult with either one of or both parties but is not obliged to consult with both parties; and
  (iii) the *Project Manager* shall act reasonably in exercising the identified functions and shall have regard to the express requirements of the *Contract* and not the commercial interests of either party.

233 Probuild submits, contrary to V601's submission, that the Contract does not distinguish between 'entitlement' and 'assessment', particularly in relation to the operation of cls 20.1, 20.2 and 34.4 of the Contract.[134]

234 Probuild submits that cl 20.2(a) provides that the Project Manager shall act as assessor and certifier for various functions, including whether the Contractor is entitled to an extension of time and whether, consequentially, the Contractor is entitled to delay damages under cl 34.9 of the Contract. Further, Probuild observes that the terms of cl 20.2(a)(i) do not limit the Project Manager's assessments to those necessary to address the Contractor's cl 34.4 entitlements.[135]

235 Probuild submits that the Contract recognises the functions of the Project Manager in

134 Probuild Further Reply Closing Submissions, 18 June 2019, [3].
135 Probuild Further Reply Closing Submissions, 18 June 2019, [4]–[5].

respect of which it is required to act independently, including by the language employed in cls 20.2 and 34.4. Probuild contends that the Project Manager's independent functions include those in relation to which the Project Manager both assesses and certifies the Contractor's claims.

236 In relation to V601's submissions concerning the operation of cl 20.2(b), and the Project Manager's entitlement to consult with the Contractor, the Principal, and third parties, Probuild submits that:[136]

> 30. V601 contends at [32] that clause 20.2(b)(ii) provides the Project Manager with an unfettered right to consult:
>
> > Clause 20.2(b)(ii) does not place any limitations on the Project Manager's right to consult with either party. There is no limit to the extent of such consultation. There is no limit to the subject-matter of such consultation.
>
> 31. This interpretation obviously seeks to excuse the extensive collusion between V601, its solicitors, TBH and the Project Manager when determining Probuild's EOT2A and 3 claims, the Façade Variation and the certification of Practical Completion.
>
> 32. It is flawed because it seeks to apply clause 20.2(b)(ii) out of context and in isolation. The Project Manager's entitlement to consult is one integer of clause 20.2(b). The other two integers are: (i) the independence requirement; and (ii) that the Project Manager act reasonably in exercising the functions listed in clause 20.2(a) having regard to the express requirements of the Contract, and not the parties' commercial interests. These integers are cumulative. This is indicated by the word 'and' at the end of clause 20.2(b)(ii).
>
> 33. Accordingly, when these integers are read together, the proper construction of clause 20.2(b)(ii) does not permit the Project Manager to conduct consultations in a partisan way when performing its 'Independent Functions'. While the Project Manager's consultations need not be with both parties, if appropriate, the consultations cannot be for the purpose of devising and advancing V601's commercial strategy to answer Probuild's claim, or to advance V601's commercial interests. Instead, the consultations permitted are those required for the proper determination of Probuild's claims.
>
> 34. V601's reliance on clause 20.2(b)(ii) to excuse its collusion with the Project Manager is therefore misconceived. It has created for itself the metaphysical challenge of explaining how the Project Manager may conduct 'consultations' regarding a particular claim in a partisan

136 Probuild Reply Closing Submissions, 12 June 2019, [30]–[34].

manner while simultaneously acting independently.

Considerations/conclusions regarding the Project Manager

General observations – role of the superintendent

237 In general, the role of the superintendent in relation to an engineering and/or construction contract is to administer the contract and to ensure contractual obligations are performed. The superintendent's role is defined by the relevant terms of the contract and the common law.

238 The superintendent commonly fulfils two separate and distinct roles, namely:

(a) to act as an agent for the principal; and

(b) to act as an independent assessor and certifier.[137]

239 In the superintendent's role as agent of the principal, the superintendent acts in the principal's best interests and pursuant to the superintendent's obligations to the principal, subject to the obligations of both the principal and the superintendent under the relevant engineering and/or construction contract and in law.

240 However, in the role of assessor and certifier, the superintendent must ordinarily act independently, and in an impartial and fair manner, and must not act in a way that advances the principal's interests over those of the contractor.

241 The faithful performance of these two roles may give rise to tension.[138]

242 The specific term of the contract applicable to the superintendent's duties and obligations in respect of the contractor, and the work to be carried out under the contract, will usually largely define the superintendent's roles and define or materially inform the superintendent's obligations and duties when acting as an assessor and certifier.

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137 *Dixon v SA Railways Commissioner* (1923) 34 CLR 71, 112.

138 *Peninsula Balmain Pty Limited v Abigroup Contractors Limited* [2002] NSWCA 211; (2002) 18 BCL 322.

243 Normally, the powers conferred on the certifier by a clause empowering the principal to administer the contract are exercisable in the performance of a merely administrative function, and the contractor will, in such a case, ordinarily not have the right to be heard.[139]

244 However, the contractor may have the right to be heard when the superintendent is determining the contractor's entitlements, although it is not clear that the duty to act fairly and impartially generally extends that far.[140] The answer will turn on the role of the certifier and on the proper construction of the relevant contract. It may be the case that, on the proper construction of the contract, the rights of the contractor have not been infringed by a refusal to entertain a party's submission in relation to an entitlement under the contract which is the subject of certification.[141]

245 In *500 Burwood Highway Pty Ltd v Australian Unity*,[142] Vickery J held that a 'certifying expert' (in that case, a quantity surveyor, and in a position analogous to a superintendent) is under no obligation, when certifying, to provide procedural fairness or natural justice in the absence of an express contractual provision, subject always to the applicable agreement between the parties.

246 In the instant matter, the terms of cl 20.2(b)(ii) of the Contract provide that, in respect of matters where the Project Manager is required to act as assessor and certifier, the Project Manager is entitled to consult with the parties but is not obligated to do so. This, in my view, implies that the Project Manager may refuse either parties' representations in relation to any entitlement which the Project Manager is assessing for the purpose of certification. This provision of the Contract, in my view, taking into account the relevant contractual context, which includes that the Project Manager is obliged to act independently, impartially, reasonably, and fairly, and in

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139 *Bysouth v Shire of Blackburn and Mitcham (No 2)* [1928] VLR 562; see also, *Nelson Carlton Construction Co Ltd (in liq) v AC Hatrick (NZ) Ltd* [1964] NZLR 72.

140 *Nelson Carlton Construction Co v AC Hatrick (NZ) Ltd* [1965] NZLR 144, 151; see also, *John Holland Construction and Engineering Pty Ltd v Majorca Projects Pty Ltd* (1997) 13 BCL 235, 248 (*Majorca*).

141 *Isca Construction Co Pty Ltd v Grafton City Council* (1962) 8 LGRA 87.

142 [2012] VSC 596, [168]; see also *Arenson v Casson Beckman Rutley & Co* [1997] AC 405.

accord with the terms of the Contract, implies transparency in relation to any representations considered by the Project Manager, and provided by the Contractor or the Principal in support of the position that each may contend for in relation to a right or entitlement under or in relation to the Contract.

247 Further, ordinarily, a superintendent exercising the powers of an assessor and certifier continues to owe both contractual and tortious duties to the principal. In *Dymocks Book Arcade Pty Ltd v Capral Ltd*,[143] McDougall J saw nothing in recent decisions 'to subvert the proposition that a common law duty of care may exist alongside contractual duties'.

248 Here, however, Probuild and V601 do not raise any issue of tortious duty in respect of the Project Manager's conduct.

249 Further, a principal may be in breach of the contract with the contractor in circumstances where the principal has failed to discharge its contractual obligation to ensure that the superintendent has properly discharged its functions under the construction contract. The principal may also be liable in relation to the negligence of the superintendent, in certain circumstances.[144]

250 It is also trite that an assessor and certifier in the nature of a superintendent may also lose independence without actually intending to do so, or even without an understanding of having done so.[145]

251 Absent some contrary contractual provision,[146] ordinarily the certifier appointed under a construction or engineering contract, in making a determination in relation to a claimant party's entitlements is not acting as an arbitrator, or as agent for the parties, notwithstanding that the function of a certifier has sometimes been described as that of a quasi-arbitrator or even as that of an arbitrator.[147] However,

143 [2013] NSWSC 343, [213].
144 *Multiplex Constructions Pty Ltd v SOR Pty Ltd* (2001) 17 BCL 174.
145 (2006) 22 BCL 92, [623].
146 *Shaw v Melbourne Board of Works* (1898) 24 VLR 70.
147 *Hickman & Co v Roberts* [1913] AC 229.

such a determination must be made fairly,[148] impartially,[149] and independently.[150]

252 A certificate is normally in writing, but this is not an essential requirement at law unless the building contract specifies otherwise.[151] Whether a certificate is formally effective will depend upon its proper construction in light of any contractual obligations as to its issue and its form.[152] The function of the subject certificate in the administration of the project may also depend on the adroitness of the certifier.

253 If the certifier is not independent, the certifier may be disqualified from providing the certificate, and certificates already issued may be set aside.[153] A certificate which is produced by fraud,[154] or by improper collusion between the certifier and a party,[155] is vitiated and of no effect.[156]

254 In *John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd & Anor* (*Majorca*),[157] Byrne J held, in summary, that duty of care can exist between a superintendent and a contractor, if it can be established that the contractor relied and depended upon the careful and impartial performance of the superintendent's obligations. However, given the facts and circumstances of that case, no relevant duty of care arose.

255 Further, ordinarily, the duties of the certifier in relation to independence, impartiality, and fairness override any agency obligations that the superintendent owes the principal. Accordingly, the principal cannot direct the superintendent as to

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148 *Perini Corporation v Commonwealth of Australia* [1969] 2 NSWR 530, 536 (*Perini*); see also, *Aviation Pty Ltd v Commonwealth* (1990) 22 FCR 527.

149 *Majorca* (1996) 13 BCL 235; (1997) 13(1) BCL 28; see also, *Jackson v Barry Railways Cmr* [1893] 1 Ch 238, 247.

150 *Hickman & Co v Roberts* [1913] AC 229, 239; *Dixon v South Australian Railways Cmr* (1923) 34 CLR 71, 94–95.

151 *Northampton Gas-Light Co v Parnell* (1855) 15 FCB 630; 139 ER 572; see also, *Coker v Young* (1860) 2 F & F 98, 101.

152 *Kirsch v HP Brady Pty Ltd* (1937) 58 CLR 36; see also, *Shaw v Melbourne & Metropolitan Board of Works* (1898) 24 VLR 70.

153 *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* (2002) 18 BCL 322.

154 *Attorney-General v McLeod* (1893) 14 LR (NSW) 246.

155 *Perini* [1969] 2 NSWR 530

156 *Redmond v Wynne* (1892) 13 LR (NSW) L 39; 8 WN (NSW) 103.

157 (1996) 13 BCL 235; see also, *Northbuild Construction Pty Ltd v Napier Blakely Pty Ltd* [2006] QSC 133.

how to act as assessor and certifier. In the instant Contract, this position is expressly confirmed by the term of cl 20.2, including cl 20.2(b)(i).

256 In *Perini Corporation v Commonwealth of Australia* (*Perini*),[158] the superintendent was the director of works and was also in substance acting as certifier. The superintendent rejected extension of time applications in respect of wet weather. The superintendent's reasoning for these rejections turned on the departmental policies of the principal. The contractor argued that this conduct on the part of the superintendent was a breach of the superintendent's role as certifier and sued for damages.

257 The Court held in *Perini* that when the superintendent is acting in the capacity of certifier, the superintendent must ensure that it acts independently and, at all material times, exercises its own discretion.[159] The superintendent should, however, bear in mind the policies of the principal, although it would be wrong for the superintendent to regard itself as being bound by those policies.

258 The Court also held that there was an implied term that the principal would not interfere with the superintendent's duties as certifier and, additionally, that the principal was obliged to ensure the superintendent properly performed its duty as certifier.[160]

259 In *Kane Constructions Pty Ltd v Sopov*,[161] Warren CJ stated in relation to indicia impugning the conduct of the Superintendent that: [162]

> These include when the superintendent allows their judgment to be influenced; when the superintendent is in a position whereby the certificate is deprived of value; when the superintendent acts in the interests of one of the parties and by their direction; when the position is misconceived and the superintendent acts as mediator; when there is not sufficient firmness in order to decide questions based on his or her own opinion; where judgement and conduct are controlled by the principal; and where the superintendent

158 [1969] 2 NSWR 530.
159 *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* (2002) 18 BCL 322, 338.
160 *Perini* [1969] 2 NSWR 530, 543 (negative character) and 545 (positive character) (Macfarlan J).
161 (2006) 22 BCL 92 (*Kane*).
162 *Kane* (2006) 22 BCL 92, [623] (footnotes omitted).

> considers the assent of the principal to be necessary, has ceased to be a free agent and does not give full disclosure of every communication between the superintendent and the principal.

260 In *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd* (*Baulderstone*),[163] Finkelstein J stated in relation to the potential vulnerability of a certifier in this context:

> The route by which BHPL seeks to attack Cliftons' decision is indirect. I mean by this that BHPL does not, as it might have done, plead that the decisions in question should be disregarded on account of some vitiating factor. The cases establish that a person in the position of Cliftons (or Mr Crawford) exercising power under a contract to decide extensions of time and determine compensation claims must act honestly and fairly and if he does not his certificate can be ignored. *Hickman & Co v Roberts* [1913] AC 229 is a leading example of this type of case. The circumstances in which a certificate will be vitiated cannot be exhaustively stated. The most recent edition of *Hudson's Building and Engineering Contracts*, 11th ed 1995 by I N Duncan Wallace, suggests the following broad categories: (1) where the decision-maker has a special interest in the result; (2) fraud or collusive conduct; (3) improper pressure, influence or interference by the owner; (4) conduct which falls short of the proper standard of fairness, independence and impartiality; (5) breach of contract or other act or omission of the owner having the effect of preventing the builder obtaining a decision; (6) unreasonable refusal by the decision-maker to consider the matter; and (7) taking improper considerations into account.

261 In *Kell & Rigby Holdings Pty Ltd v Lindsay Bennelong Developments Pty Ltd* (*Kell & Rigby Holdings*),[164] Hammerschlag J also stated:

> Clause 23.1(a) provides that the Principal shall ensure that at all times there is a Superintendent and that in the exercise of the functions of the Superintendent under the Contract, the Superintendent acts honestly and fairly. In the present case the Principal and the Superintendent are one and the same person. Thus, it was incumbent on the defendant to act fairly. Clause 23.1(a) is an express imposition of a duty which would anyway ordinarily be imposed on a person in the position of Superintendent: *Perini Corporation v Commonwealth* [1969] 2 NSWR 530.
>
> If a person in a position of the Superintendent does not act honestly and fairly, his certificate can be ignored: *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd* [2003] FCA 174 at [89]; *Hickman & Co v Roberts* [1913] AC 229.

262 As earlier outlined, in *Perini*,[165] Macfarlan J held that a certifier must make a determination fairly and that a certificate produced by improper collusion between

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163 [2003] FCA 174, [89].
164 [2010] NSWSC 777, [56]–[57].
165 [1969] 2 NSWR 530.

the certifier and a party may be deemed ineffective.

263 Furthermore, in *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* (*Peninsula Balmain*),[166] the Court considered arguments in respect of the superintendent's role as an agent of the owner. Hodgson JA (with whom Mason P and Stein JA agreed) considered that the decision in *Perini* supported the view that a superintendent is the owner's agent in all matters, but only in a 'very loose' sense; and that, when a superintendent exercises certifying functions in respect of which it must act honestly and impartially, the superintendent is not acting as the owner's agent 'in the strict legal sense'.[167]

264 Here, pursuant to cl 20.2 of the Contract between V601 and Probuild, the general proposition referred to above in *Peninsula Balmain* is cast in clear express contractual terms and is beyond doubt.

265 Pursuant to the Contract, the Project Manager's functions are, I consider, consistent with those typically performed by superintendents. Clauses 20.2 and 34 recognised that the Project Manager is the assessor and certifier of Probuild's claims for extensions of time, delay damages, and valuing variations, and in relation to assessing whether Practical Completion was achieved.

266 Expressly, cl 20.2 of the Contract requires that, when performing the four functions of assessing and certifying the Contractor's:

(a) time extension entitlements;

(b) achievement of Practical Completion;

(c) entitlement to delay damages pursuant to cl 34.9 of the Contract;

(d) variation payment in accordance with cl 36.4 of the Contract,

166 (2002) 18 BCL 322.
167 *Peninsula Balmain* (2002) 18 BCL 322 [50].

the Project Manager must:

(e) act independently of the parties and not be the subject of any direction from a party;

(f) act reasonably;

(g) have regard to the express requirements of the Contract; and

(h) not act in the commercial interests of either party.

267 In my view, absent the above express terms, when performing a relevant assessment and certification, the above requirements referred to in cl 20.2 of the subject Contract at (e) to (h) above are imposed. I also observe that, in substance, the same four terms would ordinarily be imposed at law.[168]

268 Further, I observe that the terms of the Project Management Agreement between V601 and the Project Manager, First Urban, do not alter the above position, including because Probuild was not a party to the Project Management Agreement.[169]

269 Accordingly, by force of cl 20.2(b), neither of V601 or Probuild was permitted to give the Project Manager directions, and the Project Manager was required to act reasonably in exercising those functions and to have regard to the Contract's express requirements, and not either party's commercial interests. I note that Probuild's Notice of Dispute dated 16 October 2012[170] raised issues in this regard.[171]

270 Pursuant to cls 20.2(b)(ii) and 34.4(b)(iii), the Project Manager is also entitled to consult with the parties and third parties, in relation to whether it took all reasonable measures to prevent the occurrence of the Qualifying Cause of Delay and to minimise delay.

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168 *Perini* [1969] 2 NSWR 530, 545; *Hickman & Co v Roberts* [1913] AC 229; *Kell & Rigby Holdings Pty Ltd v Lindsay Bennelong Developments Pty Ltd* [2010] NSWSC 777, [56].

169 FCB0762.

170 FCB4480–4482.

171 Bready First Witness Statement, [314].

271 V601 has framed its positive and defensive cases on the basis that the Project Manager correctly assessed both Probuild's time extension entitlements and V601's entitlement to liquidated damages.

272 In his witness statement, Nave appears to contend that his assessments were both correct and undertaken independently.[172] This is disputed by Probuild.

273 However, Nave also acknowledges that he had neither the qualifications nor the expertise to make the relevant assessments in the circumstances which pertained:[173]

> Because I hadn't been provided with appropriate programming information by Probuild, and I am not qualified as a programmer, I sought the support of an expert programing consultant to assist with the preparation of a program against which I could make a properly informed assessment of EOT 2A and EOT 3. To this end I engaged Tracey Brunstrom & Hammond (TBH) on behalf of V601 on 13 April 2012. TBH are a project and strategic management services company that specialises in project planning and programing for construction projects.

274 Notwithstanding the above, V601 contends that Nave properly assessed Probuild's entitlements.

275 However, each of the Project Manager's certificates and assessments is disputed under the Contract and V601 concedes that the Court is empowered and able to determine Probuild's earlier determined entitlements under the Contract, on the merits.

Considerations in relation to the requirements and scope of the Project Manager's duties and obligations of independence under the Contract

Proper construction of cl 20.2 of the Contract

276 Clause 20.2 of the Contract expressly provides that, when fulfilling the roles of assessor and certifier, the Project Manager must act independently of the parties and reasonably, and have regard to the express requirements of the Contract, and not the commercial interests of either party.

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172 Nave Witness Statement, ss F.3, G.3, H.1, and [606].
173 Nave Witness Statement, [324].

277 The roles of assessor and certifier apply in particular when the Project Manager is assessing and certifying the Contractor's extension of time and delay damages entitlements, and when the Project Manager is determining the Contractor's achievement of Practical Completion and the price that the Proprietor is obliged to pay for Variations to the scope of the WUC.

278 In my view, the parties' express requirement that the Project Manager act independently and reasonably, including in its role as assessor and certifier of the Contractor's entitlements to extensions of time and delay damages, carries with it a requirement that the Project Manager act fairly and impartially in respect of such assessments and certifications, and in deciding whether the Contractor has achieved Practical Completion, as well as in determining the pricing of Variations.

279 The purpose of cl 20.2 is obvious. It is to charge the Project Manager with the obligations of an independent decision maker in respect of the matters referred to in cl 20.2(a), and also to bind the Proprietor in relation to the requirements imposed on its appointee, the Project Manager, by cl 20.2.

280 It follows that a purposive construction of the Project Manager's obligation of independence includes an obligation to act impartially and similarly, and the obligation to act reasonably which, I consider, includes an obligation to act fairly.

281 Given the general manner in which the matters to be decided by the Project Manager are described in cl 20.2 of the Contract, and the protective nature of those stipulations, I am also of the view that cl 20.2 should be construed in a broad and facilitative way, consistent with the objective and purpose of the clause referred to above.

282 For the above reasons, I reject V601's contention that the application of cl 20.2 should be limited to only one part of the Project Manager's consideration of Probuild's EOT claims[174] and, subject only to the qualification referred to below in relation to the

174 V601 Closing Submissions, 12 June 2019, [24].

operation of cl 34.5(b) of the Contract, I also reject V601's submission that cl 20.2 is of limited scope in relation to the Project Manager's assessment and certification of Probuild's delay damages claims.

283 However, in *John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd (Majorca)*,[175] it is clear from the reasons that the certifying architect consulted with his own lawyer in respect of the preparation of a certificate, the provisional assessment of damages which accompanied it,[176] and whether an assessment for the certificate should be made using working days or calendar days.[177] Justice Byrne did not impugn or criticise access to, and input from, a party's lawyer in relation to such matters.

284 His Honour separately noted that the builder did not suggest that the architect was or should have been disqualified on the ground of loss of independence, but argued only that there was a breach of the duty of care to act impartially, resulting in loss.[178] It was relevant, in his Honour's view, that many of the functions of the architect required communication and consultation between the architect and the proprietor, often of a confidential nature, and that communications between an architect and the proprietor regarding payments to the builder, which were properly in furtherance of the objective of reaching a compromise, could not be impugned.[179]

285 Citing *Nelson Carlton Construction Co v AC Hatrick (NZ) Ltd*,[180] Byrne J concluded that the relevant test was whether the architect (or certifier) had heard 'representations which are of such a nature as to be calculated to influence him in arriving at his determination'. If this was so, then the other party must be afforded the opportunity of answering those communications to the architect.[181] After examining each of the

175 *John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd* (1996) 13 BCL 235 (*Majorca*).
176 *Majorca* (1996) 13 BCL 235, 252.
177 *Majorca* (1996) 13 BCL 235, 253–4.
178 *Majorca* (1996) 13 BCL 235, 247–8.
179 *Majorca* (1996) 13 BCL 235, 248.
180 [1965] NZLR 144, 151–2 (emphasis added).
181 *Majorca* (1996) 13 BCL 235, 248–9.

impugned communications, Byrne J concluded there was no material representation which the architect sought or received that ought to have been submitted to the builder.[182]

286 In *Kell & Rigby Holdings,*[183] a superintendent was held not to have acted fairly where, inter alia, he had acted on the instructions of a director of the principal without having discussed the matter with the builder beforehand.[184]

287 Here the express terms of cl 20.2(a) impose relevant obligations on the Project Manager, when acting as assessor and certifier. Both the express language and the scheme of the Contract expressly provide for the Project Manager to act as '*assessor and certifier*' in respect of a number of functions. These include evaluating whether the Contractor is entitled to extensions of time, whether the Contractor has achieved Practical Completion, is entitled to delay damages, and what the Contractor is entitled to be paid for a Variation in accordance with cls 34.9 and 36.4 of the Contract.

288 The phrase, 'the Project Manager shall also act as assessor and certifier in respect of' the four functions specified in cl 20.2(a)(i) to (iv), makes it clear that the process of assessing and certifying the Contractor's entitlement to extensions of time, achievement of Practical Completion and delay damages, and the price of Variations involves the dual steps of assessment and certification by the Project Manager.[185]

289 Accordingly, it is clear, in my view, that the Contract requires the Project Manager to independently both assess and determine Contractor entitlements under the terms of cls 34.4 and 34.5(a) of the Contract, and, if necessary, Probuild's entitlement to compensation for delay, pursuant to cl 34.9 of the Contract. The Project Manager is also to independently assess and determine the appropriate price of a Variation and

182 *Majorca* (1996) 13 BCL 235, 251–4.
183 [2010] NSWSC 777.
184 *Kell v Rigby Holdings* [2010] NSWSC 777, [63], although acting on 'instructions' may be distinguished from receiving representations or information.
185 Contract, cls 20.2, 34.3(a), 34.5(a), 34.9, 36.4(b), 37.1(c), and 41.3.

the achievement of Practical Completion.

Clauses 20.2 and 34.5(b)

290 In respect of the Project Manager's independent functions, V601 emphasised the Contract's use of the word 'entitled' in cl 20.2(a), in relation to EOTs (cl 20.2(a)(i)) and delay damages (cl 20.2(a)(iii)).[186] V601 contrasts this with the use of 'assessment' in relation to the price of a variation (cl 20.2(a)(vi)).[187] Counsel for V601 observed that, 'if one searches the document you'll see that that distinction is throughout the contract; the difference between entitlement and assessment'.[188]

291 Using the contractual language, V601 then acknowledges that the Project Manager 'shall act independently of the parties, and neither party shall be entitled to give directions to the project manager', which it submits 'means that you're not entitled to give a direction to the project manager, relevantly, determining whether or not that contractor's entitled to an EOT'.[189]

292 However, V601 submits that the Contract permits consultation with 'either one of or both parties' (cl 20.2(b)(ii)), in relation to which V601 submits:

> But consult, we say, means exactly what it is. You can consult in determining, as an assessor and certifier, in that function. You can consult with the parties, which, in this case, is V601. Of course you have to consult honestly and reasonably and impartially. We don't say you're allowed to go in there under consult provision and do things which would undermine your independent function, and we've never put that.[190]

293 Rather, V601 submits that 'consult' 'has to be addressed as a matter of construction of the contract', with 'textual analysis to assist' the Court, which it says Probuild has not done.[191] V601 highlights the content of cl 20.2(b)(iii), which provides that the Project Manager 'shall act reasonably in exercising the identified functions and shall have regard to the express requirements of the *Contract* and not the commercial

186 T1818.
187 T1818.
188 T1818.
189 T1818–T1819.
190 T1819.
191 T1819.

interests of either party'.[192]

294 On the evidence, V601 also submits that 'no regard was had to the commercial interests of V601 by Mr Nave at all'.[193]

295 I depart from V601's case to also note that Probuild objected to receiving draft assessments of its extension of time claims from the Project Manager. Amongst other things, Probuild pointed out that such 'assessments' had no contractual basis, and challenged the propriety and contractual basis for the Project Manager sending a draft unsigned letter to the principal and including that unsigned letter in its response to the Contractor.[194]

296 I consider, however, for the reasons outlined elsewhere that V601, and its agent, the Project Manager, breached their obligations in relation to the proper administration of the Contract time extension assessment and determination process; and in addition were in breach by failing to award Probuild the extension of time to which it was entitled, in respect of Probuild's EOT2A and 3 claims, and also Probuild's EOT6 and EOT7 claims.

297 I accept where bona fide the Project Manager exercises its discretionary power to extend contractual time, pursuant to cl 34.5(b) of the Contract; a power, I observe, which is probably intended by the parties to avoid circumstances arising that set the Contract's time for performance at large. The exercise of that power and associated discretion are not subject to the requirement of cl 20.2 of the Contract. This is because cl 34.5(b) is not predicated on the Project Manager ascertaining that the Contractor is entitled to an extension of time.

298 Accordingly, I accept that cl 34.5(b) of the Contract expressly does not operate in relation to the Contractor's entitlement to an extension of time, but rather the language of cl 34.5(b) distinguishes between the Project Manager's obligations and

192 T1819–T1820.
193 T1820.
194 T1864.

duties when the Project Manager is assessing and considering certifying certain defined Contractor entitlements under cl 34.5(b), and when the Project Manager exercises its sole and unfettered discretion in relation to directing an extension of time, notwithstanding that the Contractor is not entitled to an extension of time or has not claimed an extension of time.

299 By using express language to convey that cl 20.2 operates in relation to assessing and certifying the Contractor's entitlements, and by separately providing that cl 34.5(b) operates when the Contractor is not entitled to an extension of time, it is, I consider, clear that the parties did not intend that the Project Manager's obligations and duties imposed by cl 20.2, in relation to its independent functions, should apply to the exercise of the Project Manager's sole and unfettered discretion under cl 34.5(b) of the Contract.

300 However, in my view, it is quite clear that the Contract time extension regime, on its express terms, requires the Project Manager to address, assess and determine the Contractor's claims for extension of time in accordance with the terms of cls 34.3, 34.4, and 34.5(a).

301 It is equally clear, in my view, for the same reason, that the Project Manager, and the Principal in league with the Project Manager, cannot purport to direct an extension of time under cl 34.5(b) in response to a time extension claim by the Contractor, rather than cls 34.3, 34.4, and 34.5(a), by a process which, in breach of the Contract, prevents the Contractor from making a time extension claim that is fully compliant with cl 34 of the Contract, because the Contractor cannot support its claim by reference to an applicable approved Contractor's program, as the Project Manager has failed or refused to approve the Probuild Contractor's Program submitted for approval under cl 32 of the Contract.

302 Here, in my view, egregiously, the Project Manager — and I infer, for reasons elsewhere expounded in relation to the lack of independence of the Project Manager,

the Project Manager in concert with V601 — without contractual or factual or any other proper justification, as addressed elsewhere, failed or refused to approve Probuild's Contractor's program as it was obliged to and should have done pursuant to cl 32.3 of the Contract.[195]

303 In the result, in my view, the Project Manager's purported direction under cl 34.5(b) of the Contract, in relation to Probuild's EOT2A and 3 claims, was ill-founded and also void by reason of the Project Manager's lack of independence and its breaches of cl 20.2 of the Contract.

Probuild's alleged failure to provide Contractor's Programs

304 V601 asserts that the Project Manager was not able to assess Probuild's extension of time claims as the Contract required, because Probuild failed or refused to provide programs which the Project Manager was able to approve and therefore the required assessment of Probuild's extension of time claims could not be undertaken pursuant to cl 34 in relation to Approved Contractor's Programs; and as a result, the Project Manager directed the extensions of time at issue in these proceedings pursuant to cl 34.5(b) of the Contract, and therefore was not obligated to act independently and as stipulated by cl 20.2, when it directed such extensions of time.

305 I consider that Probuild's case (including as detailed in Annexure 2 to its 11 June 2019 Closing Submissions) remains pertinent, well directed and persuasive. In my view, the Project Manager's compliance with cl 20.2, and more generally whether the Project Manager has failed to act as required at law as assessor and certifier of Probuild's entitlements, directly impacts the validity of both the Project Manager's certification of Liquidated Damages, which V601 seeks to recover as a debt, and also directly impacts both the Project Manager's certifications in relation to Probuild's relevant claims for an extension of time, and the Project Manager's evidence more generally.

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195 Bready Amended First Statement, [296]–[314]; Bready Amended Reply Statement [76]–[88].

306 This is because, amongst other related matters to do with Probuild's extension of time claims, I reject V601's assertion that Probuild's time extension claims could not be assessed and certified as intended under cl 34 of the Contract, because Probuild had failed or neglected to provide V601 with Approved Contractor's Programs. I am satisfied, as explained elsewhere, that in substance, and in a manner which was as contractually compliant as it could be, given V601 and the Project Manager's acts of prevention in relation to approval of the Approved Contractor's Programs, Probuild submitted updated Contractor's Programs for the Project Manager's approval. I am also satisfied that, without justification, V601, by its agent the Project Manager, repeatedly refused or neglected to approve the Probuild Contractor's Programs and did so without proper justification.[196]

307 In the result, I find that although it could and should have done so, the Project Manager failed or refused to assess the Probuild extension of time claims as required under cl 34 of the Contract.

308 I also find that, in breach of cl 32 of the Contract, V601, by its Project Manager, prevented the approval of appropriately updated Approved Contractor's Programs and thereby prevented Probuild from relying on a program that had been approved by the Project Manager, as contemplated by cls 32.3 and 34.4(b)(ii) of the Contract.

Project Manager and the Right to Consult

309 I consider that, properly construed, affording primacy to the ordinary meaning of the words used in the clause, when considered together with their purpose and context, in particular in conjunction with cls 20.2(b)(i) and 20.2(b)(iii), cl 20(b)(ii) reflects the parties' intent that the Project Manager's entitlement to *consult* relates principally to the one practical element dealt with in cl 20.2(b); namely, the scope the Contract provides for the Project Manager to 'consult' with one or both of the parties to the Contract, but only in a way informed by the context, which expressly requires by cl 20.2(b) that the Project Manager must act independently.

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196 Bready Amended First Statement, [111]–[115]; Amended Reply Statement, [76]–[89].

310 Considering the practical application of cl 20, and for the avoidance of doubt, the words employed in cl 20.2(b) do no more than clarify that the Project Manager may, in relation to the four functions specified in cl 20.2(a), consult with either party and is not obliged to consult with both parties.

311 Clause 20.2(b) also expressly provides for several obligations relating to the independence of the Project Manager.

312 The duties, obligations, and limitations which cl 20.2 imposes on the Project Manager are, I consider, cumulative. This construction is strongly supported by the parties' inclusion of the word 'and' at the end of cl 20.2(b)(ii). Interpreted cumulatively, I consider that the parties to the Contract sought to broadly define how the Project Manager should conduct its Independent Functions when assessing and certifying certain of the Contractor's entitlements.

313 Clause 20.2(b) obliges the Project Manager to act independently of the parties to the Contract, and reasonably, having regard to the express requirements of the Contract and without regard to the commercial interests of either party.

314 In my view, by clear implication, the combination of these cl 20.2(b) obligations also extends to obligations on the part of the Project Manager to act impartially, honestly and fairly.

315 In my view, it follows from the above express and implied obligations under cl 20.2(b), that the parties did not intend by cl 20.2(b)(ii) to permit the Project Manager to consult in a way that was unfair, impartial, or lacking in independence, or in any way that assisted the commercial interests of one party.

316 Accordingly, in my view, cl 20.2(b) of the Contract does not permit the Project Manager to participate in Consultations with either or both of the parties to the Contract, which are of a partisan nature, or in consultations for, or including, the purpose of supporting or accepting or impeding or defeating any claim, or defence

to a claim under or in respect of the Contract.

317 Further, I consider that it is readily to be implied that the latitude extended to the Project Manager to consult separately with the parties to the Contract, and with third parties, was intended by the parties to the Contract to be subject to, and limited by, the Project Manager's separate and cumulative independence obligations under cl 20.2. Further, any consultation with either party to the Contract, or a third party (for example, a consultant to the Principal), which breached or conflicted with the Project Manager's obligations of independence as assessor and certifier under the Contract, referred to in the last preceding paragraph, would be in breach of the Project Manager's obligation to act independently, impartially, fairly, honestly, reasonably and in accordance with the requirements of the Contract. To the extent that the Principal procured, encouraged or collaborated with the Project Manager in respect of conduct in breach of cl 20.2 of the Contract, it goes without requiring further elaboration, that the Principal would breach its obligations by so acting.

318 Accordingly, the nature and scope of consultation permitted by cl 20.2(b)(ii) renders it impermissible, and in breach of the Contract, for the Project Manager to consult in any way which was to the prejudice or disadvantage of either party to the Contract. I consider that this includes a party's entitlements and potential entitlements under or in respect of the Contract; or so as to advantage a party to the Contract vis à vis the other party in respect of its contractual entitlements or potential entitlements; or to assist one party or disadvantage either party to the Contract, commercially or tactically, in relation to rights and entitlements; or in respect of either parties' general commercial or practical position under or in respect of the Contract.

319 I find for reasons I have outlined below that, in substance, the meetings between the Project Manager and V601, and TBH, in relation to extensions of time and delay damages, were meetings and communications primarily focused on the Project Manager and V601 co-ordinating efforts to develop and implement a strategy and tactics to defeat and/or delay, and to minimise, any assessment and certification of

Probuild's time extension and delay damages entitlements.

320 For these reasons, I also hold that such meetings and communications between the Project Manager and V601, and the Project Manager and TBH, were in breach of the Project Manager's obligations and duties under cl 20.2 and at common law; namely, the Project Manager's obligations and duties to discharge its independent functions independently, impartially, reasonably, fairly and in accordance with the requirement of the Contract and not to have regard to V601's commercial interests.

321 Further, I consider that V601 and the Project Manager breached cl 20.2 of the Contract by consulting and meeting for the purpose of devising and advancing V601's commercial strategy in relation to Probuild's claims, or so as to advance V601's commercial interests.

Probuild's detailed case impugning the independence of the Project Manager

322 By the following extensive alleged 'indicia' as to the Project Manager's lack of independence, Probuild articulates the bases upon which it impugns the Project Manager:[197]

> 1. The Project Manager is to act as assessor and certifier in respect of the following pursuant to cl 20.2 of the Contract:
> (a) whether the defendant is entitled to an EOT;
> (b) whether the defendant has achieved Practical Completion;
> (c) whether the defendant is entitled to delay damages pursuant to cl 34.9; and
> (d) in the assessment of the price of a Variation in accordance with cl 36.4.
>
> 2. In performing these functions cl 20.2(b) of the Contract requires, amongst other things:
> (a) that the Project Manager act independently of the parties, and that neither party shall be entitled to give directions to the Project Manager;
> (b) that the project Manager act reasonably in exercising the identified functions and having regard to the express requirements for the Contract and not the commercial interests of either party.
>
> 3. By its Amended Defence and Counterclaim the defendant, amongst

197 Probuild's Indicia of the Project Manager's lack of independence, 25 February 2019.

other things:

(a) denies the plaintiff's entitlement to liquidated damages based on certificates the Project Manager purported to issue (at paragraphs 7 to 12); and

(b) alleges breaches of the Contract in respect of it being awarded its full entitlements in respect of extensions of time, delay damages a bonus payment and the Façade Return Walls Variation (at paragraphs 19 to 92).

4. Each of the alleged breaches referred to above is particularised to arise by reason of, amongst other things, the Project Manager:

(a) failing to act independently of the parties, as required by cl 20.2 of the Contract;

(b) failing to act reasonably as required by cl 20.2 of the Contract;

(c) failing to have regard to the express requirements of the Contract, as required by cl 20.2 of the Contract; and, or alternatively

(d) having regard to the plaintiff's commercial interests, in contravention of cl 20.2 of the Contract.

5. The defendant contends that the failures and contraventions referred to in paragraph 4, above, arise by reason of the following.

(a) the Project Manager purporting to act as an independent certifier of the defendant's entitlements under the Contract while engaged by the plaintiff pursuant to terms which at all material times required the Project Manager to '[a]dvise, negotiate and provide recommendation for approval of project variation claims and extension of time claims';

(b) the Project Manager failing to disclose to the defendant the terms of its engagement by the plaintiff, as referred to above;

(c) the Project Manager proposing a remuneration arrangement which included a share of the plaintiff's profit from the development at 601 Victoria Street, Abbotsford;

(d) the plaintiff seeking to performance manage the Project Manager from about 6 June 2012 until about 2 October 2012, including by:

(i) issuing a 'show cause' notice to the Project Manager on 15 June 2012;

(ii) renegotiating the terms of the Project Manager's appointment from about 6 June 2012 to about 2 October 2012; and, or alternatively

(iii) withholding payment for the Project Manager's fees from about April 2012 to about 3 October 2012;

(e) the plaintiff withholding payment of the Project Manager's fees from about April 2012 to about 3 October 2012;

(f) the Project Manager seeking and, or alternatively, receiving advice from the plaintiff, or the plaintiff's agents, or consulting with the plaintiff, or the plaintiff's agents, on matters relating to the Project Manager's independent certification functions, or the proper exercise of those functions, and particularly the defendant's claims for extensions of time, the Façade Return Walls Variation and regarding the certification of Practical

Completion;

(g) the project Manager requesting that its communications with the defendant and determinations relating to the exercise of its independence certification functions be prepared, reviewed or amended by the plaintiff or its agents, and particularly in relation to the defendant's claims for extensions of time, the Façade Return Walls Variation and regarding the certification of Practical Completion;

(h) the Project Manager seeking and, or alternatively, acting upon the advice an recommendations of the plaintiff's agents relating to its independence certificate functions, or the proper exercise of those functions, and particularly in relation to the defendant's claims for extensions of time, the Façade Return Walls Variation and regarding the certification of Practical Completion;

(i) the Project Manager procuring reports from TBH regarding the defendant's EOT2A and EOT3 claims, knowing that such reports were to be used by the plaintiff or its agents to refute the defendant's EOT2A and EOT3 claims;

(j) the Project Manager participating in meetings and telephone conversations, and being copied into correspondence, between the plaintiff, its agents and TBH regarding the defence of the defendant's EOT2A and EOT3 claims, including:

  (i) the establishment and maintenance of any privilege in such reports and summary documents; and, or alternatively

  (ii) the content and timing of any determinations regarding the defendant's EOT2A and EOT3 claims having regard to the plaintiff's financing arrangements for the development at 601 Victoria Street Abbotsford;

(k) the Project Manager failing to disclose to the defendant documents produced by TBH having regard to the plaintiff's strategy of maintaining any privilege in such documents;

(l) the Project Manager failing to disclose to the defendant the extent, and content, of the meetings, telephone conversations and correspondence between the Project Manager and any of the plaintiff, its agents and TBH regarding the defendant's independence certification functions;

(m) the Project Manager instructing TBH to attach greater weight to the documents prepared by the plaintiff or the Project Manager, compared to the documents prepared by the defendant, when preparing programs, reports and summary documents regarding the defendant's EOT2A and EOT3 claims;

(n) the Project Manager failing to ask the defendant for further information in respect of its EOT2A and EOT3 claims after about 8 May 2012;

(o) the Project Manager signing a determination dated 15 August 2012 regarding the defendant's EOT2A and EOT3 claims, and issuing it to the plaintiff on about 7 September 2012, but not to the defendant, and despite knowing the extension of time referred to in it was inaccurate;

(p) the Project Manager issuing to the plaintiff, but not to the defendant, a draft determination regarding the defendant's EOT2A and EOT3 claims;

(q) the Project Manager amending the draft determination regarding the defendant's EOT2A and EOT3 claims at the direction of the plaintiff';

(r) the Project Manager amending the draft determination regarding the defendant's EOT2A and EOT3 claims at the direction of the plaintiff to reflect an assessment inconsistent with its views regarding the proper quantification of the defendant's extension for time entitlement;

(s) the Project Manager taking, or failing to take, the steps set out in paragraphs (i) to (r), above, as applicable, knowing that the draft determination was to be used by the plaintiff in its negotiations with the defendant;

(t) the Project Manager refraining from making a determination regarding the defendant's EOT2A and EOT3 claims while:

(i) taking, or failing to take, the steps set out in paragraphs (i) to (r), above as applicable; and, or alternatively

(ii) knowing that the draft determination was to be used by the plaintiff in its negotiations with the defendant;

(u) the Project Manager purported to make determinations regarding the defendant's EOT2A and EOT3 claims by uncritically adopting the findings in a report prepared by TBH;

(v) the Project Manager purporting to make determinations in respect of the defendant's EOT2A and EOT3 claims having regard to unrelated matters, such as project wide 'mitigation measures';

(w) the Project Manager purporting to make determinations in respect of the defendant's EOT2A and EOT3 claims without having regard to a proper delay analysis in respect of those claims;

(x) the Project Manager not knowing and, or alternatively, not ascertaining, the extent to which TBH's report(s) took into account the defendant's submission issued on 19 July 2012 when purporting to make a determination in respect of the defendant's EOT2A and EOT3 claims;

(y) the Project Manager issuing, and then failing to withdraw, a determination in respect of the defendant's EOT2A and EOT3 claims which the Project Manager knew did not represent its opinion;

(z) the Project Manager purporting to make a determination in respect of the defendant's EOT2A and EOT3 claims having regard to the difficulties the plaintiff was then facing with its financing arrangements for the development at 601 Victoria Street, Abbotsford;

(aa) the Project Manager issuing a draft determination to the plaintiff in respect of the defendant's EOT2A and EOT3 claims and, or alternatively, issuing it knowing that it was to be used by the plaintiff in negotiations with the defendant;

(bb) the Project Manager refraining from making a determination in respect of the defendant's extension of time claims and the

Façade Return Walls Variation within a reasonable period;

(cc) the Project Manager having regard to the plaintiff's financing arrangements for the development at 601 Victoria Street, Abbotsford when determining the content and timing of any determinations regarding the defendant's extension of time claim;

(dd) The Project Manager pre-judging the Façade Return Walls Variation, and communicating that position to the plaintiff;

(ee) the Project Manager failing to review, or failing to correct, an error in respect of the purported determination regarding the Façade Return Walls Variation;

(ff) the Project Manager refraining from making any determination at all in respect of the defendant's EOT6 claim regarding the proposed Building C childcare centre;

(hh) failing to consult with the plaintiff and the defendant in an equal way.

323 Further, by Annexure 2 in the Probuild Closing Submissions of 11 June 2019, Probuild extensively details the evidence upon which it relies to establish that the Project Manager has failed to perform its certification functions with the required degree of independence. Probuild relies upon 33 heads of asserted 'Indicia', each extensively detailed by reference to the evidence upon which Probuild relies, and its submissions as outlined in Annexure 2 of Probuild's Closing Submissions.

324 I note at this point, that V601 has not sought to traverse, or indeed in my view substantially engage with, the factual case and supporting submissions advanced by Probuild in Probuild's case against the Project Manager, and also V601, detailed in Annexure 2.

325 V601's submissions are instead directed at casting general doubt on the reliability of Probuild's detailed case concerning the Project Manager's lack of independence and V601's involvement in the Project Manager's relevant conduct. In this regard, V601 contends that Probuild's approach to this part of its case has placed V601 in an invidious position, resulting in V601 not responding to the case concerning the independence of the Project Manager as articulated by Probuild. V601 argues in a way which I consider to be most abstruse and without merit, that to respond to Probuild's case which seeks to impugn the Project Manager, and V601 because of its involvement in the same conduct, would somehow unfairly effect a reversal of the

onus of proof on this aspect of the case.

326 I reject the contention that matters have evolved in such a way as to somehow unfairly reverse an onus of proof on this topic to V601's prejudice. Nor do I accept that there is good reason for V601 not to fully respond to Probuild's detailed case on the contractually wrongful conduct of the Project Manager and Probuild's case in relation to V601's involvement in that conduct by the Project Manager, by way of submissions and evidence.

327 Annexure 2 of Probuild's Closing Submissions, 11 June 2019, as earlier outlined, details the evidence relied upon by Probuild to establish that the Project Manager lacked independence in its determinations, which are in issue in this proceeding, and for those reasons should be for that reason set aside. Annexure 2 of Probuild's Closing Submissions, 11 June 2019, as outlined earlier, details the evidence relied upon by Probuild to establish that the Project Manager lacked independence in its determinations. The independence of the Project Manager is an issue in this proceeding and, based upon inter alia the Annexure 2 evidence, Probuild says that the determinations resulting from that alleged lack of independence should be set aside.

328 By Annexure 2, Probuild relies upon 33 detailed examples of evidence which it contends establish the Project Manager's lack of independence. In addition, elsewhere in its submissions, Probuild details what it contends are instances of conduct and evidence in this proceeding that further establish the Project Manager's breaches of its obligations in respect of the Contract, and its lack of independence.

329 Ultimately, for the reasons outlined below, I have comfortably concluded, and find, that the Project Manager's conduct in relation to its role as assessor and certifier under the Contract lacked the required level of independence, and was in breach of cl 20.2 of the Contract because, including from the outset of the Precinct Project, the Project Manager failed to appreciate the standard of independence and conduct

required of its independent role of assessor and certifier, and allowed its processes of assessment, determination, and certification of Probuild's entitlements under the Contract to be unduly and inappropriately influenced by the Proprietor's strategies and tactics, and the Proprietor's commercial interests.[198]

330 Further, for the reasons outlined below, I am also comfortably satisfied and find that the Project Manager was not independent and impartial, and was also not fair, and reasonable in its assessment and certification of Probuild's time extension claims and entitlements, as well as Probuild's entitlements to delay damages under the Contract.

331 The conclusions and findings in relation to the Project Manager's lack of independence and breaches of cl 20.2 of the Contract are based on the establishment of the Indicia detailed in Annexure 2 — fours heads of which are addressed in detail below. These conclusions and findings are also based upon the additional findings outlined below in relation to the Project Manager's evidence.

332 Having so concluded and held, I consider it unnecessary to endeavour to deal with the remaining detailed Indicia relied on by Probuild in Annexure 2 which, in my view, would entail further very extensive, and in the circumstances unnecessary, judicial attention.

333 I also add, however, that in addition to the four heads of Indicia addressed below, I am comfortably satisfied that Probuild's other identified Indicia 6, 7, 8, 9 and 10 (extracted below) are also established against the Project Manager in relation to the other instances of the Project Manager's conduct detailed in the Indicia in Annexure 2. Furthermore, I consider that the additional established Indicia in Annexure 2 are also sufficient to impugn the Project Manager and justify setting aside all its assessments, determinations, and certifications under the Contract.

334 Further, for the reason outlined below, I am also comfortably satisfied, and find that

198 *Kane Constructions Pty Ltd v Sopov* (2006) 22 BCL 92.

the Project Manager and V601 collaborated in relation to a strategy, which was planned and implemented by the Project Manager and V601, to liaise in relation to the Contractor's extension of time claim(s) and to discuss and settle on the Project Manager's issuing of a 'draft determination' in relation to Probuild's extant extension of time claim; after which, the Project Manager would provide his draft determination to the Contractor, so as to create an opportunity for the Principal to negotiate with the Contractor to agree a final determination of Probuild's extension of time claim, which then achieved the best outcome for the Principal. The Project Manager's conduct in this regard also, I consider, delayed the establishment of the Contractor's entitlements under the Contract.

335 For example, in relation to Probuild's EOT2 claim issued on 6 March 2012,[199] the Project Manager issued a draft response to V601 on 13 March 2012, seeking comment from the Proprietor and, after receiving V601's response and input at about 9:53am on 14 March 2012, the Project Manager emailed its decision to Probuild in relation to WUC EOT2 on 14 March 2012 at 5:29pm.[200] That draft response proposed rejecting the Contractor's claim of 25 working days and required it to be resubmitted. In my view, no satisfactory explanation was forthcoming from Nave in relation to why referring such a draft notice to the Proprietor for its consideration was appropriate, rather than provision of a clear, unequivocal contractual decision in relation to the EOT2 claim by the Contractor.[201]

336 It is instructive to note the nature and content of certain email communications between the Project Manager and V601, immediately before the Project Manager's 14 March 2012 decision in relation to Probuild's EOT2 claim.

337 On 13 March 2012, Nave, the Project Manager, emailed the Proprietor (in part) in the following terms:[202]

199 FCB2442.
200 FCB2539; see also, FCB2537.
201 T409–T412; T410.21–T411.3.
202 FCB2537–2538.

> Colin, [Mackenzie of SPG the Proprietor]
>
> Attached are the following documents to be issued to Probuild, please review and provide comments so these can be issued Wednesday afternoon.
>
> 1. Notice to commence works under contract, (Dates as agreed, note the contract reference of 9A(b)(iii)
>
> 2. Approval for EOT no 1:
>
> Approval of EOT No l adjusted to 8 working days (Friday 13 January 2012 was not classified as a working Day and the Site was closed) This Extension of time has been approved for the Practical Completion adjustment to Separable Portion No 3 Building D and Separable Portion No 4 Building E only. The qualifying clause of delay was due to the incompletion of the Early Works Contract, and adjusts the start date for these separable portions by 8 working days. No delay costs are applicable to the EOT as an adjusted to the Start date only.
>
> 3. Non Approval for EOT no 2:
>
> Extension Of Time No 2 issued 6th March 2012 for the relating to the commencement of pile caps to Buildings D (SP3) and Building E (SP4) totalling 25 working days is not approved.
>
> …
>
> Please demonstrate the re-sequence of works to mitigate the delay, including a program on completing the Ground Works and basement slab in the next 10 weeks. Provide alternatives in reducing the potential delay to Building D and E, i.e afterhours works for critical path activities.
>
> …

338 On 14 March 2012 (9:53am), the Proprietor replied to the Project Manager in the following terms:[203]

> John,
>
> Seems like the correct response this stage. It gives us an opportunity to see what they hit back with.
>
> I think we need however to reference the contract clause that relates to re-sequencing etc. This should be added to your comments relating to item 3.
>
> C

339 By the above, the Project Manager sought to have the Proprietor's review and

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[203] FCB2537.

comment on its draft determination of EOT1 and the Project Manager's proposed response to Probuild's EOT2 claim.

340 Further, by the above email of 14 March 2012, the Proprietor provided its view that the Project Manager's draft determination of EOT1 and rejection of EOT2, in the following terms, '[s]eems like the correct response [at] this stage', and also communicated to the Project Manager that its proposed draft response to Probuild 'gives us an opportunity to see what they hit back with'.

341 In my view, the Proprietor's above email of 14 March 2012 (9:53am) reflects the nature of the collusion and co-operation between the Proprietor and the Project Manager to work in unison and deploy their strategy and tactics to manage the Contractor's claims. That communication, read together with the above emails from 13 and 14 March 2012, also evince the Project Manager's willingness to obtain V601's input and approval of the Project Manager's draft extension of time assessments and determinations, before they were communicated to Probuild.

342 By email on 15 March 2012, Sleeman of Probuild reported on potential delays to the Project.[204]

343 On 16 March 2012, Mackenzie, the Development Director on the Project for V601, communicated with the Project Manager stating, amongst other things, that V601 suggested that the responses to Probuild's extension of time claims should include a reference to certain provisions of the Contract and also stated:[205]

> OK then maybe we try an (sic) wrap it in with eot discussions. Since they disagree with ur (sic) assessment we can use this as our good faith gesture in the argument over the eot.

344 There appears to be no contemporaneous communication from Nave, the Project Manager, which in any way objected to, or attempted to distance the Project Manager from, Mackenzie's proposed strategy and tactical suggestions in relation to

204 FCB2541.
205 FCB2544.

either the above 14 March 2012 or the 16 March 2012 communications, in relation to Probuild's extension of time claims, EOT1 and EOT2.

345 On 20 March 2012, Mackenzie emailed the Project Manager advising that the Proprietor was about to meet with V601's lawyers, Baker McKenzie, to review and discuss potential delays and damages, and seeking Nave's 'summary of why they (Probuild) are not entitled to anything'. The Proprietor's 20 March 2012 email to the Project Manager states:[206]

> John,
>
> James and I are meeting Baker McKenzie on Friday morning (7.30) to review and discuss each of the potential delays and damages.
>
> We need you to prepare a document including:
>
> a) Each of the issues listed below and ANY other ones currently on the table -this should include a review of any potential things that may cause extra costs under the contract that may be contested including Coles base building works etc. - note we (salvo) will consider this all inclusive and will be used to formulate a settlement position please ensure you are being accurate.
>
> b) A copy of ALL correspondence from PCA to date and from yourself that clarifies our position.
>
> c) Your summary of why they are not entitled to anything including references to the contract.
>
> We need an honest appraisal of the position as this may end up in litigation. The lawyers will then assess the correspondence and identify our best position moving forward (i.e. prepare for litigation with a hard stances or seek to negotiate a deal early). We can all agree that we are at the cusp of some potential conflicts worth millions and therefore we want to be on the front foot.
>
> Let me know if there are any issues.
>
> Thanks,
>
> Colin

346 In my view, the Proprietor's email request of 20 March 2012, and the earlier Mackenzie emails to the Project Manager of 14 March 2012 and 16 March 2012, were

206 FCB2565.

inappropriate communications for a Proprietor to send to the independent assessor and certifier under the Contract, for the reasons I have outlined above in relation to these emails, because they were suggesting strategies and tactics in relation to Probuild's extension of time claims. It appears, however, that Nave and the Project Manager neither objected to these communications nor did Nave seek to distance the Project Manager from such communications.

347 I am satisfied that the Project Manager, as represented by Nave, did not take issue with the manner in which V601 and Mackenzie were communicating with the Project Manager in relation to strategy and tactics. Further, I am satisfied that the above communications demonstrate that V601 and the Project Manager were working in concert to plan and implement strategies and tactics in relation to the Contractor's extension of time claims EOT1 and EOT2 to delay and, if possible, defeat or minimise the entitlement certified by the Project Manager in favour of the Contractor.

348 Nave did not reject or discourage communications like Mackenzie's emails of 14 March 2012 and 16 March 2012 to the Project Manager. Nor did the Project Manager purport to have done so in his evidence under cross-examination.[207]

349 I am also satisfied in relation to the matters referred to above that the Project Manager co-operated and colluded with V601 to devise and implement strategies and tactics that would advantage V601 in its responses to, and in dealing with, Probuild's time extension and delay damages claims under the Contract.

350 On 22 March 2012 and 28 March 2012, Nave provided his views to V601's lawyers in relation to the delays referred to by Sleeman of Probuild on 15 March 2012.[208]

351 In a communication to the Project Manager on 11 April 2012, Mackenzie requested

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207 T416–T421.
208 FCB2593–2600.

the following:[209]

> Please send through your rejections as discussed.
>
> Also please confirm you have contacted your programmer in relation to the EOT's and the program. We also need to contact an independent QS to review the appropriate preliminaries. I suggest someone different to WT. Please urgently act on the above.

352 On 16 April 2012, the Project Manager provided 'draft responses' to Mackenzie of V601, in relation to Probuild's EOT2A and EOT3, and copied those draft responses to V601's lawyers.[210] Mackenzie responded to the Project Manager and V601's lawyers as follows:[211]

> I would have thought we actually issue a formal rejection on the basis that adequate information has not been supplied. We can ask them to resubmit with what John has requested.
>
> Alison/Tony can you advise?

353 The Project Manager should have readily understood that the above communications from V601 to the Project Manager were inappropriate, for the reasons outlined above. The absence of any attempt by the Project Manager to object to V601's suggested tactics, particularly given that V601's communications sought to influence the Project Manager in relation to its assessment and certification of the Contractor's extension of time claims, also reflects a lack of understanding by the Project Manager of its obligations of independence as the assessor and certifier under the Contract, as well as reflecting a lack of independence on the part of the Project Manager. The same communications referred to above also reflect V601's inappropriate and contractually wrongful conduct in enlisting the Project Manager as part of a 'team' to advantage V601 in respect of Probuild's claims under the Contract.

354 I am further satisfied that V601 and its lawyers, and the Project Manager, were

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209 FCB2781; T428.30–T429.3.
210 FCB2792–3.
211 FCB2791.

actively working as a team to implement a collective strategy to delay and reduce the Contractor's entitlements to extensions of time and delay damages, and to thereby maximise the Principal's ability to achieve the most favourable commercial outcome for itself in relation to the Contractor's time extension, delay cost, and other contractual claims. This contractually wrongful conduct on the part of V601 and the Project Manager, I find, was occurring from at least the time when Probuild submitted the first EOT2 claim; namely, from about early March 2012.

355 On 18 April 2012, V601's lawyers provided the Project Manager with a draft response to Probuild's EOT2A and EOT3 claims.[212] The revisions suggested to the Project Manager by the Proprietor's lawyers were, I note, subsequently wholly adopted by the Project Manager. In this instance, the Baker McKenzie input was limited to inserting references to contractual provisions relevant to the Project Manager's requests of Probuild. I also note that Baker McKenzie appropriately observed that the writer was mindful that the Project Manager was the person making the relevant assessment. The Project Manager's letter to Probuild of 19 April 2012 adopted all of the changes suggested by V601's lawyers, which were formal in nature.[213]

356 On 30 April 2012, V601, its lawyers and the Project Manager arranged a meeting to 'determine where we stand in relation to the EOT's/delay damages'.[214] At that meeting, which occurred on 1 May 2012, it is clear by reference to contemporaneous communications[215] that those involved included the Project Manager, Salvo, Maitland and Mackenzie, and V601's lawyers from Baker McKenzie. By reference to the same material, it is also clear what was discussed at the meeting of 1 May 2012; namely Probuild's extension of time claims, EOT1, EOT2, and EOT3. In relation to EOT3, 'it was agreed that there will be some cost for works but not necessarily any

212 FCB2794.
213 FCB2799–2800.
214 FCB2832–2833.
215 FCB2837–2841; FCB2835–2836.

delay'.[216] V601's lawyers cautioned against telling Probuild how they should be programming the works and foreshadowed that Probuild might be setting up V601 for future litigation.[217]

357 The minutes of the meeting of 1 May 2012 also record:[218]

> Under EOT3
> The engagement and use of an independent programmer will assist in developing a counter argument for any potential claim that Probuild may seek at a later date.
>
> Under EOT2
> At present, based on Probuild's program, it has not been delayed. The original Program allocated 58 days and this date is not until end of May.
>
> Summary EOT2
> Plus John needs to start more aggressive communications in terms of seeking documents and evidence. For example stating, 'this is what the contract says and this is what is required'.

358 In respect of the meeting on 1 May 2012, at which the Project Manager was present and actively involved, I am satisfied that those present agreed, amongst other things, on matters of approach, strategy, and tactics in relation to Probuild's claims, and that the engagement and use of an independent programmer would assist in developing V601's counter arguments to any potential claims Probuild might seek to make at a later date.

359 I am also similarly satisfied that, at the 1 May 2012 meeting, the Project Manager was urged by V601 to become more aggressive in its communications with the Contractor in relation to seeking documents and evidence.[219] I also note that, as set out above, the meeting recorded conclusions as to delay in relation to EOT2.

360 I consider that Nave's active participation in the meeting of 1 May 2012, in particular given the objectives of that meeting referred to above and given the matters discussed, was inappropriate and in breach of both the Principal's express and

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216 FCB2837–2841.
217 FCB2837–2841.
218 FCB2837–2840.
219 T435.15–T439.14.

implied obligations not to interfere with or direct the Project Manager in the performance of his role as independent assessor and certifier.

361 For the same reasons, I also consider that the Project Manager's involvement and active participation at the 1 May 2012 meeting, including the development of strategies to counter and delay the Contractor's extension of time claims, reflects a stark lack of appreciation by the Project Manager and by the Principal, V601, of the Project Manager's obligations of independence and impartiality.

362 My above conclusions are also supported by the failure on the part of the Project Manager to, in any way, object to or distance himself from attending and participating in a meeting of the type which occurred on 1 May 2012, either before or after the occurrence of the meeting, particularly given that those who were to be in attendance included the principal of V601 and three of V601's lawyers. The Project Manager at no point placed on the record that it could not, given its independent and impartial role as assessor and certifier, participate in, or cooperate with, the Proprietor and its contractual team's development and implementation of tactics developed to delay and minimise the certification and payment of the Contractor's entitlements under the Contract.

363 The Project Manager's failure to communicate to V601 that it felt conflicted by, and could not reconcile its obligation to act independently and impartially as assessor and certifier in respect of the Contract with, being actively involved with V601 and third parties employed by it to assist and advantage V601 under and in respect of the Contract, in relation to Probuild's contractual claims, supports my conclusions and findings in relation to the Project Manager's failures from about March 2012. These include the Project Manager's failure to understand its obligations of independence and impartiality as assessor and certifier under the Contract, and to act accordingly, including through Nave's actions, by conducting itself in a way which most effectively avoided undue influence exerted by the Principal or any appearance of such undue influence.

364 I am also satisfied that, from about March 2012, V601 substantially increased the extent of its influence and inappropriate pressure on the Project Manager, with the objective of having the Project Manager address and determine Probuild's time extension and related claims as slowly, and then as favourably, as possible to the Principal.

365 Furthermore, from at least mid-May 2012, V601 also employed Integrated Project Services Pty Ltd, a company at which Mr James Chryssafis (Chryssafis) was Managing Director, to oversee the Project Manager and provide input to the Project Manager in relation to Probuild's extension of time claims and the Project Manager's assessment and certification of those claims.[220] V601 also instructed Chryssafis and Nave, in substance, to jointly recommend whether V601 should consider immediately rejecting the Contractor's EOT2A and EOT3 claims.[221]

366 Further, under cross-examination, Nave stated that Chryssafis was harassing him.[222] Nave also stated that:[223]

> And then at 461, he says to you, 'Also, John, can you forward us a copy of the following actions: TBHs assessment' – et cetera, et cetera, and then he says, 'Finally, I would seriously consider rejecting EOTs 2A and 3'. I'm - - -?---Yeah.
> Yes?---Couldn't care less what he said.
> But he was saying that to you - - -?---Hey?
> - - - though, wasn't he?---Yeah, but I couldn't care - - -
> Yes?--- - - - less what he was saying to me.
> Okay. Now, you thought he was an idiot?---Yeah, absolutely.
> Okay. But he's the man that James Maitland turned to to bring in to look over your – to put pressure on you; correct?---Well, I don't know who brought him on, ah, in terms of from Salvo's office.
> Yes?---Yeah.
> Yes. But this is a pretty critical time, isn't it?---It's a pretty critical time. It's in May.
> Yes. You were - - -?---Yeah, 12. I'm – yeah – knee-deep in all the issues.
> Yes. And - - -?---Yep.
> - - - you're being criticised at the same time for the way you've handled things?---Correct.
> Yes. And then Mr Chryssafis comes in as well?---Yeah.

220 FCB2912; FCB2910; T260.5–T264.22; T263.15–18; T440.10–T442.23.
221 FCB2910.
222 T440.25.
223 T442.

> Yes. So on any objective view, you would have to say you were being pressured?---Um, no, not from him.
> Okay?---No.
> Being pressured more generally by V601?---Oh, I got pressure from both sides.
> Okay?---I had pressure from Probuild - - -
> Okay?--- - - - a hell of a lot as well, so I don't think it was isolated to any one side.

367 On 18 June 2012, the Project Manager sent a draft of his proposed response to Probuild's Façade Variation claim to Mackenzie of V601.[224] Later that day, Mackenzie responded that V601 wanted a legal review of that proposed response, therefore the Project Manager's draft response to Probuild's Façade Variation claim would be sent to the Principal's lawyers.[225]

368 On 19 June 2012, V601, via its lawyers, provided the proposed amended version of Nave's draft response to Probuild's Façade Variation claim to the Project Manager.[226] Thereafter, the Project Manager's response to Probuild was sent to Probuild substantially in the amended form suggested by V601's lawyers.

369 By mid-2012, V601 had engaged an expert programmer, TBH, as part of its contractual claims response team to assist it and the Project Manager to analyse the Contractor's delay claims, and to assist V601 and the Project Manager in developing counter arguments to any potential Probuild delay claim.[227] As part of this process, V601 was intent not to provide Probuild with a copy of TBH's reports, and I accept that Nave was aware of V601's strategy in that regard. Indeed, on 16 July 2012, V601's lawyers emailed Nave and others directly to advise that the Project Manager should not provide Probuild with TBH's report when delivering its assessment of Probuild's EOT2A and EOT3 claims.[228]

370 V601's lawyers' communication to their client, V601, and to the Project Manager, on

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224 FCB3530–3531.
225 FCB3530.
226 FCB3532; FCB3533–3536; FCB3538–3539.
227 FCB2835 and FCB2837; refer also meeting on 1 May 2012.
228 FCB3681.

16 July 2012, was in the following terms:[229]

> Colin/James/John,
>
> Please see attached a revised version of the letter to Probuild in relation to EOT claims 1 to 6.
>
> By way of overview, John needs to make a determination of the EOT claims based upon his own assessment and not simply adopt the findings of TBH. We have amended the letter so that the determination appears to have been made solely by John/First Urban.
>
> We have also amended the letter to remove any reference to TBH or its report altogether. The reason for this is that the report, on one construction, may be privileged in the sense that it was prepared in anticipation of dealing with claims from Probuild. In order to preserve any privilege, V601 should not provide Probuild with a copy of the report, nor should it disclose its contents. To the extent that this has already been done, privilege may have been lost.
>
> Separately to the issue of privilege, providing the TBH report to Probuild would simply open up further bases for Probuild to challenge the position taken by V601 with respect to the EOT claims. It is more manageable, from V601's perspective, that any dispute regarding the assessment of EOT claims is solely in respect of First Urban's determination.

371 By 16 July 2012, V601's lawyers had substantially amended Nave's draft assessment in relation to EOT2 and EOT3, including removal of all references to TBH's input in relation to those claims from the Project Manager's intended communication to the Contractor.[230]

372 Under cross-examination, Nave did not directly refute the proposition that V601's lawyers' advice to withhold references to TBH from his report was done for tactical reasons. When cross-examined on this aspect, Nave stated:[231]

> Did you take that communication from Baker McKenzie to be in the nature of a purely tactical position that they were recommending?---It seems like, um, they didn't want that report to go to them.
>
> For tactical reasons?---Possibly. But the report wasn't final, Your Honour. TBH hadn't, at that point, received all the information from Probuild, which then – they spent another – some time again reviewing that report and coming up with another report on 9 August and then another report on 7 September.

229 FCB3681; FCB3697.
230 FCB3681; FCB3683–3686.
231 T468.9–18.

373 Further, by email dated 18 July 2012, V601's lawyers communicated to the Project Manager that:[232]

> John
>
> I'd suggest you (us) do a summary of their logic and you rely on that without referring to TBH. If you refer then they will call for full report.

374 The day before the above communication, in an email dated 17 July 2012 from V601's lawyers to V601's Chief Operating Officer, Maitland, V601's lawyers stated:[233]

> James,
>
> I understand the logic. A solution maybe to meet with TBH and condense their Report so that we eliminate the areas for 'debate' by Probuild. What I want to avoid is Probuild presenting arguments to us based on the TBH Report which if we accept means we must give them more time and money.
>
> Happy to speak to Colin further.

375 On 26 July 2012, V601's lawyers circulated a draft of TBH's Report received on that day to the V601 claims response team, including the usual lawyers at Baker McKenzie, the Project Manager, Nave, and his assistant, as well as Mackenzie and Maitland of V601, asking the team members to review the draft TBH Report and also suggesting to those to whom it was circulated, including the Project Manager, that the circulation of the TBH Report needed to be limited 'in order to preserve privilege'.[234] On 11 July 2012, prior to circulation of the Report, the Project Manager emailed a copy of the TBH Site Status Report and a draft proposed letter, from the Project Manager to Probuild, to V601's lawyers for review and comment.[235] The Project Manager's draft letter was then viewed by V601's lawyers, revised, and returned to V601 and the Project Manager on 16 July 2012 for transmission to Probuild.[236]

376 Baker McKenzie's letter dated 16 July 2012, which returned the draft of the Project

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232 FCB3696.
233 FCB3696.
234 FCB3909.
235 FCB3666.
236 FCB3681.

Manager's letter to Probuild to the claims response team, included a statement to its client and also to the Project Manager that:[237]

> Please see attached a revised version of the letter to Probuild in relation to EOT claims 1 to 6.
>
> By way of overview, John needs to make a determination of the EOT claims based upon his own assessment and not simply adopt the findings of TBH. We have amended the letter so that the determination appears to have been made solely by John/First Urban.
>
> We have also amended the letter to remove any reference to TBH or its report altogether. The reason for this is that the report, on one construction, may be privileged in the sense that it was prepared in anticipation of dealing with claims from Probuild. In order to preserve any privilege, V601 should not provide Probuild with a copy of the report, nor should it disclose its contents. To the extent that this has already been done, privilege may have been lost.
>
> Separately to the issue of privilege, providing the TBH report to Probuild would simply open up further bases for Probuild to challenge the position taken by V601 with respect to the EOT claims. It is more manageable, from V601's perspective, that any dispute regarding the assessment of EOT claims is solely in respect of First Urban's determination.

377 A further element of the principal's strategy and intent in relation to the management and determination of Probuild's claims is exposed by an internal email dated 31 July 2012 between Mackenzie and Maitland of V601. That communication relevantly states:[238]

> The final report (from TBH) will come in the next week once they have done the status update. The strategy will then be to issue the report and have John reduce the days further for contributing to the delays.

378 A further relevant meeting occurred on 7 August 2012, which was attended by Ashford, Mackenzie, Nave, Coraci, Mr Ian Buchanan-Black of TBH, and a representative of V601's lawyers, Baker McKenzie.[239] At the meeting of 7 August 2012, the Project Manager was an active participant[240] and was advised, amongst other things, that the Proprietor 'does not have the money to stump up for

237 FCB3697.
238 FCB3913; words in parentheses added.
239 FCB4004–4009.
240 FCB4004–4009; Baker McKenzie meeting notes.

Probuild's claim'.[241]

379 At the meeting on 7 August 2012, a decision was also reached not to give TBH's delay report to Probuild, and the Project Manager was instructed to 'paraphrase TBH report and make determination in response to Variation Claim'. At that same meeting on 7 August 2012, the Proprietor and the Project Manager discussed the weakness of any claim that Probuild might bring in relation to Building D, even though no formal claim had been made by Probuild at that time.

380 At this meeting of the claims response team on 7 August 2012, a strategy was discussed which involved the Project Manager preparing a report to be reviewed by the Principal's lawyers. Separately, it was planned that TBH would also prepare its own report. At this same meeting, there was also discussion at which the Project Manager was present about the object of keeping the financier happy, where it was stated that the Financier was 'holding huge amounts off Mario at the moment'.[242] There was also discussion, at which the Project Manager was present, about a strategy to resolve Probuild's extension of time claims pending the Project Manager's assessment.[243] The Baker McKenzie meeting notes of 7 August 2012 include:[244]

> Strategy
> - John does report – BSM to review
> - TBH to do own report based on 30 July program
> - point of wanting to do deal on D and E is to show financier that there has been a levelling of claims by Probuild
> - objective is to keep the financier happy
> - willing to take the risk in giving EOT on building D unilaterally
>   - ie that Probuild won't make further claims on D
> - if we give D 10 days now then this is the starting point of negotiations
> - better off doing a total deal
> - need to let Probuild know a deal is coming so that they don't issue a 3 month EOT on D
> - Financier is very pro TBH
> - Financier is holding huge amounts off Mario at the moment.

241 FCB4006.
242 FCB4008.
243 FCB4343; T435.15–T439.13; T709.14–T711.7 and T712.2–T725.3.
244 FCB4007–4008.

381 On the basis of the evidence, including the parts of the evidence referred to and highlighted above, I am also comfortably satisfied that these and numerous other contemporaneous communications between V601, its lawyers, Baker McKenzie, TBH, and the Project Manager show that the Project Manager was part of a claims response team assembled by V601, including the Principal and its advisers, to develop and implement a strategy and apply tactics to delay and defeat and minimise Probuild's entitlements to time extensions and associated delay damages. Further, the strategy involved enlisting Nave, the Project Manager, to develop and implement that strategy, as well as applying pressure on the Project Manager to deal with the Contractor's time extension and delay damages claims in a way that assisted V601 and served its commercial interests.

382 I am also comfortably satisfied that the objectives of the claims response team, and the strategy it pursued, included delaying and minimising the determinations by the Project Manager and thereby its certification of the Probuild entitlements, under the Contract, to extensions of time and consequential delay damages.[245]

383 I am also comfortably satisfied that at conferences between V601 and the Contractor's claims response team, to which I have referred, additional conferences in which the Project Manager also participated, including on 6 September 2012, placed the Project Manager under inappropriate and very considerable undue influence from V601 and its claims response team advisers. I am comfortably satisfied that the Project Manager very early in the Project succumbed to this inappropriate and very considerable undue influence and pressure by V601's team, including Mackenzie (V601's Development Director), Maitland (V601's Chief Operating Officer), and V601's advisers to delay decisions, in relation to and to defeat if possible, or otherwise minimise, Probuild's time extension and delay damages entitlements under the Contract.

384 Further, I am comfortably satisfied that my above findings and conclusions also

245 FCB4004–4009; FCB4010.

evinced the Project Manager's failure to properly understand the need for its conduct in relation to, and the performance of, its independent assessment and certification role under the Contract to be unwaveringly independent, impartial, fair and reasonable, in accord with the express requirements of the Contract, and without regard for the commercial interests of either party to the Contract.

385 I am also comfortably satisfied that Nave, as Project Manager, willingly participated as part of the V601 claims response team, in respect of the team's objectives to which I have made earlier reference. This included the process adopted by V601 and its claims response team, which involved the Project Manager producing drafts of his assessments of the Contractor's claims, before the Project Manager issued its assessments and related certifications to Probuild, and awaiting comment and suggestions from other members of the V601 team, including as to the timing of the Project Manager's determinations.[246]

386 The file note of a telephone conversation on 13 September 2012, in which V601's lawyers spoke to Coraci, a project manager employed by the Project Manager, and a person working closely with Nave on the Precinct Project, recorded the following:[247]

> Josie Coraci
> - just spoke to Colin, can't have the meeting this afternoon as Colin is waiting on our legal advice
> - legal advice underway
> - obviously a determination needs to be issued
> - apparently First Urban issued a formal notification and assessment of EOT claims last week
> - gave to Colin
> - Colin then directed Frist Urban to reissue with different assessment
> - this revised assessment was the one handed over in draft to Probuild at last week's meeting
> - First Urban feels secure in the manner they have conducted themselves
> - made sure assessment was within requisite time
> - Colin is obviously not wanting formal assessment issued so he can negotiate
> - understand his position
> - Colin has meeting this afternoon with Matt Bready of Probuild
> - may change things from thereafter

246 FCB4214; FCB4083; FCB4250; FCB4252; FCB4257 and FCB4248.
247 FCB4343.

387 This and other similar materials substantiate V601's strategy, which I am satisfied establishes that the Project Manager, principally through its principal Nave, worked complicitly to manage the timing and aspects of the content of the Project Manager's responses, assessments, and certifications to the Contractor's claims, and so to advantage V601.

388 On 7 September 2012, the Project Manager's draft delay damages assessment went to V601 for review.[248]

389 On 5 September 2012, and in revised form on 7 September 2012, TBH provided a Mitigation Actions and Separable Portion Report to Baker McKenzie that was then provided to the Project Manager and V601.[249]

390 On 7 September 2012,[250] V601, via Mackenzie, requested that a draft assessment be issued based on the dates identified in TBH's 'mitigation strategies' report which had been issued that same date, and which was perceived by Mackenzie to be more favourable to V601.[251]

391 Further, in my view, the degree to which Nave was drawn into and enmeshed in the V601 claims response team, its thinking, and its strategy and tactics, is significantly supported by the fact that Nave, when confronted by Probuild during the Project with allegations that he lacked independence, then immediately sought advice from V601's own lawyers.[252]

392 Further evidence of the Project Manager's principal, Nave, not appreciating the nature and extent of the obligations of an independent and impartial assessor and certifier, and the way in which an independent, impartial, fair and reasonable assessor and certifier should conduct themselves, is reflected in the Project Manager's actions in October 2012, when Probuild issued a Notice of Dispute

248 FCB4248–4249.
249 FCB4198; FCB4212.
250 FCB4212; FCB4214; FCB4217–4247; FCB4298–4249.002; T548.2–16.
251 T546.25–T547.6.
252 FCB4485; T433.13–T435.14.

alleging that the Project Manager had not acted independently in relation to Probuild's extension of time claims. It is notable and troubling that the Project Manager's email of 22 October 2012 concerning the Notice of Dispute issued by Probuild, in relation to extension of times, was referred by the Project Manager directly to Baker McKenzie, V601's lawyers.[253]

393 In reaction to Probuild's above allegations, Nave emailed the Proprietor's lawyers directly and sought advice on an aspect of how the Project Manager should respond. In so doing, the Project Manager was seeking advice from the lawyers for the very party accused of compromising the Project Manager's independence.

394 When these matters were put to Nave in cross-examination, in my view, his responses made it clear that he failed to appreciate that it was anomalous and inappropriate for the Project Manager to seek advice from the Proprietor's own lawyers, in relation to the Contractor's allegation that the Proprietor had compromised the Project Manager's independence.[254] The answers provided by the Project Manager to questions put by Probuild's Senior Counsel highlighted that the Project Manager was, himself, not sure whether an independent certifier should seek advice in respect of a Notice of Dispute alleging lack of independence from the lawyer for the party alleged to have compromised the independence of that independent certifier.[255]

395 Further, by May 2013, it is clear that the Project Manager had become accustomed to communicating directly with V601's lawyers. This is established by the following. On 12 November 2013, Probuild submitted its Occupancy Permit for Stage 1 to the Project Manager requesting that Practical Completion for Stage 1 be granted for 8 November 2013. That communication was also forwarded to the Principal. This resulted in V601's lawyers communicating with the Project Manager on 13

253 FCB4485.
254 T433–T435.
255 T433.13–T435.10.

November 2013[256] and advising that it was not appropriate for Probuild to request Practical Completion by means of an email, and also advising that Probuild ask the Project Manager to backdate the date of Practical Completion to 8 November 2013. The Proprietor's lawyers also advised the Project Manager to ask Probuild to follow the Contract in relation to cl 34.6 and express the Contractor's opinion about when Practical Completion had been reached. I also again note that Baker McKenzie appropriately advised the Project Manager that the email which Baker McKenzie was recommending that the Project Manager send to Probuild should be 'in the form you are comfortable with'.

396 Under cross-examination, Nave acknowledged that, in this regard, the position adopted by V601's lawyers in their email dated 13 November 2013 was technical and that he did not agree with it. However, the Project Manager nevertheless acceded to the above request by V601's lawyers and sent the letter drafted by V601's lawyers to the Contractor.[257]

397 Similarly, in relation to the Project Manager's recognition of the Dates of Practical Completion, on 30 October 2012, Probuild notified the Project Manager that Practical Completion of Stage 1 was about to occur[258] and, in response, McKenzie emailed Maitland, in an email which included McKenzie saying: 'You and I should discuss tactics here. Obviously without titles we should not concede even one point on PC or its on our own dollar.'[259] V601's lawyers then worked on a communication to send to the Project Manager providing the Project Manager with potential legal technicalities, in my view, clearly calculated to delay and *bog down* the certification of Practical Completion.[260] I infer from these circumstances that this formed part of V601's strategy, acquiesced in by the Project Manager, in a way which again I consider establishes the Project Manager's lack of independence, to delay

256 FCB4952.
257 FCB4952; T843.17–T847.14.
258 Bready Amended First Statement, [646].
259 FCB4936.
260 FCB4952; Nave Amended Statement, 3 February 2019, [583] (Nave Amended Statement).

certification of Practical Completion and to advantage V601, including by generating liquidated damages, which I consider it is reasonable to infer V601 thought would benefit it by offsetting V601's likely interest costs. This is because under the Contracts of Sale of the Precinct apartments, settlement was to occur 14 days after the purchaser was notified of the registration of the Plan of Subdivision in relation to Buildings B and C.

398 The relevant Plan of Subdivision for Buildings B and C was not registered until 15 November 2013. Further, I consider that the inference which I have drawn is strongly supported by the Project Manager's evidence under cross-examination that, although he communicated the legal technical issues referred to above (raised by V601's lawyers) concerning certification of Practical Completion to Probuild, Nave conceded that the points raised by V601's lawyers and highlighted to Probuild were 'highly technical' and that he (Nave) personally did not agree with the technicalities raised.[261]

399 As earlier outlined, I am also comfortably satisfied on the evidence, including the specific evidence outlined above, that the additional Indicia 6, 7, 8, 9 and 10 of actions by the Project Manager, which Probuild allege establish lack of independence on the part of the Project Manager in Annexure 2 of the Probuild Closing Submissions dated 11 June 2019, also separately and additionally establish contractually wrongful undue influence by the Proprietor V601.

400 The evidence and conclusions referred to in the last preceding paragraph constitute further examples of conduct establishing that the Project Manager, by its principal Nave, failed to perform its assessment and certification functions under the Contract with the required degree of independence, and impartiality, and in a fair and reasonable manner, and in accordance with the express requirements of the Contract and also failed to perform the functions referred to without regard for V601's commercial interests. For these additional reasons, the Project Manager also

261 T843–T848.

breached cls 20(b)(i) and (iii) in relation to cl 20.2(a)(i)–(iii) of the Contract.

401 The additional Indicia referred to in the last two preceding paragraphs which are separately established, are those relied upon by Probuild in 6, 7, 8, 9 and 10 of Annexure 2, summarised below:[262]

> 6. The Project Manager requesting that its communications with Probuild and determinations relating to the exercise of its independent certification functions be prepared, reviewed or amended by V601 or its agents, and particularly in relation to Probuild's claims for extensions of time, the Façade Return Walls Variation and regarding the certification of Practical Completion.
>
> 7. The Project Manager seeking and, or alternatively, acting upon the advice and recommendations of V601's agents relating to its independent certification functions, or the proper exercise of those functions, and particularly in relation to Probuild's claims for extensions of time, the Façade Return Walls Variation and regarding the certification of Practical Completion.
>
> 8. The Project Manager procuring reports from TBH regarding Probuild's EOT2A and EOT3 claims, knowing that such reports were to be used by V601 or its agents to refute Probuild's EOT2A and EOT3 claims.
>
> 9. The Project Manager participating in meetings and telephone conversations, and being copied into correspondence, between V601, its agents and TBH regarding the defence of Probuild's EOT2A and EOT3 claims, including:
>
> (a) the establishment and maintenance of any privilege in such reports and summary documents; and, or alternatively
>
> (b) the content and timing of any determinations regarding Probuild's EOT2A and EOT3 claims having regard to V601's financing arrangements for the development at 601 Victoria Street, Abbotsford.
>
> 10. The Project Manager failing to disclose to Probuild documents produced by TBH having regard to V601's strategy of maintaining any privilege in such documents.

Summary of conclusions

402 Further, I conclude and find that:

(a) From at least about early April 2011, Nave did not appear to understand the Project Manager's duties and obligations of independence and impartiality.

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262 Probuild Closing Submissions, 11 June 2019, Annexure 2.

In my view, this is established by Nave's conduct through First Urban proposing to be engaged as Project Manager with a scope of duties and obligations, including obligations to act as assessor and certifier, and in the same proposal also seeking to agree the payment of additional fees and a percentage of total gross profit of the Project, dependant on ultimate Precinct Project profit levels;[263]

(b) The significance of the financial success of the Precinct Project to Nave, and First Urban, was raised and emphasised by Mackenzie and SPG in an email to Nave on 8 February 2012,[264] in which Mackenzie stated that:[265]

> I believe you have these issues well in hand however I also believe that currently we (Salvo and accordingly First Urban) are at financial risk and time risk because PCA is taking the approach that it's not their issue. Better coordination in the construction meeting should help balance the responsibility and give us (Salvo) some comfort that there is no looming costs or delays resulting from the above.
>
> … As you know Salvo use this as a full service solution from First Urban and accordingly a financial impact will eventuate if Salvo suffers as a result of coordination issues with PCA and First Urban. So that we can both avoid this let's be proactive in addressing the above.

(c) On 16 February 2012,[266] Nave responded to Mackenzie's earlier email of 8 February 2012, and included many detailed comments in response to that email. Nave accepted and did not comment in any way upon Mackenzie's statement that SPG (V601), and First Urban, the Project Manager, were at 'financial risk and time risk', as referred to above. Nor did Nave comment on Mackenzie foreshadowing the possible financial impact on First Urban, if SPG was to suffer as a result of coordination issues for which V601 held the Project Manager responsible;[267]

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263 FCB740; FCB760; FCB762–809.
264 FCB2376–2379.
265 FCB2378.
266 FCB2376–2378.
267 FCB2376.

(d) In my view, the proposed Project Management Agreement between First Urban and V601 was to include a profit-share arrangement until about the beginning of October 2012, when a Deed of Variation to the Project Management Agreement, between V601 and First Urban, acknowledged and agreed to waive, release, and discharge V601 from any right, entitlement, or claim it may have to share in the profit of the project.[268]

Until about the beginning of October 2012, I find that Nave and First Urban continued to propose and pursue a Project Management Agreement with V601 which included a profit incentive payable to the Project Manager, and which was tied to the commercial success of the Precinct Project. The same proposed Project Management Agreement also contemplated that the Project Manager would act as the independent assessor and certifier under the related Contract with Probuild;

(e) Nave, through First Urban, also considered it appropriate for the terms of engagement of the Project Manager to extend to advising, negotiating, and providing recommendations for approval of project variation claims and extension of time claims;[269]

(f) I also find, as established by the above evidence, including the evidence of the Project Manager's conduct establishing its lack of independence as particularised in Probuild's Indicia at Annexure 2 of its Closing Submissions, that 'V601 carefully performance managed the Project Manager'. I find that the Project Manager was receptive and amenable to such management by V601, and the inappropriate and undue influence exerted by V601;

(g) As part of the management of, and undue pressure exerted by V601 on the Project Manager, it withheld project management fees in a significant sum

268 FCB4418; cl 2.1(d).

269 FCB762 at 803; see Part B Scope of Services heading 'Construction', third dot point down: 'Advise, negotiate and provide recommendation for approval of project variation claims and extension of time claims.'

which caused financial pressure for First Urban.[270] V601 also issued First Urban with a Notice to Show Cause on 15 June 2012.[271] In the circumstances detailed above, I infer that V601 served this Show Cause Notice on the Project Manager to increase pressure on the Project Manager to accede to V601's requests in relation to the Project Manager's assessment and certification of Probuild's entitlements under the Contract;

(h) It is in my view telling that it was not until early October 2012, when the Project Manager signed a Deed of Variation for Project Management Services with V601, that the Project Manager's outstanding fees were brought up to date by V601.[272] Further, I note that, only weeks earlier, after a drawn out process, the Project Manager finally determined Probuild's EOT2A and EOT3 claims;

(i) I consider that the pressures which V601 applied to Probuild were orchestrated by V601 with the intention of pressuring the Project Manager to co-operate and work with V601 to delay and minimise the certification of Probuild's time extension and delay cost entitlements;

(j) The Project Manager worked as part of V601's claims response team, including in relation to the Project Manager's assessment and certification functions;

(k) I also infer from the extensive degree to which V601 failed to make timely discovery of a large number of documents relating to the Project Manager's assessment and certification functions, and the extensive degree to which V601 strenuously contested that those documents were subject to privilege, that V601 was motivated by concern that such communications would prove to be harmful to V601's case, and to the maintenance of the Project Manager's

270 FCB4381–4382; T635.21–22.
271 FCB3526; FCB3524.
272 FCB4426; FCB4429.

claim of independence in relation to its assessment and certification functions under the Contract. V601's claims of privilege were ultimately, in the overwhelming majority of cases, ruled to be unsubstantiated;

(l) As earlier concluded and found, the Project Manager actively and cooperatively worked with the V601 claims response team to formulate and implement V601's strategy, including in relation to addressing Probuild's EOT2 and EOT3, with the Project Manager issuing draft determinations that the Principal deployed in its attempts to delay certification, so as to negotiate what it considered to be a satisfactory financial outcome with Probuild on those claims;[273]

(m) The Project Manager was not even-handed in his treatment of V601 and Probuild, including in the way that the Project Manager received and considered materials and communications relevant to Probuild's time extension and delay cost entitlements, and relevant to the Project Manager's performance of its independent assessment and certification functions under cl 20.2 of the Contract. Without involving or informing Probuild, the Project Manager discussed, and received materials directed to defeating and minimising Probuild's claim entitlements, with V601's partisan consultants and its lawyers in a process that was generally intended to defeat, or diminish, Probuild's contractual claims but did not inform Probuild of such activities or provide Probuild with the time extension claim related materials which challenged Probuild's claims, so as to provide it with an opportunity to answer the contradictory material, and which might affect its entitlements as considered by the Project Manager, or otherwise involve Probuild in this process;

(n) The Project Manager arranged for TBH's engagement and involvement in the

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273 FCB2781; FCB2788; FCB4083; FCB4250; T173.23–31; T174.1–14; T356.9–12; T494.21–T495.20; T640.23–28.

extension of time analysis and assessment, and did so as part of V601's strategy and tactics to delay and minimise the Project Manager's certification of Probuild's contractual entitlements, and to bolster V601's position in relation to Probuild's delay claims.[274]

403 For the above reasons, I conclude and find that:

(a) V601's argument that the onus would be reversed if it were to engage directly with Probuild's detailed case and submissions[275] that the Project Manager lacked independence is rejected, as is any suggestion that V601 has good reason not to fully respond to Probuild's detailed case on the contractually wrongful conduct of the Project Manager.

(b) The Project Manager's conduct in relation to its contractual role as assessor and certifier lacked the required level of independence and constituted a breach of cl 20.2 of the Contract from near the outset of the Precinct Project, because through its officers:

(i) it failed to appreciate the standard of independence and conduct required of its role as assessor and certifier; and

(ii) it allowed its processes of assessment, determination, and certification of Probuild's contractual entitlements to be unduly and inappropriately influenced by V601's strategies and tactics, as well as V601's commercial interests.

(c) In relation to the last preceding subparagraph, I am comfortably satisfied that the Project Manager was not independent and impartial, nor was it impartial, fair, and reasonable in its assessment and certification of Probuild's extension of time claims, and of Probuild's contractual entitlements to extensions of time and delay damages.

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274 FCB2779.

275 Annexure 2 to the Probuild Closing Submissions of 11 June 2019.

(d) My conclusions and findings regarding the Project Manager's lack of independence and breach of cl 20.2 are principally based on, and comfortably satisfied by, the establishment of the first nine heads of indicia articulated in Annexure 2 to Probuild's submissions, as well as the additional findings made in respect of the Project Manager's evidence, which are outlined below.

(e) As a result of my above conclusions and findings, it is unnecessary for me to deal individually and in detail with each of the remaining indicia numbered 10 to 33 detailed in Probuild's Annexure 2; save to confirm that I am also satisfied that the further Annexure 2 indicia numbered 10 to 33 (inclusive) detailed in Probuild's Annexure 2 are also made out on the evidence particularised by Probuild in respect of each of the said indicia in Annexure 2. Furthermore, the establishment of each of those additional indicia are individually and cumulatively sufficient to establish that the Project Manager lacked independence and impartiality in its role and also to impugn the Project Manager and justify setting aside all its assessments, determinations, and certifications under the Contract which are in issue; and in addition, provide a basis for my finding that the Project Manager failed to perform its assessment and certification functions under the Contract with the required degree of independence and impartiality in a fair and reasonable manner and in accordance with the express requirements of the Contract and without regard for V601's commercial interests.

(f) I am comfortably satisfied that the Project Manager and V601 collaborated on a strategy regarding Probuild's claims for extensions of time, which involved the Project Manager sending draft determinations to V601 for review and comment, following which the draft determination would be sent to Probuild. I am also comfortably satisfied that V601, in collaboration with the Project Manager, implemented this process so as to provide an opportunity for V601 to negotiate the final determination with Probuild, in order to achieve the best

outcome for V601. In this respect, the Project Manager's conduct also delayed the determination of Probuild's contractual entitlements, an example of which is the process followed in relation to EOT2. The Project Manager was unable, via Nave's evidence, to provide a satisfactory explanation as to why it was appropriate to send the draft EOT2 determination to V601 for its consideration, instead of determining and communicating a clear, unequivocal decision on the claim to Probuild. In my view, the email communications concerning the draft EOT2 determination, which are outlined above, reflect the nature of the collusion and cooperation between the Project Manager and V601 in this regard, as well as the Project Manager's willingness to obtain V601's input and approval of draft assessments and determinations in relation to Probuild's contractual entitlement to time extensions, before communicating them to Probuild.

(g) Given their content, it was inappropriate for V601 to send the communications referred to in the last preceding subparagraph, and other similar communications relating to the Project Manager's independent assessment and certification functions, to the Project Manager. The Project Manager's willingness to seek such input and approval is underscored by the absence of contemporaneous communications from the Project Manager objecting to or attempting to distance itself from the strategy proposed in the V601 email communications. In this respect, I am satisfied that the fact the Project Manager did not take issue with the above mentioned manner in which V601 was communicating with it further demonstrates that V601 and the Project Manager were working in concert to plan and implement strategies and tactics regarding Probuild's extension of time claims, including EOT1 and EOT2, with a view to defeating or minimising Probuild's entitlement, and so as to financially advantage V601.

(h) Further, I am satisfied that the strategies and tactics and impugned conduct of

both V601 and the Project Manager outlined above extended to Probuild's extension of time and delay damages claims more generally. In respect of EOT2A and EOT3, communications of a similarly inappropriate nature were exchanged between V601 and the Project Manager, and I consider that those communications also sought to influence the Project Manager in relation to its assessment and certification of Probuild's extension of time claims. The Project Manager's ongoing failure to understand that such communications were inappropriate, when it should very promptly have come to this realisation, and the absence of any objections to the strategies and tactics V601 sought to employ, from about the time of the first of Probuild's time extension claims under cl 34 of the Contract, reflects both a lack of fundamental understanding by Nave as Project Manager regarding the independence associated with the role of assessor and certifier under the Contract, as well as evincing an actual lack of independence on the part of Nave and the entity which was the Project Manager.

(i) The EOT2A and EOT3 communications also reflect V601's inappropriate and contractually wrongful conduct in enlisting the Project Manager as part of a contract claims 'team' to advantage V601 in respect of Probuild's claims under the Contract. I am satisfied that V601 and its advisers, including its lawyers, together with the Project Manager, were actively collaborating as a team to implement a collective strategy to delay and reduce Probuild's entitlements to extensions of time and delay damages, so as to thereby maximise V601's ability to achieve the most favourable commercial outcome, vis à vis Probuild, in relation to such claims. I also find that this contractually wrongful collaboration was occurring from, at least, the time when Probuild submitted the first EOT2 claim.

(j) The Project Manager participated in meetings of an inappropriate nature, including the meeting on 1 May 2012 (detailed above) to discuss Probuild's

EOTs and delay damages, with V601's representatives and members of V601's contract claims team, including its lawyers. The 1 May 2012 meeting covered, inter alia, the engagement of an independent programmer to assist with developing V601's counter-arguments to Probuild's claims; a directive by V601 that the Project Manager was to be more aggressive in its communications to Probuild seeking documents and evidence; and discussed conclusions on delay in relation to EOT2. Given the nature of the matters discussed, in my view, the Project Manager's active participation in this meeting was very inappropriate, and provides a further example of Nave as the Project Manager failing to appreciate the contractual obligations of independence and impartiality in the assessment and certification of the Contractor's claims. In failing to object to, or distance itself from, attendance and participation in meetings such as that on 1 May 2012, and in failing to conduct himself in such a way as to avoid undue influence exerted by V601, the conduct of Nave and the Project Manager exhibited both a profound lack of required independence and also, I consider, as earlier alluded to, a lack of fundamental understanding of those aspects of the contractual role that, as Project Manager, he was charged with as assessor and certifier.

(k) I also find V601 in breach of its express and implied obligations not to interfere with or direct the Project Manager in the performance of its role as independent assessor and certifier.

(l) From about March 2012, I am satisfied that V601 substantially increased its influence and the pressure on the Project Manager, with the objective of having the Project Manager address and determine Probuild's extension of time and related claims as slowly as possible, in order to favour V601. This was achieved, inter alia, by appointing the company of which Chryssafis was managing director to oversee the Project Manager, and to provide input to the Project Manager in relation to the assessment and certification of Probuild's

extension of time claims. Under cross-examination, the Project Manager did not deny that he was receiving pressure from Chryssafis.

(m) Other forms of influence and pressure applied by V601 to the Project Manager, in its role as assessor and certifier of Probuild's extension of time and related claims, included review of the Project Manager's draft response to Probuild's façade variation claim by V601's lawyers. After this review, the Project Manager's response was then sent to Probuild in substantially the same form as the version containing the suggested amendments originating from V601's lawyers; V601 together with its lawyers issued a directive that a TBH report should not be provided to Probuild in order to preserve privilege, and that the response bear no reference to a relevant TBH report or TBH's input in relation to Probuild's subject time extension claims. V601's lawyers did however appropriately remind the Project Manager that the determination should be based on the Project Manager's 'own assessment'.

(n) At a meeting on 7 August 2012 attended by V601, its lawyers, and TBH, at which the Project Manager was present, and an active participant, references were made to, inter alia, V601 not having sufficient funds to pay Probuild's claim; possible weaknesses in relation to a potential claim by Probuild in respect of Building D; the Financier withholding funds from V601 (Mario); and strategies to assist V601 in resolving Probuild's extension of time claims pending the Project Manager's assessment.

(o) I am satisfied that the communications between V601, its lawyers, TBH, and the Project Manager establish that the Project Manager was part of a contractual claims response team assembled by V601 to develop and implement a strategy and apply tactics to delay, defeat, or minimise Probuild's entitlements to extensions of time and delay damages. This strategy involved enlisting the Project Manager to assist with developing and implementing the strategy, as well as applying pressure to the Project

Manager to deal with Probuild's claims in a way that assisted V601 and its commercial interests.

(p) I am satisfied that, at the meetings involving the contractual claims response team, the Project Manager was placed under inappropriate and considerable undue influence from V601 and its advisers to delay and minimise certification of Probuild's contractual entitlements to time extensions and delay damages and thereby to financially advantage V601. I am comfortably satisfied that, early in the Project, the Project Manager succumbed to the inappropriate and considerable undue influence and pressure exerted by V601 and its advisers to delay decisions, or minimise, or defeat, if possible, Probuild's contractual entitlements to extensions of time and delay damages.

(q) In relation to the above findings and conclusions, I am also comfortably satisfied that the Project Manager failed to properly understand that its contractual role as assessor and certifier required unwaveringly independent, impartial, fair and reasonable conduct, in accordance with the express requirements of the Contract, and without regard for the commercial interests of either party to the Contract. I am also comfortably satisfied that the Project Manager willingly participated as part of the V601 contractual claims response team. This included providing draft assessments of Probuild's claims to the V601 team for comments and suggestions and acceding to requested amendments to the Project Manager's assessments, before issuing such assessments to Probuild.

(r) In my view, the degree to which the Project Manager was drawn into and enmeshed in the V601 contractual claims response team is reflected by Nave, and through him the Project Manager's, actions in immediately seeking advice from V601's lawyers when Probuild issued a Notice of Dispute alleging that the Project Manager had not acted independently in relation to Probuild's extension of time claims. This is further evidence of the Project

Manager failing to appreciate the nature and extent of the obligations of an independent and impartial assessor and certifier, and the way in which such an assessor and certifier should independently and impartially conduct themselves. It also reflects the degree to which the Project Manager had become accustomed to dealing with V601's lawyers directly.

For the above reasons, I also conclude and find that the Project Manager failed to assess, determine and certify Probuild's extension of time and delay damages claims independently, impartially, and in a fair and reasonable manner, in accordance with the express terms of the Contract, including cls 32.3, 34.3, 34.4, 34.5, and 34.9, or assess, determine and certify Liquidated Damages independently, impartially and in a fair and reasonable manner in accordance with cl 34.7 or in accordance with cls 20.2(a) and 20.2(b) of the Contract, and I find that the Project Manager breached its obligations in relation to the requirements of the Contract referred to in each of those clauses of the Contract, in each of those respects.

404 Further, including for the above reasons, I conclude and find that V601 was in breach of the Contract:

(a) in not extending Probuild's contractual time for performance of Separable Portions 1, 3, 4, 5, 6, 6A, and 7, in accordance with Probuild's time extension entitlements;

(b) in not compensating Probuild in relation to its delay damages entitlements associated with Probuild's time extension entitlements;

(c) by procuring, encouraging and collaborating with the Project Manager in respect of the Project Manager's above identified failures to comply with its contractual obligations and duties.

405 Further, in relation to the above conclusions, I add that I reject V601's submission that there are no material facts pleaded by Probuild which can found breaches of the

Contract by V601, based on the Project Manager's failure to act independently, and otherwise in accordance with its obligations under cls 20.2, 32.3, and 34 of the Contract to approve the Contractor program and to grant extensions of time to which Probuild was entitled, and to award delay costs as required by the Contract and to act independently.

406 I am satisfied, for the reasons which follow, that Probuild is entitled to, and has succeeded in establishing, the time extension and delay damages claims it has advanced in this proceeding.

407 V601 has contended that the Project Manager dealt with Probuild's time extension claims pursuant to the discretion provided by cl 34.5(b) of the Contract, because the Project Manager could not assess whether delays were on the critical path under cl 34(b)(ii), as a result, V601 asserts, of Probuild failing or neglecting to submit compliant Contractor's Programs for approval.

408 I have rejected V601's allegation and assertions that Probuild did not provide compliant Contractor's Programs for the Project Manager's approval, and I have found that the Project Manager, in breach of cl 32 of the Contract, failed to approve Probuild's updated Contractor's Programs and that the Project Manager in substance and in breach of the Contract prevented Probuild from being able to base its time extension claims on an Approved Contractor's Program. Concomitantly, I also:

(a) reject V601's assertion that, because the Project Manager was, in the circumstances, empowered or entitled to direct extensions of time under cl 34.5(b) of the Contract, it is irrelevant therefore whether the Project Manager lacked independence or was in breach of cl 20.2 of the Contract; and

(b) find that V601, by its Project Manager, breached cls 34.4, 34.5(b), and 34.9 of the Contract in failing to certify the extensions of time and the delay damages declared and awarded to Probuild by this judgment, and by purporting to direct pursuant to cl 34.5(b) when it was obliged to address and determine the

relevant extension of time claims under cls 34.3, 34.4, and 34.5(a) of the Contract.

Further relevant concerns and criticisms of the Project Manager

409 I also highlight that, in my view, V601's submissions do not present any detail or developed argument that the Project Manager did, in fact, act independently in relation to his assessment and certifying role under the Contract, save that in oral closing submissions, V601 attempted to reference limited instances of conduct by the Project Manager which V601 asserted displayed an independent approach to the Project Manager's duties under the Contract. However, for the reasons I have outlined, I am wholly persuaded to the contrary.

410 Further, I am not satisfied that the abovementioned instances of conduct on the part of the Project Manager, cited by V601, are sufficient to displace or change the character of the very large body of uncontradicted evidence which I consider establishes that the Project Manager failed to perform its assessment and certification functions with the required degree of independence, impartiality, fairness, and reasonableness, and in accordance with the contractual requirements with which it was charged, and with no regard for V601's commercial interests.

411 More specifically, for the reasons outlined below, I find that the evidence contradicts V601's submission that it supported the Project Manager taking an independent approach to its assessment and certifying role under the Contract.

(a) Where V601 relies on Nave having disagreed with TBH's report dated 9 August 2012.[276]

On 15 August 2012, Nave signed a determination adopting TBH's analysis. Nave's evidence was that he did not provide this determination to V601 because he was not satisfied that it was accurate. I reject that evidence.

276 T1857.9–27, referring to T452.29–T453.1.

Nave's determination was sent to V601 on 7 September 2012.[277]

(b) Where V601 submits that Nave properly assessed Probuild's EOT2A and 3 claims, basing his determination on TBH's Report dated 7 September 2012 with some adjustments to that Report, where he disagreed with it.[278] More accurately, I consider the adjustments referred to by Nave merely corrected certain arithmetic errors.[279] In the vast majority of instances, the Project Manager just adopted TBH's findings.

(c) TBH was engaged to assist V601 and the Project Manager to defeat or reduce Probuild's contractual time extension claims. The Project Manager colluded with V601 and its claims response team, including V601's lawyers, to devise and implement a strategy to ultimately achieve a favourable commercial outcome for V601. TBH participated in that process, including by attending meetings with V601, its lawyers, and the Project Manager.[280] I consider that TBH's 7 September 2012 Report was part of that strategy and that Report formed the basis of the Project Manager's determination. I am satisfied for these reasons that TBH's involvement cannot be accurately characterised as intended to assist the Project Manager by providing impartial assistance from an independent programmer.[281]

I note, however, in relation to this aspect, and other observations that I have made regarding TBH, that although I am most critical of V601 and the Project Manager in relation to the manner in which they conducted themselves and enlisted their consultants in relation to Probuild's extension of time claims, and Probuild's time extension and delay cost entitlements, I intend and make no criticism of TBH itself in relation to its involvement, or for undertaking the work that it carried out; nor do I intend any criticism of Baker McKenzie, or

277 Probuild Closing Submissions, 11 June 2019, references to the relevant evidence at [19]–[20].
278 T1850.22–28.
279 T554.16–20.
280 Probuild Closing Submissions, 11 June 2019, see items 5 and 9 at Annexure 2.
281 T1820.21–26 and T1853.14–19.

its lawyers, in relation to their involvement on behalf of their client or for the legal work which they undertook for V601.

General conclusion as to difficulties created by V601 for Probuild

412 I have concluded and found that the Project Manager failed to perform its assessor and certifier role in an independent manner as required by the Contract, and that V601 actively collaborated and cooperated with the Project Manager to those ends.

413 I add that this crucial aspect of the way in which the Contract and the WUC were administered (using the word administered as a convenient general descriptor to include the activities of the Project Manager in relation to its assessment and certification role) largely occurred during a time when the Contractor and V601 were at loggerheads with each other in relation to the Contractor's rights and entitlements, and many other aspects of the Contract and Project.[282] This I consider had a toxic influence on the Project. I am satisfied that in the result, Probuild both encountered delay as a result of latent condition and variation works ordered by V601 and V601's indecision and self-serving commercial tactics, which were exacerbated by the conduct of the Project Manager.

414 I make the further general observation that the evidence demonstrates that V601 was at least a difficult principal. From the outset of the Project, it appears to have set out to control the Project Manager and to have it discharge its functions in favour of V601's commercial interests, including those functions required to be undertaken with independence and impartiality.

415 Further, during much of the Project, V601 created considerable difficulties for the Contractor because it often did not issue timely instructions and make timely decisions; a difficulty for Probuild which was exacerbated in the Project and contractual context by such problems not being addressed, as they should have been, by a Project Manager acting independently, impartially, fairly, and reasonably as

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282 T1865.31.

required by the Contract.

Programming Expert Evidence

416 Both Probuild, the claimant Contractor seeking extensions of time and other entitlements, and the Principal, V601, rely on expert programming evidence as part of their respective cases in relation to Probuild's claim for entitlements to extensions of time under cl 34 of the Contract.

417 Pursuant to cl 34.4(b) of the Contract, Probuild is entitled to an extension of time if:

(a) Probuild has made a claim in accordance with cl 34.3 of the Contract;

(b) the delay relied upon to found the Contractor's claim has affected an activity which is, in the reasonable opinion of the Project Manager, on the critical path of the Approved Contractor's Program as it existed at the time of delay; and

(c) Probuild has taken all reasonable measures to prelude the occurrence of the relevant delay and to minimise the delay, including resequencing and reprogramming the performance of WUC where it is reasonably practical to do so.

418 In relation to the programming analysis of delay, Probuild principally relies on the expert evidence of Lyall, and V601 principally relies on the expert evidence of Abbott. V601 also relies upon the expert evidence of Abbott in relation to the reasonable measures a contractor in Probuild's position would take to preclude and/or minimise delay, and Probuild relies upon the expert evidence of Peter Picking in relation to this aspect of the parties' cases. Lyall also addresses avoidance and mitigation of delays by Probuild.

419 Both V601 and Probuild argued to have the opposing programming expert witness's evidence rejected because that evidence is asserted to be inadmissible. Similarly, on

the basis of asserted deficiencies with the other parties' programming evidence, each party submits the opposing party's expert evidence is at least unpersuasive.

420 Furthermore, V601's programming expert, Abbott, and Probuild's Programming Expert, Lyall, each approach their analysis of delay utilising distinctly different methodologies.

421 Lyall opines that a '*retrospective*' method of analysis of delay is more appropriate to determine the actual extent of the delays at issue under the Contract.

422 Abbott opines that the preferable method of delay analysis in the context of the Contract, in relation to the delays at issue, is by means of a '*prospective*' delay analysis.

423 V601, and Abbott, argue that cl 34 of the Contract requires a prospective delay analysis based on the critical path of the Approved Contractor's Program. V601 further submits that Probuild has elected to plead its time extension claims entitlement on the prospective Approved Contractor's Program and should not be permitted to rely on Lyall's 'as programmed/as built' windows analysis.

V601's criticisms of Lyall – objections to Probuild's delay-related expert evidence

424 More specifically V601 argues that Lyall's expert evidence should be rejected, because Lyall:

(a) is not sufficiently independent;

(vii) V601 highlight that although Lyall was initially requested to prepare an expert report setting out his opinion as to whether Probuild's claimed delays affected an activity which was on the critical path of the Approved Contractor's Program, as it existed at the time of delay,[283] Lyall ultimately found that in his view it was not possible to prepare a Report based on the Approved Contractor's Program because no such

[283] Lyall First Report, Appendix B – Engagement letter dated 23 December 2016.

program appeared to exist.[284] Accordingly, Lyall's evidence was that he considered the options analysing the relevant delays and came to the view that the most appropriate and accurate analysis of the delays in issue was a retrospective 'as-programmed as-built windows analysis'.[285]

(viii) V601 acknowledges that Lyall was instructed to establish a critical path using an as-programmed as-built windows analysis and provide his opinion on whether the delay events referred to in Probuild's extension of time claims caused delay to the critical path which, by this sort of analysis, he identified.[286]

(ix) V601 contend that the above circumstance raises an issue as to whether Lyall failed to disclose that he was unable to find or establish an Approved Contractor's Program at the date of the relevant delay events. V601 contend that if Lyall could not do so, that would support V601's assertion that the Programs supplied by Probuild to the Project Manager in support of time extension claims were not, and could not be, Approved Contractor's Programs. V601 also asserts that evidence of this nature from Lyall would undermine Probuild's case that the PCG programs were, or should have been, Approved Contractor's Programs for the purposes of cl 34 of the Contract.

(x) V601 also submits that Lyall failed to disclose that he had advised those instructing him that he could create a claim for them based on an as-programmed as-built windows analysis and that he had received oral instructions to prepare a critical path analysis on this basis. V601 asserts that this both affects Lyall's credit and his claim to be an

284 T1286.12–20.
285 T1288.7.
286 V601 Closing Submissions, 12 June 2019, [94].

independent expert before the Court.[287] V601 add that Lyall failed to disclose that all of his reports arose 'out of these subsequent oral instructions'.

(xi) V601 also asserts that Lyall acted as Probuild's adviser regarding the best basis for formulating its claims and that Lyall 'argued' in favour of those claims at trial, and therefore Lyall did not have the characteristics of independence required of an expert under the Court's Expert Protocol and his evidence cannot be admitted.[288]

V601 also complains that Lyall sought to opine on ultimate issues of fact and law which are matters for the Court;

(xii) V601 complains that Lyall has evaluated the relevant evidence and drawn factual conclusions rather than relying on assumptions that could then be the subject of proof by Probuild.[289]

(xiii) V601 submits that Lyall makes expert findings of fact, as well as providing his expert opinion,, which V601 contends reverses the onus of proof requiring it to disprove Lyall's factual findings.

(xiv) V601 further submits that Lyall's initial view that he could not perform a delay analysis, based on the Approved Contractor's Program, resulted in Lyall recommending that the most suitable delay analysis he could undertake was that of a retrospective as-programmed as-built windows analysis. V601 contends that Lyall's recommendation was 'guided at least in part by his interpretation of cl 34' of the Contract.[290]

(xv) V601 asserts that Lyall's instructions amounted to him being told to make any assumptions about the facts of the case.

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287 V601 Closing Submissions, 12 June 2019, [95(b)].
288 V601 Closing Submissions, 12 June 2019, [96].
289 V601 Closing Submissions, 12 June 2019, [99].
290 V601 Closing Submissions, 12 June 2019, [101].

(xvi) V601 asserts that Lyall's evidence does not identify his reasoning in relying upon particular evidence or his reasoning in rejecting other evidence, and that it would prejudice V601 to have to address all these aspects in cross-examination of Lyall.

(xvii) V601 add that Lyall has no expertise in assessing the evidence, which is the Court's function.[291]

(xviii) V601 refers to an example – EOT3 – where the only issue in dispute is when the delay started. This factual dispute, V601 claims, is not sought to be proved by Probuild establishing the fact of the commencement of delay, but rather Probuild relying upon Lyall's factual conclusion that the EOT3 delay commenced on 5 April 2012.[292]

(b) his analysis utilises programs which were not agreed by the parties to be binding in relation to the Work or are otherwise inappropriate bases for delay analysis;

(xix) As an example of this V601 refers to CN19, which V601 claims Lyall uses as his counter factual analysis to confirm that his retrospective analysis is reasonable. CN19 is dated 12 November 2012 and is included in the Glazing Subcontract for the subject Project.

(xx) V601 asserts that Lyall has based his assessments on his conclusion that the Programs provided to him by Probuild were unreliable and accordingly has adopted a critical path analysis in the nature of an actual as built critical path of the WUC. V601 points out that, in order to demonstrate that his as-built critical path is reasonable and grounded in reality, Lyall undertakes a counterfactual, retrospective analysis utilising program CN19. V601 argues that Lyall has therefore

291 V601 Submissions, 10 October 2019, [4].
292 V601 Submissions, 10 October 2019, [4].

assumed that Probuild was both planning and capable of performing the WUC in accordance with CN19; however, there is no evidence to prove that assumption is correct.

(xxi) V601 also asserts that if Lyall had used the November PCG Program or the 11 November 2012 Program, he would not have been able to conclude that his retrospective analysis was grounded in reality because the 'figures' would have been significantly different.[293] Therefore Probuild's unilaterally determined Program can be seen to be unreliable.

(xxii) V601 notes that Lyall was not provided with the Hinds Blunden Programs upon which the PCG Programs of Probuild were based. Bready's evidence was that the PCG Programs, based on soft copy programs developed by Hinds Blunden, were programs intended to allow Probuild to track actual progress against planned dates, in effect, as an as-built record of the Project.[294]

(c) V601 asserts that Lyall was not given key documents resulting in fundamental errors in his 'findings of fact'. This, V601 submits, includes approved drawings showing post tensioning strands between slabs G10 and G15, and the plans and permits setting out crane locations in relation to the basement slabs that were the subject of EOT3. V601's proposition is that Lyall was not provided with such documents and therefore there are fundamental errors in his 'findings of fact'.[295] V601 adds that this and other issues demonstrate that Lyall's evidence should be given little weight.[296]

425 V601 submits that in the event the Court does not reject Lyall's expert reports, those

293 V601 Closing Submissions, 12 June 2019, [111(d)] and [111(e)].
294 Bready Second Witness Statement, [82].
295 V601 Closing Submissions, 12 June 2019, [115].
296 V601 Closing Submissions, 12 June 2019, [114].

reports should be given less weight.[297]

Considerations/conclusions – Lyall's expert evidence

Lyall's expert evidence is admissible and persuasive

(a) I do not consider that Lyall's evidence is rendered inadmissible, or that it is undermined and of less probative value and/or weight, because of the evolution of the instructions he received after he commenced to interrogate the matters raised in his initial brief and came to the conclusion that it was not, in his view, possible to base his delay report on the Approved Contractor's Program – as it appeared that the only program which was nominally of this description is the program at Appendix 5A of the Contract (entitled 546 CP02) which is a rolled-up, elementary program, in pdf and not in electronic format, and unsuitable for use as a baseline program for the purpose of the analysis of delay to the WUC.

(b) I consider that the evolution of Lyall's instructions reveal the practical and sensible development of an analysis by Lyall in the nature of a retrospective as-programmed as-built windows analysis.

(c) Further, I am also satisfied that the effect of the Project Manager's failure to carry out its obligations pursuant to cl 32.3 of the Contract prevented Probuild, as Contractor, developing an Approved Contractor's Program and updated versions of the Approved Contractor's Program (approved from time to time by the Project Manager) pursuant to cl 32, as contemplated under cl 34.4(b)(ii) of the Contract.

(d) For the same above reasons, I reject V601's argument that Lyall inverted the process by using his specialised knowledge to identify the questions which should have been asked by those who engaged him.

297 V601 Closing Submissions, 12 June 2019, [5].

(e) I also reject as a mischaracterisation of Lyall's conduct, that Lyall either advised in the role of an advocate for Probuild or advocated the case that he formulated for Probuild. I consider that Lyall did no more than appropriately and effectively identify how best, on the balance of probabilities, he could analyse the critical path from time to time and the delays which in fact beset the Project. I am also satisfied that Lyall approached and undertook his role as expert witness in this proceeding in compliance with Order 44 of the Rules of this Court.

426 I am not persuaded that Lyall inappropriately drew factual conclusions. I consider that Lyall's evidence was in the nature of admissible expert opinion, drawing on instructed facts and stated assumption. As earlier outlined, Lyall defined the sources of the instructed facts and assumptions he utilised.

427 In relation to EOT3, in my view, Lyall permissibly drew on a number of instructed facts and circumstances, including construction constraints on site in arriving at his opinion in relation to likely commencement of delay. In this regard, Lyall's analysis and the basis of his expert opinion that Probuild's EOT3 delay commenced on 5 April 2012 is addressed in more detail in relation to EOT3 below.

428 I am also unpersuaded that Lyall inappropriately sought to interpret provisions of the Contract, for example cl 34. Insofar as Lyall disclosed how he had taken into account aspects of the way in which cl 34 of the Contract appeared to operate, in my view, Lyall did so appropriately and in a manner which was necessary for an expert in Lyall's position as a result of his need to explain how he undertook his analysis, and necessarily that explanation I consider must reflect the expert's understanding of how the Contract provisions operate in relation to the assessment of compensable delay. This I consider formed a component of the reasoning of the programming and time extension expert which the expert is obligated to disclose.

429 I also record in this regard, that as also earlier outlined, I consider that Lyall

adequately explained the reasoning which led to his expert conclusions in every required respect in my view.

430 Further, in relation to Lyall's use of Program CN-19, I note that Abbott substantially agreed with the appropriateness of the use of that program by Lyall.[298]

431 Further, I am not persuaded that Lyall was not provided with the key document necessary for his analysis, nor am I persuaded that Lyall was provided with unreliable PCG programs, and finally I am not persuaded that these, or any other materials or matters, resulted in any fundamental errors in relation to Lyall's opinions.

Rejection of V601's criticisms of Lyall

432 I reject V601's assertion that Lyall received oral instructions and as a result there was uncertainty as to the construction and assumptions to which Lyall proceeded to propound in his Lyall First Report. I am satisfied that Lyall's instructions contained in Appendix B of the Lyall First Report are comprehensively identified and that V601's further contention that Lyall was given no defined assumptions is incorrect. The letters of instruction dated 23 December 2016 and 16 February 2017 at Appendix B of the Lyall First Report of 12 April 2018 contradict V601's contention. Further, as Probuild note in the Probuild Further Reply Closing Submissions, V601 did not put to Lyall that he received 'oral instructions', or material other than the material identified in Appendix B of the Lyall First Report. For these reasons, I reject V601's assertion that Lyall either acted inconsistently with his instructions or that he received 'oral instructions' which were not able to be identified in relation to his reports and which impugned his process and his conclusions.

433 I also reject V601's assertions to the effect that Lyall was tasked with and adopted the role of a 'finder of fact'.[299] There is no evidence in my view which I consider establishes this assertion by V601.

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298 Programming Experts Joint Report 2, Issues 2 and 3.
299 T1878.1–10.

434 Nor am I persuaded, as V601 asserts, that Probuild failed to provide certain programs to the Project Manager because Probuild did not want its claims assessed against 'the contract program'.[300] Probuild did in fact submit programs which were in my view both adequate and contemporaneous.[301]

435 Lyall used WUCP01 as a 'baseline program' and developed the 'as-planned' delay analysis from that baseline program.[302] Lyall also commenced his analysis by using the WUCP01 program and other information, which he identifies, to locate the critical path of his 'as-built' analysis of delay, in relation to which Lyall analyses Probuild's time extension claims.[303]

436 However, I accept Lyall's expert evidence that the Appendix 5A Contract program was unsuitable as a tool to assess delay in relation to the project for reasons including:[304]

> As there were no further programmes approved, it is my view that by the time the WUC started, the Approved Contractor's Program in Appendix 5A of the Contract no longer reflected the plan to Completion of each Separable Portion. The Appendix 5A programme was out of date when the WUC works commenced, and to produce any sensible analysis this programme would have had to have been updated to reflect the actual start of the works on site. This is what both Mr Abbott and I have done to provide baselines for our analyses. The Appendix 5A programme does not show the level of detail that would be necessary for a forensic analysis as it is only a paper copy and not an electronic file.

437 Further the programming experts ultimately agreed, as reflected in the Programming Expert's Joint Report 2 at [2], that:

> The Approved Contractor's Program is bound into the Contract and labelled 546 CP02 (Approved Contractor's Program). No exactly matching electronic file has been found of the Approved Contractor's Program. The hard copy program bound in the Contract at Appendix 5A is a hard copy rolled-up summary program with approximately 300 activities. The soft copy programs

300 T1893.14–31.
301 Probuild Reply Submissions, [99]–[103] and [108]–[112]; Bready Amended First Witness Statement, [111]; Bready Amended Reply Statement.
302 Lyall First Report, [31]–[36], [36(b)], [37]–[52].
303 Lyall First Report, [31]–[36], [36(b)], and [37]–[52]; Programming Experts Joint Report 2, Issues 2 and 3.
304 Lyall Third Report, [25].

> used by the Experts contains approximately 3,500 activities. 546 CP02 is an electronic file that was created some time in September 2011. WUCP01 is an electronic file that was created in September 2011. Neither 546 CP02 used by Mr Abbott in soft copy (Abbott's Baseline) nor WUCP01 used by Mr Lyall (Lyall's Baseline) exactly match the Approved Contractor's Program in hard copy) There is very little difference between Abbott's Baseline and Lyall's Baseline from an analysis point of view. The Experts agree that either program is a program that could be considered as an appropriate baseline program for determining delay. There are minor variances on the dates for the activities between the Approved Contractor's Programs and the Lyall Baseline and the Abbott Baseline.

438 Furthermore I also accept that, as at 18 April 2011, the planned sequence of work and durations shown on the WUCP01 program were reasonable and achievable.[305]

Failure by Probuild to submit Contractor's Programs

439 V601 also contends that, if it is established that cl 34 of the Contract is unworkable, this is because Probuild failed to submit Contractor's updated programs as required by cl 32 of the Contract; V601 adds that Probuild cannot now rely on a lack of Approved Contractor's Programs to found any of its claims.

440 V601 notes that by its pleading, Probuild relies upon 25 'updated' Contractor's Programs (PCG Programs) which were submitted to the Project Manager for approval. Probuild's case is that these are Approved Contractor's Programs or alternatively the Project Manager's failure to approve them was a breach of Contract.[306]

441 V601 contends that contrary to its pleaded case, Probuild now argues:[307]

(a) there were in fact no Approved Contractor's Programs against which extension of time claims under the Contract could be assessed;

(b) therefore it is necessary for Probuild to rely upon alternative programming analysis to establish its extension of time entitlements; and

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305 Lyall First Report, [39].
306 V601 Closing Submissions, 12 June 2019, [48].
307 See Probuild Closing Submissions, 11 June 2019, [142]–[143].

(c) if cl 34 of the Contract is held not to permit the utilisation of alternative programming analysis then the prevention principle is engaged and time under the Contract is at large.[308]

442 V601 also submits that it follows from Probuild's argument that there were no Approved Contractor's Programs, as Probuild recognises that the PCG Programs it relied upon in its claims to the Project Manager were not Approved Contractor's Programs.

443 Bready gave evidence that the PCG Programs prepared by him followed the rolled up format of the 5A Program.[309] The uncontradicted evidence of both Nave and Lyall was that the PCG Programs could not be used to analyse Probuild's claims to any extension of time. V601 submits that as a consequence, Probuild's pleaded case must fail.

Election

444 V601 contends that Probuild has elected to plead its case based on the Approved Contractor's Program and has in effect abandoned and rendered irrelevant an analysis based on an 'as-programmed as-built windows assessment' by Lyall.[310] I reject this assertion.

445 I consider that although, as the Contract, in particular the terms of cl 34 stipulate, the parties at contract contemplated that the criticality of delay would be informed by reference to the Approved Contractor's Program and Probuild's pleaded case reflected this position. Probuild's case included that the Project Manager had prevented Probuild from relying on Contractor's Programs which were approved by the Project Manager under the Contract, and therefore Probuild, by lay and expert evidence and submissions, sought to prove relevant delay based on its updated Contractor's Programs and Lyall's evidence as to the most accurate and reliable

308 V601 Closing Submissions, 12 June 2019, [48].
309 See T974.22–T975.13.
310 V601 Closing Submissions, 12 June 2019, [64]–[65].

means of determining critical delay, as contemplated by the Contract. Furthermore, V601 responded to this case by Probuild.

446 Lyall's analysis using WUCP01 (18 April 2011) accords in substance with Probuild's case as pleaded, based on the Approved Contractor's Program.[311]

447 Finally, I note that V601 ultimately accepted that Lyall's delay analysis utilising the WUCP01 program was appropriate and correct.[312]

Prevention Principle

448 V601 also argues that Probuild cannot benefit by its own wrong in not maintaining a soft copy 5A Program, or providing appropriate updated Contractor's Programs to the Project Manager for approval, to argue that because there was no Approved Contractor's Program it was entitled to rely upon Lyall's alternative analysis; and if it is not entitled to rely upon Lyall's alternative analysis, to rely on the prevention principle under the Contract, namely, that if no workable extension of time regime existed under the Contract, time completion is set at large.[313] I also reject this argument by V601. For reasons I refer to above and elsewhere, I find no relevant breach or 'wrong' perpetrated by Probuild, including in relation to any failure by Probuild to submit electronic programs to the Project Manager.

449 Accordingly, I reject V601's above contentions. I find, for reasons elsewhere outlined, that in breach of the Contract, V601, by its Project Manager, prevented Probuild from relying, under cl 34 of the Contract, on an Approved Contractor's Program by failing and neglecting, and refusing to approve Probuild's Contractor's Programs and updates of Probuild's Contractor's Program, from time to time, pursuant to cl 32.3 of the Contract.

450 I also reject that the extension of time regime under the Contract was unworkable, and in particular, that it was unworkable as a result of Probuild's conduct by

311 See Amended Defence and Counterclaim, 25 February 2019, [30], [36], [53], and [61].
312 T1850.10–15.
313 V601 Closing Submissions, 12 June 2019, [66]–[67].

electing to pursue its claims based on PCG Programs and/or failing to comply with its obligations to maintain an Approved Contractor's Program; accordingly, I reject that Probuild has denied itself the benefit of cl 34 of the Contract and cannot rely upon the prevention principle.[314] Ultimately, the parties' fundamental contractual intent, in that regard, is that the Contractor shall be entitled to extensions of time where compensable delay has affected critical activities. Probuild's evidence, in particular the evidence of its expert Lyall, has I consider established this in relation to each of Probuild's claimed EOTs.

451 As I have separately outlined, notwithstanding V601 and the Project Manager by their conduct precluding Probuild's reliance on an Approved Contractor's Program, I consider that the Contract's time extension regime remained operative and available.

Lyall's treatment of inclement weather

452 V601 submits that, in certain analogous scenarios, Lyall adopts methodology which results in different assessments for delays; for example, delay caused by Latent Conditions in respect of which subsequent industrial action also caused delay.[315]

453 V601 contends that Lyall's treatment of inclement weather is contradictory to his analysis of other concurrent delays. V601 contends on this basis that such matters undermine the objectivity of Lyall's overall analysis.[316]

Probuild's submissions in relation to the admissibility and weight of Abbott's expert evidence

Probuild's criticisms of V601's programming evidence provided by Abbott

454 V601's programming expert, Abbott, seeks to support a delay analysis methodology based on a prospective delay analysis.[317]

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314 V601 Closing Submissions, 12 June 2019, [87]–[88].
315 V601 Closing Submissions, 12 June 2019, [116]–[120].
316 V601 Closing Submissions, 12 June 2019, [116].
317 Abbott Second Report, [22].

455 Abbott considered that cl 34.3(a) of the Contract required the Contractor to demonstrate its entitlement to claimed extensions of time, on the basis of a prospective analysis of delay to the project works or relevant parts of those works.

456 Abbott acknowledged that his delay analysis methodology was one which, in substance, 'forecast outcome' in relation to the effect of delay on the works.[318]

457 Abbott firmly rejected Lyall's retrospective delay analysis methodology as appropriate or suitable.[319]

Abbott strayed from his discipline as a programming expert and criticised Probuild

458 Probuild submits that Abbott reflected both the degree to which he did not feel constrained to confine his evidence to his relevant area of expertise in these proceedings, and the degree to which he was willing to advocate a case against Probuild by commenting adversely on Probuild's conduct and competence as a Builder.

459 Probuild argues that Abbott did so, for example, in relation to Probuild's handling of the relocation of the access ramp into the site in the early part of the works, criticising Probuild's timing and coordination of orders for acquired trade packages, and what he contended were Probuild's failures in relation to the implementation of steps to mitigate delay arising from soft spots on site and other matters.

460 Probuild also argues that Abbott, in substance, undertook the process of interpreting the Contract and arguing for his interpretation, in particular of cl 34.3 of the Contract as a provision which only permitted the Contractor to demonstrate delay on a prospective delay analysis.[320]

461 Probuild contends that Abbott also, in substance, founded parts of his evidence on his own factual findings; for example, in relation to Probuild's contractual

318 T1252.28–T1253.10.
319 Abbott First Report, [550]–[571].
320 Abbott Second Report, [13(b)] and [26]–[30].

compliance in relation to providing updated programs,[321] and whether or not the Façade Variation was a 'variation' pursuant to the correct interpretation of the Contract, and as a matter of fact.[322]

Considerations/conclusions – Abbott's expert evidence

462 I accept that there were numerous instances where, in his expert evidence, Abbott departed his role as an expert witness and both purported to find facts by which he supported his own opinions, and also purported to interpret the Contract and determine whether it was satisfied in certain respects.

463 In my view, the extent to which Abbott opined on matters outside his relevant expertise as a programming witness, and on a number of occasions did so in respect of issues which were not pleaded by V601, I consider, indicated that Abbott's evidence was to a significant degree motivated by what he considered to be a need to advocate for V601. As a result, I consider that Abbott's evidence on disputed matters should be given less weight for this reason.

464 In *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3)*,[323] Dixon J stated:

> 98. In summary, the matters that will usually be considered at both stages of the inquiry that considers whether the exception under s 79(1) (*Evidence Act 2008*) renders opinion evidence admissible may conveniently be referred to as four 'rules' (one of which is in three parts), which are:
>
> (a) is the opinion relevant (or of sufficient probative value)[324] (the relevance rule);
>
> (b) has the witness properly based 'specialised knowledge' (the expertise rule);
>
> (c) is the opinion to be propounded 'wholly or substantially based' on specialised knowledge (the expertise basis rule);
>
> (d) is the opinion to be propounded 'wholly or substantially based' on facts assumed or observed that have been, or will be, proved, or more specifically (the factual basis rules):
>
> (i) are the 'facts' and 'assumptions' on which the expert's opinion is founded disclosed (the assumption

321 Abbott First Report, [77]–[92].
322 Abbott First Report, [550]–[571].
323 [2012] VSC 99, [98]–[99].
324 Bearing in mind the discretion under s 135 of the *Evidence Act 2008*.

identification rule);

(ii) is there evidence admitted, or to be admitted before the end of the tendering party's case, capable of proving matters sufficiently similar to the assumptions made by the expert to render the opinion of value (the proof of assumptions rule);

(iii) is there a statement of reasoning showing how the 'facts' and 'assumptions' relate to the opinion stated to reveal that that opinion is based on the expert's specialised knowledge (the statement of reasoning rule)?[325]

465 I consider that Abbott's evidence, in several significant respects, fails to meet the requirement that expert opinion is to be based on relevant programming speciality; and also based on facts either instructed or identified as assumed, and which facts and matters are established by other evidence in this proceeding.

466 Matters addressed by Abbott which I consider were not wholly or substantially within his relevant specialised knowledge, include his views in relation to Probuild's handling of the relocation of the access ramp into the site in the early part of the works, and Probuild's timing and coordination of orders for acquired trade packages, which Abbott contended represented Probuild's failures in relation to the implementation of steps to mitigate delay arising from soft spots on site. Likewise, in this category were his opinions in relation to matters referred to in the last preceding paragraph and also as outlined below.

467 I am also satisfied that a substantial number of communications in the nature of Abbott's instructions and also documentary materials provided to Abbott are not able to be specifically identified as a result of the evolution of his instructions and the materials provided to him.

468 In the Abbott First Report, Appendix A identifies the documents provided to Abbott. By a letter of instruction dated 12 August 2018, Abbott was requested to opine on a number of additional matters. However, Abbott's instructions of 29 August 2018

325 See also the summary list of considerations identified by Austin J in *ASIC v Rich* [2005] NSWSC 149; (2005) 190 FLR 242, [256].

identified no particular further documentation as being provided to him in respect of the additional matters he had been asked to address.

469 Under cross-examination, Abbott clarified that, in addition to those documents listed and identified in his two reports, further materials provided to him were not exhaustively defined.[326]

470 I am also satisfied that Abbott has not in his Reports precisely identified all the facts and assumptions upon which he relied. In both the Abbott First Report of 12 September 2018 and the Abbott Second Report of 17 October 2018, Abbott on a number of occasions stated that he had reviewed the information available to him that related to delay, and that he had completed his delay analysis drawing on the review of that information.[327]

471 Abbott's statements however often do not identify the information available to him which he reviewed in relation to specific delay claims.

472 Under cross-examination, Abbott acknowledged that he had on occasions not identified contemporaneous records relied upon to form his relevant opinions. Furthermore, at no point did Abbott, in my view, satisfactorily identify how the Court could establish what material was specifically drawn upon as part of his delay analysis, in respect of a number of extension of time claims.[328]

473 Accordingly, in my view, it is not possible with the required degree of confidence for the Court to identify the establishment of all the assumptions and facts upon which Abbott has founded his opinions in relation to delay; nor is it possible, in my view, for the Court to be satisfied that in all instances such assumptions and facts have been sufficiently established by other evidence in this proceeding.

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326 T1458.4–30.

327 Abbott First Report, [189], [467]; Abbott Second Report, [67], [73], [91], [129], [133], [173], [177], [184], [218], [223], [231], [240], [270], [277], [281], [287], [308], [316], [319], [350], [354], [363], [369], [394], [399], [407], [413].

328 T1351.12–16.

474 I am also persuaded that Abbott's prospective methodology in relation to delay analysis is significantly less reliable, probative and persuasive as outlined elsewhere herein.

475 For the above reasons I find Abbott's analysis and conclusions in relation to all Probuild's extension of time claims in issue to be significantly less persuasive than those of Probuild's expert programming witness, Lyall.

Abbott's criticism of Lyall relying upon programs other than the Approved Contractor's Programs

476 Abbott characterised Lyall's programming and delay analysis evidence as fundamentally flawed, and also unreliable and erroneous.[329] In my view, Abbott's characterisation and the basis he advanced for this conclusion are unjustified and unsubstantiated because the evidence established that there was but one Approved Contractor's Program and that was the program included in the Contract as 'Appendix 5A'.

477 Further, the Approved Contractor's Program, Appendix 5A, I am persuaded was not an adequate or sophisticated enough programming tool for the assessment and quantification of delay of the works, or the Separable Portions of the Works;[330] and was in any event, a program in existence at the time of Contract, and therefore outdated before the commencement of the Works. For example, the Early Works were themselves not brought to completion by the date specified in the Approved Contractor's Program, Appendix 5A.

478 Further, Abbott's criticism of Lyall's analysis based on programs which were not 'Approved Contractor's Programs' is in my view greatly weakened by Abbott relying upon program CP02 in relation to his own delay analysis. I am not satisfied that the CP02 program was accurately described by Abbott as representative of the

329 Abbott First Report, [55(a)] and [99]; Abbott Second Report, [40].
330 Lyall Third Report, [25].

Approved Contractor's Program in Appendix 5A of the Contract.[331]

479 I am however not satisfied that there is any evidence that in fact CP02 was the Approved Contractor's Program. This assertion or assumption by Abbott is to be contrasted with his evidence that CP02 was a program which reflected a slightly different status to the Approved Contractor's Program.[332] Abbott's evidence was I consider also rendered more equivocal because he stated that the Approved Contractor's Program was not a suitable tool for programming analysis, and therefore it was necessary to identify an appropriate baseline program in other ways.[333]

Abbott's approach – theoretical analysis

480 Abbott impugns Lyall's impacted as-planned analysis as being 'speculative, theoretical and divorced from reality' and purely speculative and theoretical, based purely on a mathematical model without any consideration of factual material or actual performance under the Contract.[334] I reject these criticisms of Lyall's impacted as-planned analysis which I have earlier concluded is logical and persuasive.

481 Additionally, in my view, Abbott's analysis utilising a time impact analysis is itself in the nature of a theoretical analysis. For example, as pointed out by Lyall, Abbott's analysis incorporates predictions about the works to be undertaken and how delay will impact those works.[335] This criticism by Lyall was in substance accepted by Abbott in his evidence that the methodology which he, Abbott, had applied produced only a 'forecast outcome'.[336]

482 In the *Society of Construction Law Delay Disruption Protocol* (2nd ed, 2017) at 11.6(b), the learned authors state that:

> The product of this method of analysis is a conclusion as to the likely delay of

331 Abbott Second Report, [75]; Programming Experts' Joint Report 3, [2].
332 T1215.22–24.
333 T1183.22–T1184.24.
334 Abbott First Report, [57(a)]–[57(c)].
335 Lyall Third Report, [100].
336 T1252.28–T1253.10.

> the modelled delay events on the programme/critical path that is most reflective of the contemporaneous position when the delay events arose. This method does not capture the eventual actual delay caused by the delay events as subsequent progress is not considered.

483 I am satisfied that Abbott's analysis and reports contain material methodological errors which I consider significantly diminish the reliability and weight of his reports. Abbott's methodological errors include Abbott's reliance upon program CP02, notwithstanding the gist of Abbott's following evidence:[337]

> WITNESS ABBOTT: Typically that's the only way they get approved and changed. Certainly approved programs don't get changed and then reapproved to accommodate contractor delays.
>
> If there's an EOT that's been approved, it will be inserted into the program, the program rescheduled, then that program's effectively agreed as the revised, um, the revised approved contract is program. That's typically the only time they get changed, unless there is some agreement to change the sequence and timing but - - -
>
> HIS HONOUR: But they're not changed on the basis of the delaying effect that is asserted to be the duration of the extension of the activity rather than what the superintendent might have agreed was the period of delay.
>
> WITNESS ABBOTT: I think the only way I can answer that is it's the approved amount.
>
> HIS HONOUR: Yes.
>
> WITNESS ABBOTT: Which probably more times than not both parties won't necessarily agree with. Whatever the approved EOT is, the program is extended by. But I think the important point, and not wanting to complicate, but it is important, an approved contract is program – if an EOT's approved, the program will be, will be effectively rejigged to accommodate the approved EOT and the end date's adjusted accordingly.
>
> But that program still guarantee will not be in sync with what's happening out on the project because this is the approved contract program. This is the contract against which EOTs are assessed, which invariably very, very different to the contractors' target program at the time.
>
> You know, in my experience and my understanding of the operation of contracts, it is simply the structure that you assess EOTs against and ultimately, importantly, assess things like liquidator damages and delay costs and that contract program is typically only adjusted by agreement and that agreement normally, in my experience, comes with approved EOTs.
>
> HIS HONOUR: Thank you.

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337 T1261–T1262.

> MR MASON: So consistent with that explanation then, Mr Abbott, when it comes to the quantification of further EOTs and the quantification of things like liquidator damages, there's going to be a split between – it's going to reflect that updated program and not what the contractor is actually experiencing on one site with their on-site programs?
>
> WITNESS ABBOTT: It's my experience always - - -
>
> MR MASON: Yes, thank you.
>
> WITNESS ABBOTT: Liquidator damages are always calculated against the contract program.

484 Furthermore Abbott, in effect, conceded that he solely focused on the CP02 program because he considered it to be an 'approved program', a conclusion which I reject for reasons earlier stated. Abbott also in substance conceded that because he considered that this program was the only approved program, he did not amend the logic of the program notwithstanding changes to the works.[338]

485 Accordingly, and erroneously in my view, notwithstanding changes to the works including delays and sequencing changes, Abbott's delay analysis adhered to the logic of the CP02 program developed as early as about April 2011. Abbott did not render his analysis more persuasive by making appropriate amendments to the logic of the program he utilised, including by taking into account the reality of what occurred on the Precinct Project and how it was built, including the delays affecting the works.

Abbott purported to opine on matters not within his expertise

486 Abbott's evidence reflected a confusion of roles. In this regard, Abbott both provided his expert opinions as an expert 'Programming Expert', but also provided his opinion on matters beyond his established expertise in relation to, for example, whether certain Programs were of a certain character and compliant with the terms of the Contract, as to what constituted a variation under the Contract, and as to cl 34 of the Contract requiring prospective delay analysis.[339]

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338 T1204.20–26; T1477.30–T1478.31; T1497.22–T1498.1.

339 Abbott First Report, [88]–[90]; [550]–[571]; Abbott Second Report, [22].

487 I consider that, in so doing, Abbott reflected his confusion as to his role as an expert programming witness in this proceeding. I also regard Abbott's partially confused approach to his brief as another factor diminishing the reliability and weight of his evidence in this proceeding.

488 Abbott's credit and reliability was also I consider reduced because it is clear from his evidence that he was willing to enthusiastically criticise Lyall's reliance upon the WUCP01 program as 'fundamentally flawed', and yet Abbott ultimately accepted that either the WUCP01 program used by Lyall or the CP02 program utilised by Abbott were appropriate to be used as 'baseline' programs to analyse the extent of delay on the Project,[340] and that either of those programs was appropriate as a baseline program for determining delay.

Provisional period of delay

489 I am ultimately unpersuaded that there is any relevant issue between the parties in relation to a provisional period of delay which might otherwise be required to set-off Probuild's time extension entitlements.

490 In this regard, I note that the dKO Architectural Specification at cl [112C] states:[341]

> … The Provisional Period for Delay will be deemed to be included within the Nominated Date for Practical Completion.

491 In my view these words clearly reflect the intent of the parties that the Dates for Practical Completion in the Contract take into account the Provisional Period for Delay referred to in the Contract.

492 Furthermore, nowhere in V601's pleadings is there an assertion that any relevant Provisional Period of Delay should be adjusted against Probuild's time extension entitlements.[342]

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340 Programming Expert's Joint Report 2, [2].

341 FCB2024–2240 at 2035.

342 Abbott however, in the Abbott Second Report at [222] and [283] and elsewhere, refers to Provisional Period of Delay.

Global Claim by Probuild

493 I do not consider that V601 pleaded any issue in relation to Probuild's case being in the nature of a global claim. In all events, I am not satisfied that Probuild's extension of time claims are in the nature of global claims.

494 The Lyall Third Report[343] explains the following:

> Mr Abbott has provided an opinion that my analysis fails to consider culpable delay in progress of the works. My analysis clearly sets out what each delay event consists of, and how each event relates to the associated delay along the actual critical path to the Contractor's achievement of each separable portion. Mr Abbott says that my analysis is a global claim, and I deny that it is. For example, it can be seen in the following extract from my Report of 12 April 2018 that there are 29 days of critical delay from 5 July 2012 to 12 December 2012, which is attributable to the Contractor through the construction progress of the superstructure of Building A (emphasis added).[344]

495 In *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd & Anor* (*Kvaerner*),[345] Byrne J made the following statement in connection with global claims:[346]

> Argument before me focused on the causal link between two facts or groups of fact: the breaches of contract and the extra cost incurred by Holland which is the loss alleged. For present purposes, I assume that each of these facts has been established. This may be obvious but it is, none the less, worth stating, if only to underline that I am concerned with a pleading question: to what extent it is necessary to set out in the statement of claim the causal link between these two asserted facts. I am not concerned with the question, what loss, if any, flowed from the breach. Where a plaintiff establishes a breach of contract it will not be denied relief on the ground only that it is difficult to estimate the damages which flow from that breach.[347] This being the case, it may be said that a statement of claim which is unable to set out with precision the amount of loss claimed ought not to be struck out. But even in such a case, the plaintiff must identify what is the loss alleged to have been suffered and which cannot be quantified and how it is that this loss was caused by the breach. The amount of loss claimed here is not the problem; it is the causal link between this and the breaches of contract. Next, any question of the causal link must be examined in a pragmatic way.

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343 Lyall Third Report, [11(h)].
344 Table taken from Lyall First Report, [166].
345 (1996) 8 VR 681 (*Kvaerner*).
346 *Kvaerner* (1996) 8 VR 681, [13]–[15].
347 *Fink v Fink* (1946) 74 CLR 127, 143 (Dixon and McTiernan JJ); *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 83–4 (Mason CJ and Dawson J).

Where the loss is caused by a breach of contract, causation for the purposes of a claim for damages must be determined by the application of common sense to the logical principles of causation.[348] Finally, it is possible to say that a given loss was in law caused by a particular act or omission notwithstanding that other acts or omissions played a part in its occurrence. It is sufficient that the breach be a material cause.[349] This last matter may be of particular importance in a case like the present where a number of potentially causal factors may be present. But, as will be seen, the form of the present pleading avoids these matters by implying rather than stating the necessary causal relationship.

The claim as pleaded … is a global claim, that is, the claimant does not seek to attribute any specific loss to a specific breach of contract, but is content to allege a composite loss as a result of all of the breaches alleged, or presumably as a result of such breaches as are ultimately proved. Such claim has been held to be permissible in the case where it is impractical to disentangle that part of the loss which is attributable to each head of claim, and this situation has not been brought about by delay or other conduct of the claimant.[350]

Further, this global claim is in fact a total cost claim. In its simplest manifestation a contractor, as the maker of such claim, alleges against a proprietor a number of breaches of contract and quantifies its global loss as the actual cost of the work less the expected cost. The logic of such a claim is this:

- the contractor might reasonably have expected to perform the work for a particular sum, usually the contract price;
- the proprietor committed breaches of contract;
- the actual reasonable cost of the work was a sum greater than the expected cost.

The logical consequence implicit in this is that the proprietor's breaches caused that extra cost or cost overrun. This implication is valid only so long as, and to the extent that, the three propositions are proved and a further unstated one is accepted: the proprietor's breaches represent the only causally significant factor responsible for the difference between the expected cost and the actual cost. In such a case the causal nexus is inferred rather than demonstrated.[351] The unstated assumption underlying the inference may be further analysed. What is involved here is two things: first, the breaches of contract caused some extra cost; secondly, the proprietor's cost overrun is this extra cost. The first aspect will often cause little difficulty but it should not, for this reason, be ignored. The likelihood and nature of some extra cost flowing from the breaches of contract may be readily apparent from the nature of each of the breaches and a general understanding of its impact on the building project. It may also be apparent in what precise way this breach

348 *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310, 315 (Glass JA), 350–1, 357 (McHugh JA).

349 *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310, 353–8 (McHugh JA).

350 *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51, 102 (Vinelott J). See also *Wharf Properties Ltd v Eric Cumine Associates (No 2)* (1991) 52 BLR 1, 20 (Lord Oliver).

351 For present purposes, I ignore any adjustment that may have to be made for variations and extras.

> led to the extra cost. In most, if not all, cases, however, there is an intervening step relating the extra cost to the breach. For example, it may be that a breach means that work has to be redone, or that work takes longer to perform, or that its labour or material cost increases, or perhaps that there was extra cost due to disruption or loss of productivity. Again, in the given case this may be readily apparent but difficulties will arise for the parties and the tribunal of fact where the global nature of the claim involves the interaction of two or more of these intervening steps, particularly where they and their role are not, in terms, identified and explained. It is the second aspect of the unstated assumption, however, which is likely to cause the more obvious problem because it involves an allegation that the breaches of contract were the material cause of all of the contractor's cost overrun. This involves an assertion that, given that the breaches of contract caused some extra cost, they must have caused the whole of the extra cost because no other relevant cause was responsible for any part of it.

496 In *Bernard's Rugby Landscapes Limited v Stockley Park Consortium Ltd*,[352] the Official Referee Judge Humphrey Lloyd QC adopted Byrne J's analysis and statement of principle in *Kvaerner*[353] to the effect that:

(a) it is for the parties to determine how their case is to be articulated;

(b) the Court may however strike out a claim if it is untenable and likely to result in wasted Court resources, and where the articulation of the relevant claim is likely to prejudice, embarrass or delay the fair trial of the proceedings.

497 In *Kvaerner*,[354] Byrne J also stated that:

> The question whether in a given case a pleading based on a global claim, or even a total cost claim or some variant of this, is likely to or may prejudice, embarrass or delay the fair trial of a proceeding, must depend upon an examination of the pleading itself and the claim which it makes.[355] The fundamental concern of the court is that the dispute between the parties should be determined expeditiously and economically and, above all, fairly. Where the proceeding is being managed in a specialist list, the judge, whose task it is to steer the case through its interlocutory stages, might, and perhaps should, explore the claim to determine whether the form it takes is driven by its nature and complexity, or by a desire to conceal its bogus nature by presenting it in a snowstorm of unrelated and insufficiently particularised allegations, or by a desire to disadvantage the defendant in some way. Relevant to this is an acknowledgment that a total cost claim puts a burden on the defendant. This burden may involve the defendant in extensive

352 [1997] 82 BLR 39.
353 *Kvaerner* (1996) 8 VR 681.
354 (1996) 8 VR 681.
355 *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 72 BLR 26, 34 (Saville LJ).

> discovery of documents relating to the performance of the project; it may mean that at trial the defendant must cross-examine the plaintiff's witnesses to expose the flaws in a claim which assumes that the defendant is, itself, responsible for every item of the plaintiff's cost overrun; it may mean that the defendant must lead evidence to explain what, in fact, was the impact of each of the acts complained of on the project, as was done in *McAlpine Humberoak Ltd v McDermott International Inc* (No 1).[356] Litigation inevitably imposes burdens on the parties; the court must exercise its powers to ensure that, as far as possible, these burdens are not unreasonable and are not unnecessarily imposed.

498 I am satisfied that Probuild's case as articulated in this proceeding is not in the nature of a global claim or a total cost claim. This is because Probuild's delay claims, as pleaded and supported by the facts and expert evidence of Lyall in the way detailed above, and in many other similar articulations of Probuild's delay case, set out the nature of each relevant delaying event and how each relevant delaying event gives rise to Probuild's claimed delay, in particular including by reference to the actual critical path to completion of each relevant separable portion as established, principally by Lyall's evidence.

499 Further, I am not persuaded that Abbott's expert's evidence explains how it is that Probuild's claims are in the nature of global claims or total cost claims. At [131] of the Abbott First Report, Abbott relevantly states:

> Whilst Mr Lyall has used an As Planned versus As Built method in windows, in respect of each of the analysis windows I note that Mr Lyall has not considered Probuild's performance on and off site. Further, Mr Lyall does not consider Probuild's own delays and/or concurrency of delays with matters that are Probuild's risk (for example wet weather), which ultimately results in each window being in effect a global assessment. That is, Mr Lyall assumes that the Principal is liable for all causes of delay.

500 I do not accept Abbott's statement that Lyall has not taken into account off-site delays; for example, Lyall's analysis deals extensively with the town planning related events and the procurement and manufacture of glazing in connection with EOT7. It is quite clear that, when Lyall considered it appropriate and necessary to do so, Lyall considered off-site delays in his analysis of the Probuild delay claims.

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356 (1992) 58 BLR 1, 28 (Lloyd LJ).

501 I consider that Probuild's extension of time claims are articulated and supported by evidence which cogently identifies each relevant qualifying delaying event and the causal connection between those events and the delay claimed by Probuild.

Contractually appropriate treatment of inclement weather

502 V601, through the evidence of its programming expert, Abbott, asserts that many relevant concurrent delays have occurred on the Project and that this should result in many instances of non-compensable delay.[357]

503 Probuild submits that cl 34.4(a) requires that the Project Manager evaluate and apportion delay to the WUC according to the degree to which the Qualifying Cause of Delay and the non-quantifying cause of delay (relevantly here inclement weather) contributed to delay to the WUC.

504 Probuild submits that in relation to all relevant delay, Probuild's work had been delayed by a Qualifying Cause of Delay from before, and throughout, the instances of inclement weather referred to by Abbott in his evidence.

505 Therefore, Probuild submits, the instances of inclement weather referred to by Abbott are not overlapping non-qualifying causes of delay; they were not the cause of delay; in each example, the existing Qualifying Cause of Delay was already delaying the works, and continued to do so after the occurrence of inclement weather. Probuild adds that Abbott's assertions about the effect of inclement weather do not consider what actually occurred in relation to delay and do not accord with common sense or the contractual requirements.[358]

506 Lyall's evidence was that:[359]

> Mr Abbott references inclement weather as a concurrent delay issue. I disagree with the way Mr Abbott has applied an abatement to his assessment of delay in respect of lost time due to the inclement weather. In my opinion, the effect of the inclement weather that is occurring during the time that

357 Abbott Second Report, including at [68], [130], [174], [219], [241], and [287].
358 Probuild Closing Submissions, 11 June 2019, [158]–[159].
359 Lyall Third Report, [11(g)].

occurs while the delaying events in question are causing delay only exacerbates the delay they cause, and does not act as a concurrent delay.

507 On the evidence and Lyall's expert evidence, I am not persuaded as to V601's unpleaded assertion that there have been instances of concurrent delay, which should result in deductions to extensions of time claimed by Probuild.

Concurrent causes of delay – other than inclement weather

508 V601's pleaded case does not assert any factual basis upon which it contends that concurrent delaying factors, either in the nature of inclement weather or from other causes, have contributed to the delays claimed by Probuild.

509 Probuild also observes, by reference to its list of V601's abandoned issues (provided 13 June 2019), that V601 has ultimately not pressed concurrent delays (other than in relation to inclement weather), including in relation to:

> 7. That the multitude of allegedly concurrent delays identified in V601's lay and expert evidence (except for wet weather),[360] including:
> (a) installing the piling bench;[361]
> (b) tower crane;[362]
> (c) work to slab B7;[363]
> (d) resourcing of Probuild's excavations subcontractor, HWM Contractors;[364]
> (e) addressing the risks arising from the Soft Spots;[365]
> (f) replacing Caelli with I&D as the in situ structure subcontractor;[366]
> (g) Probuild's request for sign-offs of the vapour barrier's design.[367]

510 In the circumstances I consider that I need do no more than record that I am not persuaded as to any relevant concurrent delay which disentitles Probuild to any part of the extension of time claims it seeks to establish in these proceedings.

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360 Probuild Closing Submissions, 11 June 2019, [152]–[155], [160]–[161], [169]–[192] (regarding EOT2A) and [200]–[205] (regarding EOT3).
361 Probuild Closing Submissions, 11 June 2019, [173]–[175].
362 Probuild Closing Submissions, 11 June 2019, [176]–[177].
363 Probuild Closing Submissions, 11 June 2019, [178]–[180].
364 Probuild Closing Submissions, 11 June 2019, [181]–[183].
365 Probuild Closing Submissions, 11 June 2019, [184]–[189].
366 Probuild Closing Submissions, 11 June 2019, [201]–[203].
367 Probuild Closing Submissions, 11 June 2019, [204]–[205].

Delay analysis

Programming experts' opinions in relation to prospective and retrospective delay analysis

511 Other than the evidence of each parties' programming experts, and Probuild's evidence from its Construction Manager, Bready, in relation to the substratum of fact drawn on, principally by Lyall (Probuild's programming expert), V601 and Probuild advance no other means of assessing the extent of compensable delay for the purpose of establishing the Contractor's entitlements to extensions of time under cl 34 of the Contract, or of establishing that integer of the calculation of delay damages pursuant to cl 34.9 of the Contract, or the extent of delay in relation to the qualification of common law damages for delay.

512 Put another way, the only time extension related cases which V601 and Probuild have put on by way of evidence and submissions is based on their respective prospective or retrospective assessments of delay to the WUC, and its Separable Portions, in turn founded on the expert programming evidence as to the effect and duration of delay, provided by either Lyall or Abbott.[368]

513 Given the highly complex nature of the Precinct Project, including as a result of it comprising eight Separable Portions, and the associated highly complex programming and delay analysis (both contemporaneously during the course of the Project, and as presented as evidence during the trial), save in relation to discrete and limited aspects, in my view, it is not appropriate or possible for the Court to establish the effect of the multitude of potentially relevant delays on the relevant critical path, other than by evaluating the expert programming and delay evidence relied upon by the parties in relation to relevant delays, informed by established on-site facts in relation to the Works and the progress of the Works, including constraints on activities, and the like. In these respects, at least, I consider that the present case is materially different to that decided in *White Constructions Pty Ltd v*

368 Probuild's Early Works delay is based on a different contract entitlement under cl 9A of the Contract and is not the subject of expert programming evidence.

PBS Holdings Pty Ltd, a case which was drawn to my attention by V601.

Methods used by programming experts

514 The parties have both engaged programming Experts to report on the assessment of delays to Probuild's work under the Contract, in relation to its extension of time claims. Lyall (Probuild) and Abbott (V601) prepared reports and participated in an Expert Conclave on behalf of their respective clients. As a result of the programming Expert's Conclave, Lyall and Abbott produced two Programming Experts Joint Reports dated 8 February 2019 (Programming Experts Joint Report 2) and 15 February 2019 (Programming Experts Joint Report 3).

515 The parties' experts adopted different programming methods in their delay analysis. Lyall used a 'retrospective' method of analysis. Abbott used a 'prospective' method.

516 Lyall also undertook the additional exercise of applying Abbott's prospective analysis methodology to bolster Lyall's own earlier conclusions based upon his preferred retrospective approach to analysing delay to the WUC.

517 Lyall based his retrospective delay analysis on Program WUCP01, as his Baseline Program. Abbott based his retrospective delay analysis on program 546 CP02, as his Base Line Program. The Programming Experts Joint Report states the following:

> **Base line program**
>
> The Approved Contractor's Program is bound into the Contract and labelled 546 CP02 (**Approved Contractor's Program**). No exactly matching electronic file has been found of the Approved Contractor's Program. The hard copy program bound in the Contract at Appendix 5A is a hard copy rolled-up summary program with approximately 300 activities. The softcopy programs used by the Experts contains approximately 3,500 activities.
>
> 546 CP02 is an electronic file that was created some time in September 2011. WUCP01 is an electronic file that was created in September 2011.
>
> Neither 546 CP02 used by Mr Abbott in soft copy (**Abbott's Baseline**) nor WUCP01 used by Mr Lyall (**Lyall's Baseline**) exactly match the Approved Contractor's Program in hard copy)
>
> There is very little difference between Abbott's Baseline and Lyall's Baseline from an analysis point of view.

> The Experts agree that either program is a program that could be considered as an appropriate baseline program for determining delay.
>
> There are minor variances on the dates for the activities between the Approved Contractor's Programs and the Lyall Baseline and the Abbott Baseline.[369]

518 Probuild also criticises Abbott for inappropriately opining as to contractual interpretation in his report, and critically in that regard, for asserting that 'clause 34.3 of the Contract only contemplates a prospective delay analysis'.[370]

519 Lyall's opinions as to the suitability of a prospective analysis of the type employed by Abbott included that Abbott's delay analysis methodology is 'not desirable as it cannot determine the actual extent of critical delay to Completion, it can only determine a forecast delay to Completion'.[371] Lyall opines that an *As Planned v As Built* analysis, in his opinion, 'is more appropriate to determine the actual extent of delay as opposed to a theoretical calculation of critical delay, especially as the facts of the case are now known'.[372]

520 However, as earlier noted, Lyall undertook a prospective analysis of the type undertaken by Abbott and came to very similar results to those produced by Lyall's retrospective analysis.[373] I note both that I have dealt more extensively elsewhere with the reasons why Lyall's evidence is more persuasive than Abbott's evidence, and I also note that this is a further factor convincing me that Lyall's evidence, analysis and conclusions are more persuasive than Abbott's on all programming and delay issues in dispute.

521 In the Programming Experts' Joint Report 2, the programming experts, Lyall (Probuild) and Abbott (V601), outline their opinions on the most appropriate delay analysis methodology, which can be summarised as follows:

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369 Programming Experts Joint Report, 8 February 2019, Item number 2, page 3.
370 Probuild Closing Submissions, 11 June 2019, [104], referring to Abbott Second Report, [13(b)] and [26]–[30]. See also, Abbott Second Report, [22].
371 Lyall Third Report, [11(c)].
372 Lyall Third Report, [11(d)]. See also, Probuild Closing Submissions, 11 June 2019, [135].
373 T1723.

A. Abbott's observations, propositions and opinions

(a) Both the 546 CP02 electronic program file used by Abbott in soft copy (Abbott's Baseline) and the WUCP01 soft copy program used by Lyall (Lyall's Baseline) are appropriate Baseline programs for determining delay in relation to the WUC.[374]

(b) Neither Abbott's Baseline program nor Lyall's Baseline program exactly match the Contract Appendix 5A program. The Contract Appendix 5A rolled up summary program contains only about 300 activities, and is not in electronic format. The experts' Baseline programs are electronic, programmable and identify about 3,500 construction activities.

(c) The retrospective analysis used by Lyall is inconsistent with the analysis requirements of the Contract, as it seeks to assess the actual delay attributable to an event whereas any actual delay that is found is a function of a myriad of actions, issues and general progress which occurs after the event and has no relationship to the delay being assessed.[375]

(d) The Prospective Delay Analysis seeks to assess if a delay has affected an activity on the critical path of the Approved Contractor's Program as it existed at the time of the occurrence, in accordance with cl 34.4(b)(ii) of the Contract.

(e) The Prospective Delay Analysis takes into account the information that is available to the parties at the time of the delay event and only that information.

(f) To introduce information, progress and impacts that were not known to the parties at the time of the delay event is inappropriate, unreasonable and not consistent with the Contract and commercial agreement upon which the

374 Programming Experts' Joint Report 2, [2] and [14].
375 Programming Experts' Joint Report 2, [4].

Contract is based.[376]

(g) It is standard practice to status approved programs to ensure that the status date in the program is close to the commencement of the delay event being assessed and Abbott's programs are updated in the same way in which the Contractor updated its programs at the time of the Works.[377]

(h) The Association for the Advancement of Cost Engineering International preferences the use of contemporaneous schedules and updates as they were prepared/viewed, approved, and accepted in analysing delay; however, on this Project, no programs were prepared, viewed, approved, or accepted and used on the Project, because Probuild did not follow the contractual requirements of updating its Approved Contractor's Program and getting it approved by the Project Manager.[378]

(i) The programs used in Abbott's Time Impact Analysis are not theoretical creations but the Approved Contractor's Program statused at around the start of each alleged delay event using contemporaneous project data.

(j) Lyall's unapproved program varies from the Approved Contractor's Program and has been created by the Contractor from time to time, with no approval by the Project Manager or the Principal.[379]

(k) Lyall's *As Planned v As Built* analysis did not adequately consider Probuild's own delays and the concurrency of delays.[380]

(l) Lyall uses neither 'common sense' nor a 'practical approach' in establishing his critical path.[381]

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376 Programming Experts' Joint Report 2, [6].
377 Programming Experts' Joint Report 2, [7].
378 Programming Experts' Joint Report 2, [7].
379 Programming Experts' Joint Report 2, [8].
380 Programming Experts' Joint Report 2, [13].
381 Programming Experts' Joint Report 2, [19].

(m) Abbott's primary reasoning for rejecting the use of Probuild's working programs is that they are not the Approved Contractor's Program and are not suitable for assessing delay in accordance with the requirements of the Contract.[382]

(n) Lyall has taken shortcuts which have produced an inappropriate *As Planned v As Built* analysis because he has rolled up activities rather than defining each and every activity on the critical path.[383]

(o) Lyall's retrospective delay analysis also fails to 'capture the eventual actual delay caused by the delay events'. Retrospective delay analysis, as used by Lyall, includes all of the events that occur after the delay being assessed and captures the effect of an incalculable number of decisions and impacts by the parties along a critical path (or paths) of the program, and construction progress relating to thousands of logic-linked activities (that is, under the control of the Contractor) that have been impacted by an innumerable number of influences which all occurred after the delay event under assessment. Abbott opines that it is not possible to capture the eventual actual delay caused by a discrete delay event using this method.

Prospective delay assessment (Abbott's method) on the other hand captures the impact of the discrete delay on the end date of the program, at the time the delay event occurs (which is required by the Contract), which is the same time that decisions resulting from that delay event are made.[384]

(p) Abbott also opines as to his view of the proper construction of cl 34 of the Contract.[385]

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382 Programming Experts' Joint Report 2, [25].
383 Programming Experts' Joint Report 2, [31].
384 Programming Experts' Joint Report 2, [41(1)].
385 Programming Experts' Joint Report 2, [41(7)].

B. Lyall's observations, propositions and opinions

(q) Both the 546 CP02 electronic program file used by Abbott in soft copy (Abbott's Baseline) and the WUCP01 soft copy program used by Lyall (Lyall's Baseline) are appropriate Baseline programs for determining delay in relation to the WUC.

(r) Neither Abbott's Baseline program nor Lyall's Baseline program exactly match the Contract Appendix 5A program. The Contract Appendix 5A rolled up summary program contains only about 300 activities, and is not in electronic format. The experts' Baseline programs are electronic, programmable and identify about 3,500 construction activities.

(s) Lyall's methodology includes a retrospective analysis (*As Planned v As Built*) using WUCP01 (see Lyall First Report and Lyall Second Report).

(t) Lyall has also undertaken an alternative prospective analysis using the CP02 program to provide a comparison with Abbott's analysis.

Lyall also uses the CP02 program to undertake a retrospective analysis.[386]

(u) Both of Lyall's alternative analyses referred to in (d) have been developed to provide additional support for his primary analysis on a retrospective basis utilising the WUCP01 program.

(v) Lyall's *As Planned v As Built* method of delay analysis is the most appropriate method, because it assesses the actual critical delay to the relevant construction activities at the time of the delaying event, and does not provide a theoretical model of the impact of delays on the Works.[387]

(w) A prospective delay assessment is a theoretical forecast of what will transpire on the Project, without regard to what would actually happen during the

386 Programming Experts' Joint Report 2, [3].
387 Programming Experts' Joint Report 2, [4].

course of the Works.

(x) A prospective assessment is inferior to an assessment of delay undertaken when the facts affecting the progress of the Project are known and the actual delay can be assessed.[388] Parties and experts do not need to rely upon a theoretical delay model when the actual delay to the relevant construction activities can be established.

(y) No native copy of the Approved Contractor's Programs existed at the time of the majority of relevant delaying events, nor were there native copies of contemporaneous construction programs at those times. Therefore, non-contemporaneous programs have been created to undertake Abbott's prospective analysis.[389]

(z) Lyall's retrospective method of analysis does not require the creation of programs to make assessments and is therefore more appropriate and practical in the assessment of delay events.[390]

(aa) The retrospective assessment of delay is consistent with the Contract because it establishes the critical delay to the activity or sequence of activities at the time of the delaying event.[391]

(bb) Absent a contemporaneous or Approved Contractor's Program, the retrospective assessment of delay is the most practical and reliable method of analysing the actual delay to the work referenced back to the appropriate baseline to measure delay as agreed by Lyall and Abbott, WUCP01.[392]

(cc) It has not been necessary to list hundreds of individual activities in a sequence which have no bearing on Lyall's analysis, nor where the critical path is

388 Programming Experts' Joint Report 2, [6].
389 Programming Experts' Joint Report 2, [7].
390 Programming Experts' Joint Report 2, [8].
391 Programming Experts' Joint Report 2, [9].
392 Programming Experts' Joint Report 2, [8].

located or the extended delay. Lyall has explained how he reaches conclusions on the location of the relevant critical path and has identified the activities delayed in each sequence.[393]

(dd) The retrospective delay analysis applies common sense and a practical approach to the location of the critical path, with reference to contemporaneous Project records and the measurement of delay.

(ee) Prior to commencement of fit-out works in late 2012, the construction of the Project was linear in nature, with one sequence of construction activity needing to be completed prior to completion of the next.

(ff) Three of the four relevant delays (EOT2/2A, EOT3 and EOT6) affected the construction of the baseline slabs or superstructure of the building. Construction at that stage was linear and sequential as is typical of residential or commercial construction projects.[394]

(gg) Slab construction work is critical to the linear progress of the construction of the buildings. If the buildings do not have a completed basement slab, then the vertical construction of the building cannot be completed in that area.[395]

(hh) It is common industry practice to introduce analysis in the form of high-level summaries of as-built critical paths. If greater detail is required in a particular area or section of the critical path, that can be detailed and added.[396]

(ii) An as-built programme is not required to calculate the difference between the actual start of an activity against the planned start of an activity. This is simple mathematics. The same applies for the finish dates. The *As Planned v As Built* windows analysis, as set out by the Protocol, is a method separate to

393 Programming Experts' Joint Report 2, [18(ii)].
394 Programming Experts' Joint Report 2, [19].
395 Programming Experts' Joint Report 2, [22].
396 Programming Experts' Joint Report 2, [27].

the longest path method of analysis.[397]

(jj) In the Programming Experts' Joint Report 2, Abbott criticises Lyall for coming to conclusions regarding actual delay relating to his assessed delays to establish his as-built critical path, and then using these conclusions to establish critical paths.[398] In response, Lyall states:[399]

> I disagree that I have approached this analysis 'back to front'. The assessment of some events need to be considered in the context that they occurred to assess whether it is likely that they are controlling the critical path at any given time. For example the procurement of the glazing and the manufacturing offsite which is the subject of EOT7 was not modelled at all in the contemporaneous updates. That does not mean that the delay event should be ignored, but means that an alternative method of assessment needs to be performed in to assist in establishing as to whether the delay in the placement of the glazing would have always controlled the completion of the works. This is the analysis that has been provided in my Report [e.g. paragraphs 147 through 164] and my Reply [258 to 280].

(kk) The Time Impact Analysis used by Abbott is a prospective method of analysis that can only be utilised to forecast a theoretical likely delay to the completion of works in his own forecast, which was created time distant from the actual completion of the project.

(ll) In relation to the Time Impact Analysis methodology, the Society of Construction Law Delay and Disruption Protocol (2nd ed) notes:

> The product of this method of analysis is a conclusion as to the likely delay of the modelled delay events on the programme/critical path that is most reflective of the contemporaneous position when the delay events arose. This method does not capture the eventual actual delay caused by the delay events as subsequent progress is not considered.[400]

(mm) Given the timing of the dispute between the parties, and that the actual facts are known in relation to the project, a retrospective assessment of the actual

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397 Programming Experts' Joint Report 2, [30]; Lyall Third Report, [87]–[102].
398 Programming Experts' Joint Report 2, [38(i)].
399 Programming Experts' Joint Report 2, [38(i)].
400 Programming Experts' Joint Report 2, [41(1)].

critical delay that arose during the course of the works is more appropriate; and given that the facts for the delays have actually been established, a retrospective method of analysis that establishes what has happened is a more practical approach.[401]

(nn) The Contract appears to allow for either a prospective or a retrospective method of delay analysis to be performed, and as the facts are now know in relation to the Project, there is little benefit in preparing a prospective delay analysis that produces theoretical results when the actual delay to the completion of the works can be identified.[402]

(oo) The Society of Construction Law Delay and Disruption Protocol (2nd ed, February 2017) states:[403]

> Delay impact is determined in one of two different ways. A prospective analysis identifies the likely impact of historical progress or delay events on a completion date. The conclusions of a prospective delay analysis may not match the as-built programme because the Contractor's actual performance may well have been influenced by the effects of attempted acceleration, re-sequencing or redeployment of resources in order to try to avoid liability for liquidated damages or due to other Employer and Contractor Risk events. A retrospective delay analysis identifies the actual impact of the delay events on the identified actual or as-built critical path. (emphasis added)

(pp) The Protocol supports Lyall's opinion and approach. The analysis is now time distant from the event, so reliance on a prospective method is inferior compared to a retrospective method such as the *As Planned v As Built* windows method.[404]

(qq) The *As Planned v As Built* method is based on the actual start and finish dates, compared to the relevant planned dates. This is Lyall's reason for relying on

401 Programming Experts' Joint Report 2, [41(2)].
402 Programming Experts' Joint Report 2, [41(3)].
403 Programming Experts' Joint Report 2, [41(5)(c)].
404 Programming Experts' Joint Report 2, [41(8)].

the retrospective method as his primary method of analysis.[405] Prospective analyses cannot and do not measure actual critical delay.[406]

(rr) Abbott's prospective analysis is limited to an indicative measure of delay in his own forecasts, as constructed in his own programmes.[407]

(ss) The CP02 program is not the Approved Contractor's Program provided in Appendix 5A to the Contract. As noted earlier, both experts agree on this point. Abbott's modifications to the CP02 program change the CP02 program so that it does not resemble the Approved Contractor's Program in Appendix 5A to the Contract.[408]

(tt) Abbott's criticisms of Lyall's use of the WUCP01 program are invalid because the WUCP01 program was contemporaneously produced by the Contractor before the start of the WUC, and is more likely to represent the Contractor's plan to complete the WUC than Abbott's modified CP02 program, which does not reflect the programme included at Appendix 5A to the Contract.[409]

Clause 34.3(a) requirements for assessment of a relevant delay to Probuild's WUC

522 Furthermore, Probuild and V601 are also in dispute as to how the Contract should be interpreted to assess relevant delays to Probuild's work under the Contract for the purposes of an extension of time claim under cl 34.

523 The issue concerns whether the assessment of a relevant delay pursuant to cl 34.4(b)(ii) should be made using a prospective method or a retrospective method of delay analysis, or whether either is permissible under the Contract.

524 Probuild submits that under cl 34.4(b)(ii) delay may be assessed either retrospectively or prospectively, however, Probuild seeks to establish its delay case

405 Programming Experts' Joint Report 2, [41(9)].
406 Programming Experts' Joint Report 2, [41(11)].
407 Programming Experts' Joint Report 2, [41(10)].
408 Programming Experts' Joint Report 2, [41(13)].
409 Programming Experts' Joint Report 2, [41(14)].

based on a retrospective analysis.

525 V601 argues that under cl 34 of the Contract, delays must be established by prospective analysis of delay.

526 Clause cl 34.3(a) of the Contract requires an assessment of whether the relevant work **is or will be** delayed in reaching Practical Completion.

Relevant contractual provisions

Time extension claims under the Contract

527 Clause 34.2 of the Contract provides that:

> A party becoming aware of anything which will probably cause delay to *WUC* shall promptly give the *Project Manager* and the other party written notice of that cause and the estimated delay.

528 Clause 34.3 of the Contract provides that:

> (a) Subject to clause 34.4, the *Contractor* shall be entitled to such *EOT* as the *Project Manager* assesses, if the *Contractor* **is or will be** delayed in reaching *Practical Completion* by a *Qualifying Cause of Delay*.[410]
> (b) As soon as the *Contractor* becomes aware or suspects that the progress of *WUC* will be delayed (and in any event within 5 *Business Days* after the occurrence of the event causing the delay), it shall notify the *Project Manager* in writing giving details of the relevant event and the anticipated extent of the delay.
> (c) The *Contractor* shall take all reasonable measures to preclude the occurrence of the event causing the delay, and to minimise the resulting delay to *WUC*.
> (d) If the cause of the delay is a *Qualifying Cause of Delay* and the *Contractor* wishes to claim an *EOT* then as soon as the *Contractor* can ascertain or estimate with reasonable accuracy, the extent of the delay, and in any case not later than 10 *Business Days* after the occurrence of the *Qualifying Cause of Delay*, the *Contractor* shall make a written claim to the *Project Manager* for an EOT, giving details of:
> (i) the *Qualifying Cause of Delay*;
> (ii) the nature and extent of the delay, or likely delay to *WUC*; and
> (iii) the *EOT* claimed.
> (e) The *Contractor* shall promptly provide any further information requested by the *Project Manager* in relation to a claim for an *EOT*.
>
> (emphasis added)

529 Clause 34.4 of the Contract provides that:

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410 Emphasis added.

(a) When both non-qualifying and *Qualifying Causes of Delay* overlap, the *Project Manager* shall apportion the resulting delay to *WUC* according to the respective causes' contribution.

(b) The *Contractor* is not entitled to an *EOT* unless:

(i) it has made an *EOT* claim in accordance with the requirements of clause 34.3 (and in this regard time is of the essence);

(ii) the delay **has affected** an activity which is, in the reasonable opinion of the *Project Manager*, on the critical path of the *Approved Contractor's Program* as it existed at the time of the occurrence of the *Qualifying Cause of Delay*; and[411]

(iii) the *Contractor* has taken all reasonable measures to preclude the occurrence of the *Qualifying Cause of Delay* and to minimise the resulting delay including resequencing or reprogramming the performance of *WUC* where it is reasonably practicable to do so.

(emphasis added)

530 Further, cl 34.5 of the Contract provides that:

(a) Within 10 *Business Days* after receiving the *Contractor's* claim for an *EOT*, or if the *Project Manager* has requested further information from the *Contractor* in relation to an *EOT* claim, then after receipt of that further information, the *Project Manager* shall assess the *EOT* claim and notify the *Contractor* and the *Principal* in writing of the *EOT* (if any) granted so assessed.

(b) Notwithstanding that the *Contractor* is not entitled to or has not claimed an *EOT*, the *Project Manager* may, in the *Project Manager's* sole and unfettered discretion, at any time and from time to time before issuing the *Final Certificate* direct an *EOT*. The *Project Manager* is not required to exercise its discretion under this clause 34.5(b) for the benefit of the *Contractor*.

(c) A delay or failure of the *Project Manager* or the *Principal* to grant an *EOT* within the period specified in clause 34.5(a), or at all, will not cause the *Date for Practical Completion* to be set at large.

Probuild's position as to the required contractual analysis of delay for the purposes of cl 34.3(a)

Relevant pleadings

531 In its Amended Defence and Counterclaim, Probuild seeks declarations in relation to its cl 34 entitlements.[412] Probuild also alleges breaches of the Contract by V601

411 Emphasis added.

412 Probuild Closing Submissions, 11 June 2019, [61]. See Amended Defence and Counterclaim (with proposed further amended particulars), 25 February 2019, [31], [37], [55], [63], [B] of prayer for relief (Amended Defence and Counterclaim).

arising from Probuild's time extension entitlements not being granted.[413] The breaches alleged by Probuild include the Project Manager's alleged failure to assess Probuild's extension of time claims in accordance with the criteria stipulated in cl 34 of the Contract.[414]

532 Probuild argues that it submitted appropriate updated versions of the Contractor's Program to the Project Manager for approval, in accordance with cl 32.2 of the Contract.[415] However, the Project Manager refused or failed to approve any of those programs as contemplated under cl 32.3 of the Contract.

533 Probuild argues that these updated construction programs, which it formally submitted to the Project Manager for his approval pursuant to cl 32.3 of the Contract constitute Approved Contractor's Programs for the purposes of the Contract.

534 Alternatively, Probuild submits that if such Programs are not 'Approved Contractor's Programs', that was a circumstance caused by V601 and the Project Manager's breaches of their obligations. V601 through its agent the Project Manager was contractually obliged to approve such programs and that if such programs are not formally 'Approved Contractor's Programs', through breach of the Contract by V601 and the Project Manager, by failure, refusal, and/or neglect to approve construction programs submitted by Probuild for approval, V601 by its agent the Project Manager has failed to do what the Contract required to be done and has thereby prevented Probuild from being able to base its time extension claim on a program approved by the Project Manager as an 'Approved Contractor's Program'.[416]

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413 Probuild Closing Submissions, 11 June 2019, [61].

414 Probuild Closing Submissions, 11 June 2019, [61(c)]. See Amended Defence and Counterclaim, [32], [38], [56], and [64]. In its closing submissions at [63], Probuild notes Nave's claim that he is 'not qualified as a programmer': Nave Witness Statement, [324].

415 Amended Defence and Counterclaim, [16]. Probuild lists the dates for 25 updated programs ranging from 3 August 2011 to 11 December 2013; see, eg, Bready Amended Reply Witness Statement, [76]–[89].

416 Amended Defence and Counterclaim, [17]–[18].

535 Probuild pleads that it submitted extension of time claims for the following extensions of time (which remain in issue):

(a) EOT1: 'Soft start';[417]

(b) EOT2A: Discovery of soft spots;[418]

(c) EOT3: Discovery of hydrocarbon contamination;[419]

(d) EOT6: Building C childcare tenancy;[420]

(e) EOT7: Delay to town planning approval regarding acoustic windows.[421]

536 In respect of the above, Probuild alleges breaches of the Contract by V601 in relation to each extension of time claim (which remain in issue):

(a) EOT1;

(b) The Early Works time extension claim granted only in part;[422]

(c) EOT2A: Not granted in full and dates for Practical Completion were also brought forward in relation to SP2 and SP5, due to soft spots;[423]

(d) EOT3: Not granted in full and dates for Practical Completion were also brought forward in relation to SP2 and SP5, due to the hydrocarbon delay;[424]

(e) EOT6: Not granted;[425]

(f) EOT7: Not granted.[426]

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417 Amended Defence and Counterclaim, [19]–[26].
418 Amended Defence and Counterclaim, [27]–[32].
419 Amended Defence and Counterclaim, [33]–[38].
420 Amended Defence and Counterclaim, [50]–[56].
421 Amended Defence and Counterclaim, [57]–[64].
422 Amended Defence and Counterclaim, [23], [26].
423 Amended Defence and Counterclaim, [32].
424 Amended Defence and Counterclaim, [38].
425 Amended Defence and Counterclaim, [56].
426 Amended Defence and Counterclaim, [64].

537 Probuild pleads, further and in the alternative, that if the notices submitted in respect of each extension of time claim are not valid, it relies on the prevention principle, as outlined in its Amended Defence and Counterclaim.[427]

538 In response to V601's Amended Reply and Defence to Counterclaim,[428] Probuild alleges, inter alia, that:

(a) V601 fails to plead the basis upon which it says that Probuild's updated Contractor's Programs did not comply with cl 32.3 and on what basis they could not be approved;[429]

(b) V601 fails to plead the basis upon which it says that Probuild 'failed and refused' to submit updated programs compliant with cl 32.3 at the Project Manager's request, to comply with the Project Manager's directions, and to promptly provide further information at the Project Manager's request.[430]

539 Probuild responds at length in response to V601's pleadings denying its extension of time claims;[431] the details of which are outlined elsewhere in this judgment.

Probuild submissions on admissibility of Lyall's evidence

540 Probuild rejects V601's submissions which assert that Lyall's Reports should be excluded from the evidence, because he has 'failed to disclose his real instructions', and 'undertak[en] a legal analysis of the Contract in order to determine the best

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427 Amended Defence and Counterclaim, [65].

428 Amended Reply and Defence to Counterclaim, 21 September 2018 (Amended Reply and Defence to Counterclaim).

429 Amended Rejoinder and Reply, 12 November 2018, [1A(ii)]–[1A(iii)] (Amended Rejoinder and Reply). In oral submissions, Probuild said that Nave had 'refused to approve' any other contractor's programs: T1731.

430 Amended Rejoinder and Reply, [1B]. Regarding the provision in cl 32 enabling the Program Manager to request an updated contractor's program from the contractor, Probuild submitted to the Court that 'the project manager only ever once asked for such a program, and that was in 2013'. Probuild says that 'it was provided'. On this point, Probuild also referred to cl 32.3(f) which states that: 'The initial *Contractor's Program* and any *Approved Contractor's Program* are not a *Contract Document* and do not form part of the *Contract*, but will be used by the *Program Manager* as a basis for administering the *Contract* (to the extent possible) and for assessing any *EOT* claims': T1731.

431 See Amended Rejoinder and Reply, [2]–[6] (EOT1); [7]–[9] (EOT2A; [10]–[11] (EOT3); [12]–[15] (EOT4); [16]–[21] (EOT6); [21A]–[25] (EOT7).

method for analysing the relevant delays', and 'acted as a claims consultant' for Probuild in formulating claims that had no relation to the pleaded material facts.[432]

541 Probuild observes that V601 failed to put the allegation regarding Lyall's purported failure to disclose his real instructions to him in cross-examination, and submits that V601's criticism appears to be based on Lyall 'not finding an approved [contractors] program in the material provided to him'.[433] Probuild submits that Lyall appropriately 'expressed a personal preference for doing an as-programmed, as-built windows analysis … '[434]

542 In relation to V601's contention that Lyall undertook a legal analysis of the Contract to determine the best method for analysing the relevant delays, Probuild submits that 'programmers quite often have to take a view on what the clause means in order to undertake the programme analysis … They go and look at the material and they form opinions based on that material'.[435]

543 As for the method of analysis adopted by Lyall, Probuild points to Lyall's letter of instruction which asked him to:

> Review the pleadings, contract and other documents briefed and prepare reports setting out your expert opinion as to whether the delay events, the subject of the various claims, affected an activity which is on the critical path of the approved contractor's program as it existed at the time of occurrence of the cause of delay.[436]

Lyall's view was that the analysis he undertook was that which was most appropriate in the circumstances.

544 V601 argues that Lyall lacked sufficient independence because he failed to disclose his real instructions.

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432 T1721–T1722, with Counsel quoting from V601 Closing Submissions, 12 June 2019, [89].
433 T1722.
434 T1722–T1723.
435 T1723–T1724.
436 T1724.18–26.

Considerations/conclusions – objections to Lyall's evidence

545 I am not however persuaded that V601 has established any substantive or significant respect in which Lyall failed to disclose any material instruction. Furthermore, I also accept Probuild's submission that it was not squarely put to Lyall that he failed to disclose his real instruction in some significant respect, nor was it put to Lyall that he lacked independence. As a consequence Lyall was at all events not given the opportunity to directly refute this assertion by V601.

546 Similarly, V601 failed to squarely put to Lyall that he was, as submitted by V601, an advisor to Probuild, advising it on how best to formulate its time extension claims. Further, in my view, this assertion is not established by the evidence.

547 More specifically, I am not satisfied that Lyall was instructed to identify the relevant critical path of the WUC utilising an as-programmed as-built windows analysis; ultimately Lyall also undertook an alternative prospective analysis of delay to demonstrate the validity and preferability of his as-planned as-built retrospective analysis of delay on the Precinct Project, and Lyall also explained the rationale for preferring his methodology.[437]

548 Neither am I persuaded that in adopting the approach he did to undertaking his programming and delay analysis by reference to cl 34 of the Contract, Lyall overstepped the role of an expert witness in his area. In my view, in this regard it was practically necessary for Lyall to take a view as to what cl 34 of the Contract required in relation to identifying a critical path and the identification of relevant delay. Doing so does not in my view impugn Lyall as an expert witness.

549 I do not accept V601's submission that Lyall has undertaken a process of fact finding, including, as an example relied on by V601, in relation to commencement of delay in relation to EOT3. Rather, I am satisfied that Lyall's identification of 5 April 2012 as the start of that delay was the result of the synthesis of the factual evidence available

437 Lyall First Report [31]–[41]; Lyall Reply Report [31]–[43]; [49]–[82].

to the Expert and the formulation of Lyall's expert opinion based on instructed facts, circumstances and assumptions. Bready's evidence was that Probuild could have commenced work on Slab B4 at about 5 April 2012, but for the delay caused by the immediately adjacent area affected by the vapour barrier and other factors.[438]

550 For the reasons including the above, and the reasons separately outlined elsewhere in relation to V601's objections to Lyall's expert evidence, I reject V601's arguments directed to having Lyall's expert evidence rejected as inadmissible; and I also reject V601's submission that in any event Lyall's evidence should be given diminished weight.

551 I consider Lyall's expert evidence to be wholly admissible, reliable and persuasive. In my view, Lyall did not, in the abovementioned or any other instance, purport to venture outside the legitimate role of an expert witness of his discipline, namely bringing his expertise to bear, informed by instructed facts and assumptions and desisting from purporting to determine factual matters.

Interpreting cl 34.3(a) to determine how delay analysis is assessed

V601's contentions as to the method of delay analysis and cl 34

552 V601 argues that cl 34.3(a) and cl 34.4(b)(ii), in particular, support its position that the Contract requires the application of a prospective method of delay analysis.

553 Referring to the text of cl 34.3(a), Abbott describes the approach that he adopted as follows:[439]

> I have assumed this to mean that the Contractor will be entitled to an EOT if it is delayed at the time of the delay or will be delayed in the future by virtue of the delay. Either way, in my opinion, it is apparent this requires an assessment of relevant delay event to be undertaken at or around the time of the delay occurring necessitating a prospective form of analysis. By prospective form of delay analysis, I mean delay analysis that looks forward at the time of the delay and forecasts whether the end date of the program will be impacted by the delay event as distinct to looking back retrospectively

438 Bready Amended First Statement, [283]–[291], [300]–[301]; Bready Amended Reply Statement, [71], and Probuild EOT claim dated 5 April 2012.

439 Abbott Second Report, [22] (emphasis in original).

after the event, at the end of the Project or at some later point in time.

554 Abbott's evidence in relation to Lyall's use of a retrospective *As Planned v As Built* method of analysis was that it 'is not suitable or appropriate in circumstances where, based on my assumption above, a prospective form of delay analysis was agreed between the parties in the Contract'.[440]

555 In oral submissions, in relation to Lyall's use of the April 2011 Baseline program and identification of the critical path of the Approved Contractor's Program, as it existed at the time of the occurrence of the qualifying cause of delay,[441] V601 submitted that there is a 'difference between a retrospective factual or delay analysis and a retrospective critical path analysis'.[442] In this respect, V601 submitted that Lyall's analysis of the critical path is 'significantly further away from the concept of the approved contractors program, as it existed at the time', and different to 'simply using a Baseline program that both parties have agreed was an appropriately similar program to the 5A program'.[443]

556 V601 submitted that: [444]

> [T]his is not an analysis of a critical path of an approved contractors program that existed at the time of the cause of delay; it's not an analysis of the critical path of the baseline program that Mr Abbott accepted was appropriate for use in a delay analysis; it's not the assessment of a critical path on any programs that V601 has consented to having used in the determination of the rights as between the parties.

557 In respect of Lyall's retrospective analysis and establishment of the critical path, V601 submitted that Lyall's focus was on events occurring after the qualifying cause of delay.[445] Specifically, V601 submits that:

> Looking back from this perspective, having come to the completion of the project and then taking this retrospective view, that's how Mr Lyall determines what was on the critical path, not of the approved contractors

440 Abbott Second Report, [33].
441 T1884–T1885.
442 T1885.
443 T1885.
444 T1885–T1887.
445 T1887.

> program, not of the baseline program, but what was on the critical path at the time that he's considering these delay events.[446]

558 V601 sought to distinguish the decision in *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* (*Wiggins Island*) on the basis of cl 35.5(B)(5) of the *Wiggins Island* Contract, which entitled a contractor to an extension of time only if it had demonstrated 'to the satisfaction of the Principal that the Contractor has been or will be actually delayed in achieving Practical Completion'.[447] V601 submitted that the Court in *Wiggins Island* 'specifically relied on the use of the words "has been … actually delayed"' to support the Court's finding that a retrospective analysis was appropriate.[448]

559 V601 highlights that the reference in *Wiggins Island* to 'has been' relates to 'achieving practical completion', which V601 submits 'assumes that it's possible to assess the EOT after practical completion'.[449] V601 submits that it is this feature of the relevant clause in the *Wiggins Island* contract which the Court explicitly found allows for an analysis of contractual delay after the entire project has been completed.[450]

560 V601 submits that cl 34.4(b)(ii) refers to the Approved Contractor's Program 'at the time the delay event occurred', and the critical path that existed 'at the time the delay event occurred'.[451]

561 V601 points to the words 'has affected' in cl 34.4(b) of the Contract, extracted below:[452]

> The *Contractor* is not entitled to an *EOT* unless:
> …
> (ii) the delay **has affected** an activity which is, in the reasonable opinion

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446 T1888.

447 V601 Closing Submissions, 12 June 2019, [54] (emphasis in original), referring to *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2017] QSC 85, [659] (*Wiggins Island*).

448 V601 Closing Submissions, 12 June 2019, [54], referring to *Wiggins Island* [2017] QSC 85, [660]. I note that Flanagan J prefaced his comments on this point by stating that '[t]he use of the disjunctive "or" gives the Contractor a choice to demonstrate that either it has been actually delayed or it will be actually delayed in achieving Practical Completion': *Wiggins Island* [2017] QSC 85, [660].

449 T1889.

450 T1889.

451 T1890.

452 Emphasis added.

> of the Project Manager, on the critical path of the *Approved Contractor's Program* as it existed at the time of the occurrence of the *Qualifying Cause of Delay*; and
>
> …

and submits that, whilst this clause 'mandates that the delay event "has affected" an activity on the critical path',[453] V601 contends that:[454]

> (a) it is possible for an event to 'have affected' an activity before that activity 'has been' delayed — for example, a Variation has affected an activity once it has been directed, even if this is before it has been carried out; and
>
> (b) even once an activity 'has been' affected, Probuild will not yet have been 'actually delayed in achieving Practical Completion' — the latter phrasing, which was included in the provision considered in *Wiggins Island*, clearly anticipates the assessment of an EOT after Practical Completion has been achieved.

562 Both parties referred to *Wiggins Island*,[455] and advanced contrary submissions as to the relevance of this decision to their respective arguments.

563 In the *Wiggins Island* case, the programming expert conducted a prospective analysis based on his interpretation of the contract clause in contention[456] which, in cl 35.5(3), provided that:

> If the Contractor **is or will be** delayed in reaching Practical Completion … and within 28 days after the delay occurs the Contractor gives the Principal's Representative a written claim … the Contractor shall be entitled to an extension of time for Practical Completion.[457]

564 Probuild relies upon Flanagan J's analysis of this clause. His Honour relevantly stated that:[458]

> The use of the disjunctive 'or' gives the Contractor a choice to demonstrate that either it has been actually delayed or it will be actually delayed in achieving Practical Completion. The past tense 'has been' as CMC submits,

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453 V601 notes that 'Probuild relies on this as drawing a parallel between the provision under consideration in *Wiggins Island* and the relevant provision in this case': V601 Closing Submissions, 12 June 2019, [55] n 16. See Probuild Closing Submissions, 11 June 2019, [137] n 232.

454 V601 Closing Submissions, 12 June 2019, [55].

455 [2017] QSC 85.

456 T1222.5–31; Probuild Closing Submissions, 11 June 2019, [137].

457 [2017] QSC 85, [659] (emphasis added).

458 [2017] QSC 85, [660]. Probuild refers to the first sentence only: Probuild Closing Submissions, 11 June 2019, [137].

> contemplates looking backwards, after the delay event has expired, to demonstrate that (with knowledge of hindsight) the Contractor has actually been delayed in achieving Practical Completion. CMC further submits that the retrospective approach is particularly appropriate if the activity delayed occurs towards the end of the project, such that the time at which the claim for the extension comes to be assessed is after Practical Completion has been achieved. [Citation omitted.]

565 In *Wiggins Island*, Flanagan J considered a dispute between a principal (WICET, the defendant) and contractor (CMC, the plaintiff) arising from a bulk earthworks contract, under which the contractor made claims in respect of variations, directions, and a claim for delay costs.[459] In response, the principal brought a counterclaim for alleged overpayments, liquidated damages, and the repayment of amounts paid and subsequently re-valued.[460]

566 The *Wiggins Island* case raised the issue of programming methodology, namely whether the contract permitted both a prospective and a retrospective delay analysis, or whether the assessment of relevant delay required only one or other of those methodologies. The principal submitted that the contractor's retrospective delay analysis, which had used an 'as planned' v 'as built' analysis, was not permitted by cl 35.5 of the contract.

567 Justice Flanagan's ultimate conclusion was that 'the better view is that the Contract permits both a prospective and retrospective analysis'.[461]

568 The *Wiggins Island* contract provided, in part, as follows:[462]

> Paragraph 3 of clause 35.5 provided that:
>
> > If the Contractor **is or will be** delayed in reaching Practical Completion … and within 28 days after the delay occurs the Contractor gives the Principal's Representative a written claim … the Contractor shall be entitled to an extension of time for Practical Completion.
>
> Clause 35.5 further provides:

459 [2017] QSC 85, [14]–[15].
460 [2017] QSC 85, [16].
461 [2017] QSC 85, [658].
462 [2017] QSC 85, [659] (emphasis added).

> The Contractor will only be entitled to an extension of time for Practical Completion pursuant to this Clause if —
> …
> (B) the Contractor —
> …
> (5) demonstrates to the satisfaction of the Principal that the Contractor **has been or will be** actually delayed in achieving Practical Completion.

569 Justice Flanagan considered that the use of the disjunctive 'or' in cl 35.3 provided the Contractor with the option of demonstrating that either it has actually been delayed, or it will in future actually be delayed in achieving Practical Completion.[463]

570 Justice Flanagan summarised the contractor's position as follows:[464]

> The past tense 'has been' as CMC submits, contemplates looking backwards, after the delay event has expired, to demonstrate that (with knowledge of hindsight) the Contractor has actually been delayed in achieving Practical Completion. CMC further submits that the retrospective approach is particularly appropriate if the activity delayed occurs towards the end of the project, such that the time at which the claim for the extension comes to be assessed is after Practical Completion has been achieved. [Footnote omitted.]

571 Justice Flanagan also referred to the following submission made by the principal:[465]

> Whilst the word 'has' (much like the word 'is') might, viewed in isolation, suggest a retrospective analysis, the word is immediately followed the critical words by 'or will be'. The phrase 'has or will be actually delayed' should have the same meaning as 'is or will be delayed'. Further the insertion of the word 'actually' does not require a retrospective analysis. If that were intended, the word 'actually' would not have been proceeded by 'will be'. On a proper construction, the word 'actually' simply emphasises that CMC is only entitled to a EOT if Practical Completion is affected. [Footnote omitted.]

572 Justice Flanagan concluded:[466]

> I do not accept this construction. The use of the words 'has been … actually delayed' addresses past delay permitting or indeed inviting retrospective analysis. A Contractor would be entitled to an extension of time for Practical Completion if it demonstrates either a past or future delay. Further as CMC correctly submits, WICET's construction does not give the word 'actually' any

463 [2017] QSC 85, [660].
464 [2017] QSC 85, [660].
465 [2017] QSC 85, [661].
466 [2017] QSC 85, [662]–[663]. His Honour then made further comments at [663]–[664] regarding the Society of Construction Law Delay and Disruption Protocol on delay analysis, which both parties had referred to, and which was subject to the primacy of the contract.

work to do.

> My interpretation of clause 35.5 as permitting both a prospective and retrospective delay analysis rest on the ordinary meaning of the term 'has been or will be actually delayed'. …

573 V601 also relies on the Western Australian Supreme Court decision of *CMA Assets Pty Ltd v John Holland Pty Ltd (No 6)* (*CMA Assets (No 6)*),[467] as providing guidance in interpreting the relevant provisions of cl 34, and submits that the case considers 'a more similar (and therefore more relevant) provision … in which the subcontractor was entitled to an EOT if it "is or will be delayed" and the delay "has affected the critical path"'.[468] Allanson J's review of the relevant contractual provisions noted that CMA would be 'entitled to claim an extension of time to the Date for Completion if it was, or would be, delayed by a Cause for Delay "in a manner which will prevent it from achieving Completion of the Works": cl 10.10'.[469]

574 V601 submits that for a subcontractor to be entitled to an extension of time it must establish a delay that 'has affected the critical path of execution under the Subcontract as set out in the Approved Construction Program or any approved revision'.[470]

575 In finding that, on the proper construction of the contract, a prospective analysis was required,[471] in *CMA Assets (No 6)*, Allanson J relied upon the following various factors:[472]

> 1. The program has a current operation governing what is now happening and what will happen. The obligation on CMA is to comply with and perform the works in accordance with the Approved Construction Program or any approved revision of it: cl 10.5(b).

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467 [2015] WASC 217.

468 V601 Closing Submissions, 12 June 2019, [56], quoting from *CMA Assets (No 6)* [2015] WASC 2017, [265]–[266]. See also, T1891.

469 [2015] WASC 2017, [265].

470 [2015] WASC 2017, [266]. The full text for cl 10.12(a)(i) is: The Subcontractor shall not be entitled to any extension of time pursuant to this General Conditions Clause 10.12 unless: (i) the delay for which extension of time is claimed has affected the critical path of execution of work under the Subcontract as set out in the Approved Construction Program or any approved revision thereof'.

471 [2015] WASC 2017, [323].

472 [2015] WASC 2017, [324]. See also, T1891.

2. In providing for revisions to an Approved Construction Programme, cl 10.6 provides that John Holland 'will approve a revision' if CMA is entitled to an extension of time: cl 10.6(a). By 10.6 (b), CMA is to submit a draft revised Approved Construction Programme within seven days of being notified of any extension of time granted.

3. CMA must report 'actual progress' against the programme monthly: cl 10.7.

4. The language of cl 10.10 is prospective: the Subcontractor may claim an extension if it 'is or will be delayed'.

5. The requirements for making a claim by giving notice to John Holland continues throughout the relevant delay: cl 10.11.

6. In determining whether CMA is entitled to an extension, John Holland shall have regard to the critical path and whether the Subcontractor '[has] been or [will] be delayed in reaching Practical Completion': cl 10.14.

7. Clause 10.18 provides for the issue of an Acceleration Order. If the Subcontractor would, but for the Acceleration Order, have been entitled to an extension of time, its entitlement is limited to the extra costs reasonably incurred by it and directly attributable to accelerating the works.

576 Justice Allanson's view was also that 'it would be incongruous for the determination of whether delay entitles the Subcontractor to an extension of time to be determined at some later point and retrospectively'.[473]

577 V601 relies upon some of the factors listed by Allanson J in *CMA Assets (No 6)* to support its submission that a prospective analysis is required in the current proceeding. These principally include the following:[474]

(a) the contractor's program had a current operation, governing what was happening at the time and what would happen in the future;

(b) in providing for revisions to the Approved Contractor's Program, the contract stated that a revision would be approved if CMA was entitled to an EOT;

(c) CMA was to report 'actual progress' against the program on a monthly basis;

(d) the language of the EOT clause was prospective, providing for an

473 [2015] WASC 2017, [325].

474 V601 Closing Submissions, 12 June 2019, [56], citing *CMA Assets (No 6)* [2015] WASC 2017, [323]–[325]. See also, T1891.

extension if the contractor 'is or will be delayed'; and

(e) if the contractor would have been entitled to an EOT if not for an acceleration order, its entitlement was limited to extra costs reasonably incurred and directly attributable to accelerating the works.

578 V601 also compares the contract in *CMA Assets (No 6)* to the Contract in the current proceeding, submitting that:[475]

> [T]he Contract in this case provides for the Approved Contractor's Program to have a current operation,[476] allows updated Contractor's Programs to account for EOTs and Variations granted,[477] and limits Probuild's entitlements where it would have been entitled to an EOT if not for a direction to accelerate.[478]

579 V601 submits that cl 34 requires the assessment to be conducted against a contemporaneous Approved Contractor's Program, which means that 'even if the delay could be assessed retrospectively, the critical path against which it was analysed would always have to be prospective'.[479]

580 V601 relies upon contractual provisions concerning the timing of extension of time claims and the above authorities to support its argument that a prospective approach to delay analysis is preferred under the Contract, noting that claims must be 'dealt with relatively quickly after the occurrence of the delay event'.[480] Referring to the substance of cls 34.3(b), 34.3(d), and 34.3(e), V601 emphasises the requirements of the Contract, including that Probuild notify it of delays to the progress of the WUC 'as soon as it [became] aware of or suspect[ed]' them; that Probuild submit extension of time claims 'as soon as it [could] estimate the extent of the delay with reasonable accuracy'; and that Probuild provide further information 'promptly' to the Project

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475 V601 Closing Submissions, 12 June 2019, [57].

476 On this point, V601 states: 'Under clause 32.3(d), where progress of the WUC falls behind that provided for in the Approved Contractor's Program, the Project Manager may direct Probuild to provide an updated Contractor's Program "to show how the WUC *will be carried out to recover lost time* …"': V601 Closing Submissions, 12 June 2019, [57] n 20 (emphasis in original).

477 V601 refers to cl 32.3(b) of the contract to support this point.

478 V601 refers to cl 32.5(b) of the contract to support this point.

479 V601 Closing Submissions, 12 June 2019, [57].

480 V601 Closing Submissions, 12 June 2019, [58]. See cl 34.3 of the Contract.

Manager when requested to do so.[481]

581 V601 also put forward arguments as to why the above timing requirements were necessary for both parties; namely, V601 needed to be able to determine whether to accelerate before granting the extension of time, and because Probuild needed to then revise the Contractor's Program upon receipt of the extended dates for practical completion; and in the event that extension of time claims were partly or wholly rejected, Probuild would need to consider whether to incur additional costs in order to reduce its liquidated damages liability.[482]

582 V601 also outlined some additional considerations supporting its submissions that the Contract required a prospective analysis, including that cl 34.7 required liquidated damages to be certified progressively which therefore necessitated that the date for practical completion 'be determined in advance'; and that cl 36 requires Probuild to provide V601 with an estimate of the impact of delay prior to the direction of a variation 'such that [V601] can determine whether to direct the Variation with full knowledge of the extension of time to which Probuild would therefore be entitled'.[483]

583 In its closing submissions, Probuild contends that cl 34.3(a) 'accommodates either a retrospective or prospective analysis' of relevant delays.[484] It submits that the clause[485]

> requires that Probuild 'is or will be delayed in reaching Practical Completion by a Qualifying Cause of Delay'. The language 'is … delayed' contemplates that Probuild has sustained delay, or is currently incurring delay, such that a retrospective analysis may be more appropriate. The phrase 'or will be delayed' contemplates Probuild sustaining delays into the future, such that a prospective analysis may be more appropriate. This interpretation also makes practical and commercial sense. It provides the Court with flexibility to apply the most appropriate method such that Probuild receives a just entitlement.

481 V601 Closing Submissions, 12 June 2019, [58].
482 V601 Closing Submissions, 12 June 2019, [59].
483 V601 Closing Submissions, 12 June 2019, [60].
484 Probuild Closing Submissions, 11 June 2019, [136]. See also, T1724.
485 Probuild Closing Submissions, 11 June 2019, [136]. See also, T1725.

584 On this issue, Probuild relied on the Queensland Supreme Court decision of *Wiggins Island*,[486] in which Flanagan J, interpreting a clause that Probuild asserts contained very similar language to cl 34.4(b)(ii), rejected an argument that a retrospective delay analysis ('as planned' v 'as built') was not permitted by the clause of the contract in issue,[487] and concluded that 'the better view is that the Contract permits both a prospective and retrospective delay analysis'.[488]

Considerations/conclusions – cl 34 of the Contract – prospective/retrospective analysis

585 I consider that cl 34.3(a) also contemplates that the relevant delay has already occurred. Clause 34.4(b)(i) in my view contemplates a retrospective analysis of delay. This is clear from the parties including the words, 'the delay has effected', and the further reference to the relevant delay being on 'the critical path' of the Approved Contractor's Program, as it existed at the time of the occurrence of the delay in question. In terms, cl 34.4(b)(ii) provides:

> (b) The *Contractor* is not entitled to an *EOT* unless:
>
> …
>
> (ii) the delay has affected an activity which is, in the reasonable opinion of the *Project Manager*, on the critical path of the *Approved Contractor's Program* as it existed at the time of the occurrence of the *Qualifying Cause of Delay*; and
>
> …

586 I consider that in the circumstances which occurred, including the extent to which relevant delays were not the subject of valid and contractually enforceable assessment and certification, resulting from the Project Manager failing to act independently, impartially, reasonably and fairly to assess, determine and certify in accordance with the provisions of the Contract in its role, pursuant to cls 20.2 and 34 of the Contract, the consequence of breaches, failings and defaults by V601, by its

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486 [2017] QSC 85.

487 Like Lyall, the programming expert for the other party had used an 'as planned' v 'as built' analysis: *Wiggins Island* [2017] QSC 85, [657]. See also, T1727, 1728–T1729.

488 *Wiggins Island* [2017] QSC 85, [657]–[658]; Probuild Closing Submissions, 11 June 2019, [137]. See also, T1727.

Project Manager referred to, was that contractual and proper assessment of relevant delay under cls 34.3 and 34.4 (apart from the Contractor's assessments used to formulate its contemporaneous delay claims) had to be undertaken well after the WUC had reached Practical Completion.

587 Furthermore, I consider it to be more practical and more accurate and sensible to analyse delay and the effect of delay retrospectively, with the benefit of hindsight, and the higher level of assurance now achievable from a retrospective delay analysis utilising the 'as build' facts to ascertain how the WUC were actually constructed and actually delayed.

588 My reasons for the above conclusions are principally:

(a) A prospective delay assessment is a theoretical forecast of what will transpire on the Project, without regard to what would actually happen during the course of the Works.

(b) A prospective assessment is inferior to an assessment of delay undertaken when the facts affecting the progress of the Project are known and the actual delay can be assessed.[489] Parties and experts do not need to rely upon a theoretical delay model when the actual delay to the relevant construction activities can be established.

(c) No native copy of the Approved Contractor's Programs existed at the time of the majority of relevant delaying events, nor were there native copies of contemporaneous construction programs at those times. Therefore, non-contemporaneous programs have been created to undertake Abbott's prospective analysis.[490]

(d) Lyall's retrospective method of analysis does not require the creation of programs to make assessments and is therefore more appropriate and

489 Programming Experts' Joint Report 2, [6].
490 Programming Experts' Joint Report 2, [7].

practical in the assessment of delay events.[491]

(e) The retrospective assessment of delay is consistent with the Contract because it establishes the critical delay to the activity or sequence of activities at the time of the delaying event.[492]

(f) Absent a contemporaneous or Approved Contractor's Program, the retrospective assessment of delay is the most practical and reliable method of analysing the actual delay to the work referenced back to the appropriate baseline to measure delay as agreed by Lyall and Abbott, WUCP01.[493]

(g) The retrospective delay analysis applies common sense and a practical approach to the location of the critical path, with reference to contemporaneous Project records and the measurement of delay.

(h) The Time Impact Analysis used by Abbott is a prospective method of analysis that can only be utilised to forecast a theoretical likely delay to the completion of works in his own forecast, which was created time distant from the actual completion of the project.

(i) In relation to the Time Impact Analysis methodology, the Society of Construction Law Delay and Disruption Protocol (2nd ed) notes:

> The product of this method of analysis is a conclusion as to the likely delay of the modelled delay events on the programme/critical path that is most reflective of the contemporaneous position when the delay events arose. This method does not capture the eventual actual delay caused by the delay events as subsequent progress is not considered.[494]

(j) The Society of Construction Law Delay and Disruption Protocol also states:[495]

> Delay impact is determined in one of two different ways. A

491 Programming Experts' Joint Report 2, [8].
492 Programming Experts' Joint Report 2, [9].
493 Programming Experts' Joint Report 2, [8].
494 Programming Experts' Joint Report 2, [41(1)].
495 Programming Experts' Joint Report 2, [41(5)(c)].

> prospective analysis identifies the likely impact of historical progress or delay events on a completion date. The conclusions of a prospective delay analysis may not match the as-built programme because the Contractor's actual performance may well have been influenced by the effects of attempted acceleration, re-sequencing or redeployment of resources in order to try to avoid liability for liquidated damages or due to other Employer and Contractor Risk events. A retrospective delay analysis identifies the actual impact of the delay events on the identified actual or as-built critical path. (emphasis added)

(k) The Protocol supports Lyall's opinion and approach. The analysis is now time distant from the event, so reliance on a prospective method is inferior compared to a retrospective method such as the *As Planned v As Built* windows method.[496]

(l) The *As Planned v As Built* method is based on the actual start and finish dates, compared to the relevant planned dates. This is Lyall's reason for relying on the retrospective method as his primary method of analysis.[497] Prospective analyses cannot and do not measure actual critical delay.[498]

(m) Abbott's prospective analysis is limited to an indicative measure of delay in his own forecasts, as constructed in his own programmes.[499]

(n) Abbott's criticisms of Lyall's use of the WUCP01 program are invalid because the WUCP01 program was contemporaneously produced by the Contractor before the start of the WUC, and is more likely to represent the Contractor's plan to complete the WUC than Abbott's modified CP02 program, which does not reflect the programme included at Appendix 5A to the Contract.[500]

589 At the point at which the Experts have considered delay, and the Court has grappled with the relevant on-site and off-site facts and the Expert programming and delay evidence, a theoretical delay analysis of the type undertaken by Abbott is in my

496 Programming Experts' Joint Report 2, [41(8)].
497 Programming Experts' Joint Report 2, [41(9)].
498 Programming Experts' Joint Report 2, [41(11)].
499 Programming Experts' Joint Report 2, [41(10)].
500 Programming Experts' Joint Report 2, [41(14)].

view, for the reasons I have outlined, less likely to reliably determine the delay, as required by cls 34.3 and 34.4 of the Contract, and a theoretical delay analysis of the type undertaken by Abbott is I consider, for the reasons outlined above and elsewhere herein, a less accurate method to assess and determine delay.

590 Justice Flanagan's interpretation of the delay assessment framework of the *Wiggins Island* Contract also took into account cl 35.5(B)(5) of that Contract.[501] Clause 35.5(B)(5) of the *Wiggins Island* Contract entitled the contractor to an extension of time for practical completion if it had 'demonstrate[d] to the satisfaction of the Principal that the Contractor **has been or will be** actually delayed in achieving Practical Completion'.[502] This language is not replicated in the subject Contract, although cl 34.4(b)(ii) requires that 'the delay **has affected** an activity which is, in the reasonable opinion of the *Project Manager*, on the critical path of the *Approved Contractor's Program* …'[503] I consider that this temporal requirement is consistent with a prospective or retrospective analysis, including because cl 35.5(B)(5) contains the same past tense and future tense as cl 34.4(b)(ii) of the subject Contract. In this regard, as I have earlier alluded in substance, I accept Probuild's submission that in a prospective analysis, an activity on the critical path is prospectively affected. In a retrospective analysis, an activity on the critical path has actually been affected.

591 I reject that cl 34.4(b) supports V601's argument in support of a prospective delay analysis because it refers to delays which 'have affected' an activity.

592 In my view, the words 'have affected' applied to the delay of an activity is more likely to have been intended by the parties to describe when an activity is affected thereby giving rise to delay.

593 Probuild submits that the *Wiggins Island* clause (cl 35.5(B)(5)) is analogous to

501 Probuild Closing Submissions, 11 June 2019, [137] n 232.
502 *Wiggins Island* [2017] QSC 85, [659] (emphasis added). See Probuild Closing Submissions, 11 June 2019, [137].
503 Probuild Closing Submissions, 11 June 2019, [137] n 232 (emphasis added).

cl 34.4(b)(ii):[504]

> [I]t's because of the use of the past tense in [(b)(ii)], 'The delay has', past tense, 'Affected an activity which is, in the reasonable opinion of the project manager, on the critical path of the approved contractor's program'. That's past tense.
>
> It's not will affect, and it's not has or will affect, it's 'Has affected', and that was the similar phrase that was used in [*Wiggins Island*].

594 Probuild also contends that because the initial Contract Appendix 5A program is a static PDF document,[505] it would be inappropriate to use just that program to identify the critical path.

595 Given that the 'Approved Contractor's Program' at Appendix 5A of the Contract is a PDF document, Probuild submits that the Appendix 5A program had to be converted to electronic format to enable a sophisticated programming analysis to be conducted by Lyall, and Abbott.[506]

596 Lyall found that the Appendix 5A program was not useful because it was a static PDF document and included only about 300 'rolled-up' summary activities.[507] Lyall therefore identified a contemporaneous electronic program which contained the same start date and the same planned completion dates which closely reflected those in the contract. This WUCP01[508] program, Probuild submits,

> was approved as a baseline program in the September 2011 PCG meeting. It contained work sequences and durations which appeared reasonable and achievable. The critical path for this program therefore reflected the critical path in the appendix 5A program. That's what the contract required.[509]

597 I am satisfied that by reference to the WUCP01 program, Lyall replicated the critical path of the Appendix 5A Contract Program, and created the time assessment tool contemplated by cl 34 of the Contract.

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504 T1726.
505 T1733–T1735.
506 T1736.
507 Programming Experts' Joint Report 2, Issue 2, page 3.
508 Lyall First Report, [36(a)].
509 T1737.

598 Further, I do not accept that, following a delay event, the Contract requires a prompt time extension claim and that this Contract requirement supports a prospective delay analysis.

599 I consider that it is clear that in practical reality the timeframe for submitting an extension of time claim will, in a number of likely circumstances, often not occur for some considerable time after the occurrence of the relevant delaying event because of the nature of the qualifying cause of delay and its effect. Accordingly, as I have elsewhere decided in relation to the temporal operation of cls 34.3 and 34.4 of the Contract, the timeframe for assessment of delay under cl 34.4 may in certain instances include and accommodate a time extension claim being made at the 'end of the delay period'.

620 Collins Street (No 1)

600 As alluded to above, Probuild relied upon *620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 1)* (*620 Collins St (No 1)*)[510] to support its closing submissions. In *620 Collins St (No 1)*, an application was made to set aside an arbitrator's award on the grounds of misconduct. The parties, 620 Collins Street (principal) and Abigroup (contractor), entered into a building contract for the design and construction of Liberty Tower.[511]

601 A series of disputes arose between the parties and, following proceedings in the Victorian Civil and Administrative Tribunal, the parties agreed to an accelerated arbitration.[512] The Arbitrator published a first interim award, followed by a second interim award to the arbitration.[513] Thereafter, 620 Collins Street applied to the Supreme Court of Victoria to set aside the Awards on the bases of legal/technical misconduct by the arbitrator.[514]

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510 [2006] VSC 490 (*620 Collins St (No 1)*).
511 *620 Collins St (No 1)* [2006] VSC 490, [1]–[2].
512 *620 Collins St (No 1)* [2006] VSC 490, [7]–[8].
513 *620 Collins St (No 1)* [2006] VSC 490, [12]–[13].
514 *620 Collins St (No 1)* [2006] VSC 490, [16].

602 Part of the argument in the proceedings to set aside the Arbitral Awards concerned whether cl 33.2 of that Contract[515] had been satisfied by the contractor's use of the Go-Mode program.[516] The Arbitrator found that it had not.[517]

603 Clause 35.5 of the Contract in *620 Collins Street (No 1)* provided the following in relation to claims for an extension of time:[518]

> If the Contractor is being delayed or will be delayed in reaching Practical Completion by a cause described in the next paragraphs and within 7 days after the delay occurs or the Contractor becomes aware of the delay and, the Contractor gives the Superintendent a written claim for an extension of time for Practical Completion setting out the facts on which the claim is based and demonstrating the extension to the critical path or paths as set out in the Contractor's Program provided under clause 33.2, the Contractor shall be entitled to an extension of time for Practical Completion to the extent approved by the Superintendent (or any tribunal or court reviewing the decision of the Superintendent).

604 In *620 Collins Street (No 1)*, the focus of argument was however on the contractor's reliance upon the penultimate paragraph to cl 35.5, which provided a discretion to the superintendent that could be applied in the absence of an extension of time, stating:[519]

> Notwithstanding that the Contractor is not entitled to or has not claimed an extension of time, the Superintendent may at any time and from time to time before the issue of the Final Certificate by notice in writing to the Contractor extend the time for Practical Completion for any reason.

605 In its submissions, the contractor asserted that:[520]

> The discretion under clause 35.5 (penultimate paragraph) requires that the Superintendent act fairly and reasonably but is otherwise unfettered and is in no way dependent on Abigroup demonstrating a delay to the critical path set out in the contractor's program provided for under clause 33.2.

606 In construing the contract, the Arbitrator had concluded that 'it was not necessary

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515 *620 Collins St (No 1)* [2006] VSC 490, [40], [53].
516 *620 Collins St (No 1)* [2006] VSC 490, [40]–[41].
517 *620 Collins St (No 1)* [2006] VSC 490, [46]; see also, [61(1)].
518 *620 Collins St (No 1)* [2006] VSC 490, [39].
519 *620 Collins St (No 1)* [2006] VSC 490, [42]–[43].
520 *620 Collins St (No 1)* [2006] VSC 490, [43(b)]. The superintendent had exercised the discretion, but the contractor said that it had 'failed, refused or neglected to grant reasonable extensions of time for practical completion': at [43(c)].

for [the contractor] to prove that it had complied with the requirements of clause 33.2 in respect of a contractor's program in order for an EOT to be granted pursuant to the penultimate paragraph of clause 35.5'.[521]

607 In relation to cl 35.5, the Arbitrator then considered the basis upon which he might exercise the discretion referred to above, in circumstances where the contractor was not entitled to or had not claimed any extension of time.[522] This entailed an identification of the 'methodology appropriate to assessment of the merits of any entitlement to an extension of time' which involved: (i) the parties providing expert programming evidence; (ii) the experts meeting and drafting a joint report; (iii) the experts each producing an as-built program, having reviewed site records during the conference; and (iv) agreement from the experts on appropriate programming methodology.[523]

608 Referring to the production of as-built programs by the experts, and their agreement on programming methodology, the Arbitrator stated that:[524]

> 178. Each expert produced an as-built programme, and, after reviewing site records during the conference, the Experts were able to resolve a number of date differences between their initial as-built programmes. An important outcome of this process was an agreed as-built programme that records how the project was actually built. This programme includes the effect of all compensable and non-compensable delay events. It should be appreciated that the as-built programme is a summary-type programme which does not specifically identify periods when work is not being carried out on a particular activity or identify delay events.
>
> 179. The Experts agreed that the following programme methodology is appropriate to assess any entitlement of Abigroup to an EOT.
>
> 1. An acceptable programme to completion is required.
> 2. The programme should be updated to account for all progress achieved reasonably close to the date of the delay.
> 3. Using the above progress status programme, assess the critical path at the time of the delay.
> 4. Assess the factual records of the delay period to identify the following points:

521 *620 Collins St (No 1)* [2006] VSC 490, [45].
522 *620 Collins St (No 1)* [2006] VSC 490, [53].
523 *620 Collins St (No 1)* [2006] VSC 490, [54].
524 *620 Collins St (No 1)* [2006] VSC 490, [54], quoting from the Arbitrator's Award at [178]–[179].

(a) Identify the start and finish dates of the delay
(b) Identify the programme tasks affected by the delay
(c) Identify lost time within the delay period for any other causes (eg. Industrial, weather, contractor delays)
(d) Identify the actual duration of the delay excluding lost time as above.

5. Identify if the delay period affected the critical path.
6. The delay to completion is the extent to which the delay affected the critical path.

609 The Arbitrator 'accept[ed] and agree[ed] with' the above methodology, whilst also indicating that this would be subject to consideration of other contractual provisions.[525]

610 In his judgment in relation to the challenge brought against the Arbitrators Award in *620 Collins Street (No 1)*, Osborn J noted that the contractor gave evidence at the arbitration that its expert (Lynas) had adopted this methodology, 'utilising the available project documentation and appropriate critical delay analysis', which was said to have enabled him to 'demonstrate the effect of delay events on a critical path'.[526] In his conclusions at [194] of the Award, reproduced below, the Arbitrator is of the opinion that Lynas's revised Go Mode D program 'does provide a reasonable basis for assessing the effect of the claimed delays using the programming methodology agreed by the Experts' and outlined at [179] of the Award,[527] reproduced above. Later in his decision, Osborn J states that:

> Part of the reasoning accepted by the Arbitrator turns on his acceptance of the proposition that it was reasonable for Mr Lynas to demonstrate criticality by his adjusted Go Mode program (a view based ultimately on the Arbitrator's perception of the evidence as a whole going to this issue).[528]

In this context, the Arbitrator had been considering Lynas's evidence on the question of critical path.[529] His Honour found that the Arbitrator's reasoning demonstrated no misconduct.[530]

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525 *620 Collins St (No 1)* [2006] VSC 490, [54].
526 *620 Collins St (No 1)* [2006] VSC 490, [54].
527 *620 Collins St (No 1)* [2006] VSC 490, [55], quoting from the Arbitrator's Award at [194].
528 *620 Collins St (No 1)* [2006] VSC 490, [101].
529 *620 Collins St (No 1)* [2006] VSC 490, [99].
530 *620 Collins St (No 1)* [2006] VSC 490, [103].

611 The Arbitrator's conclusions on programming methodology included the following acceptance of a retrospective delay analysis, in relation to the relevant discretionary determination of an extension of time for Practical Completion:[531]

> 194. The 15 August 2000 issue of the Go Mode Programme does broadly portray the proposed construction sequence and intent. The development of this programme by Mr Lynas into Go Mode C and then as finally revised to Go Mode D:
>
> (a) sits comfortably with the as-built programme agreed by the Experts;
>
> (b) whilst not the Contractor's Program under cl 33.2, is a programme (developed from an Abigroup construction programme) which is capable of being used to assess the effect of identified delays; and
>
> (c) generally satisfies the guidelines for retrospective delay analysis published by the UK Society of Construction Law [2002].
>
> In my opinion, therefore, the Go Mode D Programme does provide a reasonable basis for assessing the effect of the claimed delays using the programming methodology agreed by the Experts, which is earlier discussed in Paragraph 179.

612 In relation to the process adopted by the Arbitrator, as referred to above, Osborn J stated that he was 'not persuaded that either this process of reasoning or these conclusions demonstrate misconduct'.[532] His Honour also stated that the conclusions 'flow logically from the reasoning adopted' and expressed his satisfaction that they were open to the arbitrator.[533]

613 Although in *620 Collins Street (No 1)* the principal had argued that the contract contemplated a prospective construction program as a precondition to valid extension of time claims,[534] Osborn J noted that the Arbitrator had 'rejected the contractual basis of this argument', and had also 'addressed the evidence expressly on the basis that its adequacy in justifying a retrospective delay analysis was ultimately critical issue'.[535] In respect of these matters, Osborn J was not satisfied

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531 *620 Collins St (No 1)* [2006] VSC 490, [55], quoting from the Arbitrator's Award at [194].
532 *620 Collins St (No 1)* [2006] VSC 490, [55].
533 *620 Collins St (No 1)* [2006] VSC 490, [64].
534 *620 Collins St (No 1)* [2006] VSC 490, [63].
535 *620 Collins St (No 1)* [2006] VSC 490, [63].

that the Arbitrator's reasoning demonstrated any misconduct.[536]

614 In my view the decision in *620 Collins Street (No 1)* is, with great respect to Osborn J, of no assistance in this case, because the Court was there concerned with quite different issues to be tested under the criteria required by the *Commercial Arbitration Act 1984* (Vic). Further, in *620 Collins Street (No 1)*, the parties did not appear to argue that the Arbitral Award should be set aside on the basis of an error in relation to the interpretation of the time extension entitlement provisions of that contract.

CMA Assets (No 6)

615 As earlier outlined, V601 also relied upon *CMA Assets Pty Ltd v John Holland Pty Ltd (No 6)*.[537] In *CMA Assets (No 6)*, John Holland was engaged to carry out an upgrade and extension of a wharf at Finucane Island.[538] John Holland performed some of the required work and also subcontracted some of the scope of work to the company that subsequently became CMA Assets.[539] The relevant dispute concerned two delay claims made by CMA.[540]

616 Justice Allanson concluded in relation to the Contractor's extension of time entitlement under cl 10.10 of the relevant Contract that: 'CMA is entitled to claim an extension of time to the Date for Completion if it was, or would be, delayed by a Cause for Delay "in a manner which will prevent it from achieving Completion of the Works": cl 10.10'.[541]

617 Clause 10.12 of the *CMA Assets (No 6)* contract also provided that:[542]

> (a) The Subcontractor shall not be entitled to any extension of time pursuant to this General Conditions Clause 10.12 unless:
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> (i) the delay for which extension of time is claimed has affected the critical path of execution of work under the Subcontract as set out in the Approved Construction Program or any

536 *620 Collins St (No 1)* [2006] VSC 490, [64].
537 [2015] WASC 217 (*CMA Assets (No 6)*).
538 *CMA Assets (No 6)* [2015] WASC 217, [1].
539 *CMA Assets (No 6)* [2015] WASC 217, [4].
540 *CMA Assets (No 6)* [2015] WASC 217, [19].
541 *CMA Assets (No 6)* [2015] WASC 217, [265].
542 Clause 10.12(a), as quoted in *CMA Assets (No 6)* [2015] WASC 217, [266].

approved revision thereof; and

(ii) John Holland is satisfied that the work under the Subcontract was, but for the event giving rise to the claimed extension of time, on schedule (that is, complete to the required extent at the date of comparison in accordance with the Approved Construction Program or any approved revision thereof).

…

618 In relation to the question of whether the contract required a prospective or a retrospective delay analysis, Allanson J preferred the construction advanced by CMA's expert, Mr Griffith, to the effect that the contract required a prospective analysis.[543] His Honour outlined the factors in cl 10 that led to the Court's preference for this construction:[544]

1 The program has a current operation governing what is now happening and what will happen. The obligation on CMA is to comply with and perform the works in accordance with the Approved Construction Program or any approved revision of it: cl 10.5(b).

2. In providing for revisions to an Approved Construction Programme, cl 10.6 provides that John Holland 'will approve a revision' if CMA is entitled to an extension of time: cl 10.6(a). By 10.6 (b), CMA is to submit a draft revised Approved Construction Programme within seven days of being notified of any extension of time granted.

3. CMA must report 'actual progress' against the programme monthly: cl 10.7.

4. The language of cl 10.10 is prospective: the Subcontractor may claim an extension if it 'is or will be delayed'.

5. The requirements for making a claim by giving notice to John Holland continues throughout the relevant delay: cl 10.11.

6. In determining whether CMA is entitled to an extension, John Holland shall have regard to the critical path and whether the Subcontractor '[has] been or [will] be delayed in reaching Practical Completion': cl 10.14.

7. Clause 10.18 provides for the issue of an Acceleration Order. If the Subcontractor would, but for the Acceleration Order, have been entitled to an extension of time, its entitlement is limited to the extra costs reasonably incurred by it and directly attributable to accelerating the works.

619 Justice Allanson concluded that, taking into account the above provisions, 'it would be incongruous for the determination of whether delay entitles the Subcontractor to an extension of time to be determined at some later point and retrospectively'.[545] His

543 *CMA Assets (No 6)* [2015] WASC 217, [323].
544 *CMA Assets (No 6)* [2015] WASC 217, [324].
545 *CMA Assets (No 6)* [2015] WASC 217, [325].

Honour supported this conclusion with the following reasoning:[546]

> The use of a prospective analysis is significant. John Holland contended that the removal of debris had to be completed for CMA to achieve practical completion, and whether that activity had in fact been completed at the specified Date for Completion must affect the analysis of earlier delays. But on a prospective construction, whether CMA had in fact completed all tasks at the extended date for practical completion does not affect the analysis which is concerned with what was the extent of the delay at the time of the cause of delay (ts 1318). That some other activity proved to take longer than expected, so that practical completion is further delayed, does not retrospectively change what was the critical path at the time of a delaying event (ts 1319). To the extent that contractual entitlements arise (either extension of time or entitlement to additional contract sums), those matters are to be determined from the time of the delay event. Where a subsequent delay event begins to operate concurrently, it is only taken to affect the critical path from when the event earlier in time ceases to be effective. It is the delay which first becomes critical which causes a delay in reaching practical completion (exhibit 60A pt 4.4).
>
> John Holland argued against the extension of time claims on the basis that none of the delay events did delay or was likely to have delayed CMA in reaching completion, as a matter of fact, because CMA's obligation to remove demolition debris from the seabed, from July or September 2006, became in fact the actual critical path to completion. That was an activity which was never properly programmed. Further, it became in fact the most difficult and time consuming of all of the activities within CMA's work. The removal of debris was not completed until about March 2008. John Holland consistently contended that, as a matter of objective fact, it was debris removal which prevented CMA from achieving completion of its work on time.
>
> Were a retrospective analysis appropriate, the delay in removal of debris may have the effect contended for. But, on the construction which I have accepted, the entitlements to an extension of time for delay and the costs of that delay are analysed prospectively. The additional delay to completion which occurred subsequently, although to some extent it operated concurrently, did not become critical until each of the earlier events and delays had ceased. The subsequent delay did not, on my understanding of the Subcontract, remove an entitlement that had already accrued.

620 In my view, *CMA Assets (No 6)* is of little assistance because, although cl 10.12 of the CMA Contract required that 'the delay for which extension of time is claimed has affected the critical path of execution of work under the Subcontract', his Honour's analysis of that clause appears to give very little or no weight at [324] (in factors 1 to 7) to the parties' use of the words characterising the relevant delay as one which 'has

546 *CMA Assets (No 6)* [2015] WASC 217, [326]–[328].

affected' the critical path of execution of work. In my view those words, notwithstanding the 6 other factors his Honour lists, plainly convey an intent that the Contractor is entitled to an extension of time if it can demonstrate, as the Contract requires, that it 'has' been delayed. Further, it is clear in my view that cl 10.10 which permits a claim under that Contract if the Contractor 'is or will be delayed', is broad enough to support a claim made which is not only delaying the Contractor at the time of the claim, but a delay which has in the past delayed the Contractor.

621 Further, in *Bwllfa v Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* (*Bwllfa*)[547] their Lordships supported the use of a retrospective analysis.[548] In that case, the appellant colliery company was prevented from working a seam of coal, due to a statutory notice issued by the respondent waterworks company in October 1898.[549] The appellant had estimated that it would reach the coal seam in or about June 1900, which would then be 'worked out in about two years from that date'.[550] In response to the respondent's notice, the appellant sought statutory compensation for its loss and the matter was referred to arbitration.[551] The key issue between the parties concerned whether compensation was to be assessed on the value of the coalfield or coal in October 1898, or whether the appropriate basis for assessment was the amount that could have been made if the appellant had mined the coal.[552] It was held that the proper basis for determining compensation was to place the mine owner 'in the position in which he would have been if he had been free to go on working'.[553]

622 In *Bwllfa*, if the arbitration had occurred soon after the notice had been issued, the

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547 [1903] AC 426 (HL) (*Bwllfa*). See also *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12; [2007] 2 AC 353, in which Lord Carswell approved Lord Macnaghten's comments in *Bwllfa*: at 392, [65].

548 Probuild Closing Submissions, 11 June 2019, [139].

549 *Bwllfa* [1903] AC 426, 426.

550 *Bwllfa* [1903] AC 426, 429 (Lord Macnaghten).

551 *Bwllfa* [1903] AC 426, 426–7.

552 *Bwllfa* [1903] AC 426, 428 (Earl of Halsbury LC), 433 (Lord Robertson).

553 *Bwllfa* [1903] AC 426, 431 (Lord Macnaghten).

arbitrator could have estimated the possible rise and fall in coal prices over the relevant period, and then made a calculation on that basis.[554] However, in the events which occurred, the arbitration took place at a later point when evidence of the rise in prices over the relevant period was available. The Court held that it would be wrong to require the arbitrator to disregard such evidence.[555] In this respect, Lord Macnaghten observed:

> If the question goes to arbitration, the arbitrator's duty is to determine the amount of compensation payable. In order to enable him to come to a just and fair conclusion it is his duty, I think, to avail himself of all information at hand at the time of making his award which may be laid before him. Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark? The mine owner prevented from working his minerals is to be fully compensated — the Act says so. That means that so far as money can compensate him he is to be placed in the position in which he would have been if he had been free to go on working.[556]

623 Given the particular and relatively special circumstances of this matter, in particular the lack of contractually compliant and effective determination of Probuild's delay entitlements during the currency of the construction of the Precinct Project, and as a result of the time between the relevant delaying events and the presentation of the parties' delay cases, including the expert evidence on delay, a retrospective analysis of the delays which occurred on the Precinct Project is, I consider, not only the most appropriate method of identifying the actual delay which occurred, but is also likely the only practical way of doing so and satisfying the real intent of cl 34 of the Contract and also doing justice as between the parties. Lyall's methodology is therefore in my view entirely appropriate, particularly because Probuild's delay entitlements are now being assessed more than 5 years after Practical Completion was purportedly certified by the Project Manager.[557]

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554 An approach advocated by the respondent waterworks company, which was adopted by the Court of Appeal: *Bwllfa* [1903] AC 426, 430 (Lord Macnaghten).

555 *Bwllfa* [1903] AC 426, 429 (Earl of Halsbury LC), 431 (Lord Macnaghten), 432 (Lord Robertson).

556 [1903] AC 426, 431, quoted in Probuild Closing Submissions, 11 June 2019, [139].

557 Probuild Closing Submissions, 11 June 2019, [140].

Considerations/conclusions – Abbott's prospective delay analysis

624 For the reasons I have referred to above, I consider that Abbott's prospective delay assessments, in seeking to 'capture' the impact of discrete delays on the end date of a particular program, at the time the delay event occurs are inherently less likely to result in an accurate assessment of delay, in contrast to Lyall's retrospective analysis. This is because Abbott's method is not able to factor into its assessment the future ongoing impact of the occurrences which caused delay and Abbott's assessment is, including for that reason, inherently theoretical.

625 I consider that Lyall's delay assessment analysis more likely (for the above reasons) to identify actual delay, when compared with Abbott's more theoretical analysis, because Lyall's method accesses the actual critical delay to the relevant construction activities at the time of the delaying event.

626 I am satisfied that Abbott's prospective method and resulting analysis is in the nature of a theoretical forecast of what will transpire on the Project but, unlike Lyall's method of analysis, Abbott's prospective method does not take into account what actually occurred during the course of the works.

627 The subject Project has now been completed and, although the Contract must be applied, it is in my view sensible, practical and just to recognise that in retrospect a more realistic and accurate assessment of the actual effect of delaying occurrences during the course of the performance of the WUC can now be made. Whereas a prospective assessment of delay is inherently inferior, because it cannot accurately take into account what will actually occur during the performance of the work after that assessment is made, such analysis is, I consider, inherently theoretical.

628 The Programming Expert evidence of both parties, and the submissions of both parties, assert that because of the complexities of the WUC, including that those works are comprised of at least approximately 3,500 construction activities and eight Separable Portions, expert programming evidence of the type provided in this case by Lyall for Probuild, and Abbott for V601, is necessary to assess and determine

delay to relevant activities on the critical path(s) of the work for the purpose of ascertaining whether the Contractor is entitled to an extension of time under cl 34 of the Contract. I accept that expert evidence and the parties' cases in this particular respect.

629 Accordingly, although the programing and delay evidence of the parties advance two alternative methods of analysis and assessment of delay, there is no other way in which V601 and Probuild suggest, let alone seek to prove, the quantifiable extent of relevant contractual delay under the Contract.

Conclusions – cl 34

630 For the above reasons, I find that cl 34.4(b)(ii) of the Precinct Project Contract reflects the parties' intention that the delay assessment and certification process under the Contract may be compliantly undertaken retrospectively after a delaying event had occurred and when the effect of that delaying event on the critical path can be reasonably accurately assessed.

EOT Claims

Probuild's extension of time (EOT) claims

631 Annexure 3 of Probuild's Closing Submissions dated 11 June 2019 contains a detailed Chronology of events relevant to Probuild's cl 34 extension of time claims. That Chronology summarises the facts in relation to the time extension claims advanced by Probuild and also provides a cross-referenced substantiation of each of those facts. I am satisfied that each significant relevant fact can be cross-referenced to contemporaneous documents passing between the parties, as cross-referenced in Probuild's written closing submissions and its cross-referenced index of evidence in Annexure 3, which deals in detail with extension of time claims (EOTs) 2A, 3, 6 and 7. In Annexure 3 of its closing submissions, Probuild has also provided references from the Final Court Book (FCB) for each key document relied upon.

632 Probuild's helpful Chronology of events in Annexure 3 is tied to Probuild's final

written submissions in relation to each of its time extension claims, and was also relied upon in Probuild's oral closing submissions in support of each of its cl 34 time extension claims.

633 V601 did not compile and rely upon a similar Chronology of events, nor in my view did V601 address the factual substrata in relation to Probuild's time extension claims in a correspondingly comprehensive and detailed manner. In short, for the above reasons, and for additional reasons that I have outlined below, V601's evidentiary case in relation to Probuild's extension of time claims was far less persuasive.

634 Of great significance in the above respect is that Bready, Probuild's Construction Manager, who was an experienced estimator, contract administrator, project manager, project director and construction manager, and a person directly involved with the Early Works and the WUC on a day to day basis, and intimately familiar with the Precinct Project at the work face, and at a management level, gave detailed evidence in relation to each of Probuild's time extension claims remaining in issue, including the Early Works Contract cl 9A delays. I found Bready's evidence, which was tested under cross-examination, very reliable, thorough and very persuasive, generally, and in particular on matters in dispute.

635 Bready was an impressive witness at trial, including under cross-examination, and displayed a detailed recall of the work undertaken on the Precinct Project, and the events and effects of the occurrences at the heart of Probuild's claims in this proceeding.

636 Finally, in this regard, I also note that no witness called by V601 purported to have anything approaching as high a degree of detailed contemporaneous Precinct Project work face knowledge of the relevant occurrences, the effect of those occurrences, and the delay claims in issue.

637 V601's evidence was not supported by any witness of fact comparable to Bready. In substance, only Maitland, the General Manager of the Salvo Property Group, a

person who was fulfilling a senior management role, gave evidence in relation to Probuild's claims. Maitland's direct evidence from personal knowledge principally addressed management dealings between Probuild and V601, in respect of the arrangements in relation to Early Works. Maitland's evidence did not substantially address Probuild's cl 34 extension of time claims.

638 Contemporaneous contract communications indicate that V601's employee, Mackenzie, V601's Development Director, was likely to be able to give extensive direct evidence from personal knowledge, in relation to events on the site of the Precinct Project and particularly in relation to Probuild's time extension claims; however, he did not give evidence at trial.

639 Nave, the Project Manager, purported to deal with the facts in relation to Probuild's four cl 34 EOT claims. However, on matters in issue I reject Nave's evidence, unless supported by unequivocal documentary evidence or corroborated by other persuasive evidence, for reasons I have addressed extensively elsewhere.

640 In addition to the extensive lay witness statements relied upon in this proceeding, I have considered the parties' factual case including the detail in Probuild's Annexure 3 factual Chronology of events. I have been able to verify the key factual matters referred to by Probuild in Annexure 3, by reference to the evidence relied upon, and the contemporaneous project documents cross-referenced in Probuild's Annexure 3 Chronology which are contained in the Final Court Book. As a result, I am persuaded that Probuild's Annexure 3 Chronology represents a substantiated and highly reliable summary of the key factual matters in support of each of Probuild's time extension claims numbered 2A, 3, 6 and 7. Probuild's Early Works delay claim was treated separately by Probuild.

Summary of Probuild's EOT claims

641 Probuild makes the following EOT claims in the proceeding:

(a) EOT1 – 'soft start' – Early Works, is a claim in relation to the Early Works

carried out by Probuild at the Site under a separate Early Works Contract. In the proceeding, Probuild claims an extension of time under cl 9A, alternatively pursuant to cl 34 of the Contract, for the period up to the date on which Early Works Completion was actually achieved.

(b) EOTs 2A and 3 – soft spots, contamination and vapour barrier

(xxiii) 'EOT 2A' relates to delays caused by the discovery of unstable subsoil conditions in the area of the Site to the north of Shamrock Street (Soft Spots).

(xxiv) Probuild asserts that the Soft Spots meant that it was necessary:

- for contractors performing the Early Works to install a piling platform to enable access by piling rigs and to undertake sheet piling for the core to Building E; and
- for Probuild to redesign the piling and retention works in the area of the Site to the north of Shamrock Street on account of the Soft Spots.

(xxv) 'EOT3' relates to the discovery of petrochemical contamination of the ground in the south-west corner of the Site (Contamination). Upon the discovery of the existence of Contamination, it was necessary for contractors performing the Early Works to design and install a vapour barrier.

(c) EOT6 – Childcare

'EOT6' advances Probuild's claims that it was delayed as a result of the following:

- in around mid-2012, V601 notified Probuild that it intended to alter the designated use of part of Building C from commercial space to space allocated for a childcare centre;
- between mid-2012 and 13 February 2013, V601 did not make a

decision and, or alternatively, did not notify Probuild of any decision, to alter the designated use of part of Building C from commercial space to space allocated for a childcare centre; and

- on or about 13 February 2013, the Project Manager directed Probuild to vary the WUC by altering the designated use of part of Building C from commercial space to space allocated for a childcare centre.

(d) EOT7 – town planning – Glazing

(xxvi) Probuild claims that:

(A) V601 did not obtain town-planning approval for the glazing performance criteria, including acoustic requirements, for the windows to be incorporated into the Works until about 14 December 2012; and

(B) Probuild was delayed in completing the glazing matrix for the windows to be included in the works until required town-planning approval had been obtained in relation to the glazing performance criteria. As a result, Probuild claims:

- it could not take steps to procure the glazing or window frames to be included in the works before about 14 December 2012; and
- as a result, the necessary glazing or window frames were not available for incorporation in the works causing extensive delay to completion.

EOT1 (delayed completion of Early Works)

Early Works Claim under cl 9A of the Contract

642 Probuild summarises its Early Works delay claim as follows.

Clause 9A extension of time

643 Pursuant to cl 9A, Probuild is entitled to have the Date for Practical Completion extended to reflect that Early Works Completion was not achieved until 7 July 2012.

644 Probuild claims the following extensions of time in relation to EOT1:

(a) 165 calendar days, from 25 January 2012 to 7 July 2012, in respect of SP3 and SP4; and

(b) 199 calendar days, from 22 December 2011 to 7 July 2012, in respect of SP1, SP2, SP5, SP6, SP6A and SP7.

Background

645 Under the separate Early Works Contract dated 20 April 2011, Probuild was engaged to manage the works necessary to prepare the Site while designs for the WUC were being completed. The Early Works in question included Site clearance and demolition, excavation, piling installation of a basement retention system, and other associated and preliminary works. These works were performed by Probuild as a Construction Manager under the Early Works Contract.

646 By cl 1 of the Early Works Contract, 'Early Works' were defined as Early Works carried out on behalf of V601, in respect of which, as explained, Probuild had been separately appointed the Construction Manager (the Early Works).

647 Clause 9A of the Contract (that is, the Contract dealing principally with the WUC, the subject of this proceeding) provides that the dates for Practical Completion shall be extended for each day after 7 October 2011, during which 'Early Works Completion' was not achieved.

648 As a result of delays in the completion of the Early Works, Probuild contends that it is entitled to a substantial adjustment to the dates for Practical Completion as detailed above.

649 Probuild's Amended Defence and Counterclaim dated 25 February 2019, at [76],

claims (in the alternative) that if Probuild was not entitled to the extensions of time claimed for EOT1, it should be entitled to additional delay damages, including $232,869, in respect of nine working days granted by the Project Manager in relation to EOT1. Other than this allegation in its pleading, however, Probuild does not appear to prove the quantum of its delay damages or delay-generated costs, loss and expense caused by the Early Works delay.

650 Clause 9A of the Contract provides as follows:[558]

> **9A Construction Management of Early Works**
>
> (a) The parties, acknowledge that the *Contractor* has separately been appointed by the *Principal* as construction manager in respect of the *Early Works*.
>
> (b) Despite any other provision of this *Contract* the *Contractor* shall not commence the *WUC* until:
>
> (i) the *Early Works* have achieved completion in accordance with the construction management agreement and respective trade contracts ('*Early Works Completion*');
>
> (ii) the *Early Works* in respect of that part of the *Site* (or affecting access to that part of the *Site*) have achieved *Early Works Completion*;
>
> (iii) any other commencement date (or staggered dates as the case may be) agreed in writing by the parties; or
>
> (iv) a *Direction* to carry out a *Variation* is issued by the *Principal* in accordance with Clause 9A(d).
>
> (c) Notwithstanding clause 34, the *Dates for Practical Completion* under the *Contract* shall be extended for each day after the **7th October 2011** that *Early Works Completion* has not been achieved.
>
> (d) During the performance of the *Early Works*, the *Project Manager* may identify portions of the *Site* where it believes the *WUC* can commence and give the *Contractor* written notice of a proposed *Variation* in accordance with Clause 36.2. Subject to the *Contractor's* response in accordance with Clause 36.2 the *Principal* may then issue a *Direction* to carry out a *Variation* to commence the *WUC* in accordance with Clause 36.1(b)(vi).

651 Pursuant to cl 9A(b)(i) of the Contract, the Contractor was not to commence the WUC until Early Works had achieved completion.

652 Commencement of the WUC had been scheduled for 7 October 2011. That did not occur.

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558 FCB0088–0089.

653 It is accepted by the parties that, ultimately, they agreed that the WUC was to be treated as having commenced from 21 December 2011.

654 Furthermore, by 21 December 2011, there were components of the Early Works which had not been completed.

655 Substantial completion of the Early Works was achieved on 25 January 2012, and Probuild issued Extension of Time 1 (EOT1) under cl 34 of the Contract seeking an extension of time of nine working days to SP3 and SP4. The Project Manager granted this extension under the Contract in respect of SP3 and SP4, on the basis that the Early Works remained incomplete up to 25 January 2012, but did so in the exercise of its discretion under cl 34.5(b) of the Contract; thereby, it would appear, not recognising that the Project Manager was determining a compliant cl 34 Contractor's claim.

656 For Separable Portions other than SP3 and SP4, the Project Manager granted Probuild an extension of time on the basis that the Early Works remained incomplete up to 22 December 2011.

657 Probuild contends that not all relevant parts of the Early Works were complete by 22 December 2011, and that the Early Works were not complete until 7 July 2012.

Probuild's claim in relation to cl 9A

658 Probuild submits that cl 9A of the Contract reflects a 'bespoke arrangement', pursuant to which the parties agreed to manage the interface between the WUC and the 'Early Works' (which needed to precede the main contract works). These Early Works were undertaken by Probuild pursuant to terms agreed with V601 under the separate Early Works Contract.[559]

659 Probuild principally founds its Early Works cl 9A delay entitlement on the terms of cl 9A of the Contract, in particular cl 9A(c) above. Probuild also bases its claim on

559 FCB0001–0052.

the uncontested fact that the Appendix 5A program, which formed part of the Contract, did not reflect and therefore make any allowance for any deferral of the commencement of the main contract works as a result of delay to the completion of the Early Works.

660 Probuild emphasises that cl 9A(c) provides for the extension of Dates for Practical Completion for each day by which Early Works Completion is not achieved after 7 October 2011. Probuild submits that on a proper construction of cl 9A(c), it is entitled to an extension of time for each calendar day beyond 7 October 2011, during which the Early Works Completion was delayed.

661 Probuild also submits that its entitlements to extensions of time pursuant to cl 9A are not tied to when Probuild started performing its work, nor, on Probuild's submission, is its extension of time entitlement pursuant to cl 9A dependent upon whether Probuild's work under the Early Works Contract, or the Contract, 'was critically delayed'.[560]

662 Probuild submits that its entitlements under cl 9A of the Contract are dependent upon when the Early Works Completion was achieved. Probuild also asserts that its extension of time entitlements under cl 9A of the Contract apply to all Separable Portions of the WUC.

663 Probuild's assertions in the last two preceding paragraphs appear not to be contested by V601.

664 Further, Probuild submits that Early Works Completion was achieved at the time that the Early Works were completed in accordance with the Early Works Contract and the relevant trade contracts.

665 Probuild summarises the essence of its EOT1 extension of time claim as follows:

> Probuild's case in this regard is simple. For SP3 and SP4 it has been granted

560 Probuild Closing Submissions, 11 June 2019, [34]–[37].

> extensions of time on the basis the Early Works remained incomplete up to 25 January 2012. For the other separable portions it has been granted an extension on the basis the Early Works remained incomplete up to 22 December 2011. In seeking further extensions for each separable portion, it points to works comprising part of the Early Works, and then it points to the uncontested dates on which that work was completed. On this basis, 'Early Works Completion' was not achieved until 7 July 2012.[561]

666 Probuild also asserts that the Early Works included:

(a) the works relocating the Grosvenor Street powerlines and poles. Probuild contends that the Grosvenor Street powerlines were not fully relocated until 7 July 2012;

(b) the removal of the Basement Access Ramp. Probuild contends that the removal of the access ramp did not occur until 2 July 2012; and

(c) the relocation of the High Voltage Conduit. Probuild contends that the high voltage conduit work was not completed and certified until 24 April 2012.

667 Accordingly, Probuild seeks extensions of time to all Separable Portions of the WUC until 7 July 2012, the date of completion for relocation of the Grosvenor Street powerlines and poles, which Probuild submits represented the completion of the Early Works and the milestone of 'Early Works Completion'.

V601's position in relation to Probuild's cl 9A entitlements

668 By Amended Reply and Defence to Counterclaim dated 21 September 2018, V601 acknowledges the parties' agreement to cl 9A of the Contract including cl 9A(c), and that pursuant to this clause, the WUC was scheduled to commence on 22 December 2011.

669 V601 asserts that the parties reached a relevant separate agreement in relation to the

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561 Probuild submits that, at the very least, an extension of time should be granted to reflect an 'Early Works Completion' date of 25 January 2012 for all separable portions: Amended Defence and Counterclaim, [25]–[26]. This is to reflect that such an extension was granted in respect of SP3 and SP4, and the same extension should be granted to all other separable portions on the proper construction of cl 9A. See also Bready First Witness Statement, [72], detailing an email from Nave dated 23 February 2012 in which Nave said the Early Works were substantially complete as at 25 January 2012.

Early Works. By paragraph [23B] of its Amended Reply and Defence to Counterclaim, V601 asserts that between 22 December 2011 and 25 January 2015, V601 and Probuild agreed that:

(a) pursuant to cl 9A(b)(iii) of the Contract, WUC would commence on 22 December 2011;

(b) notwithstanding cl 9A(c) and/or any variation thereof, the parties agreed that the Dates for Practical Completion under the Contract would not be extended for each day after 7 October 2011 up to 21 December 2011 but would be extended to the dates agreed to by the parties set out in the particulars to paragraph [23] of the Defence and Counterclaim, namely:

> In respect of the period beginning on 8 October 2011 and ending on 21 December 2011, the *Dates for Practical Completion* were extended by agreement between the parties to the following dates:
>
> (i) Separable Portion 1 – 8 April 2013;
>
> (ii) Separable Portion 2 – 11 April 2013;
>
> (iii) Separable Portion 3 – 18 June 2013;
>
> (iv) Separable Portion 4 – 23 July 2013;
>
> (v) Separable Portion 5 – 29 July 2013;
>
> (vi) Separable Portion 6 – 9 August 2013;
>
> (vii) Separable Portion 6A – 9 August 2013; and
>
> (viii) Separable Portion 7 – 20 August 2013.
>
> In respect of the period beginning on 22 December 2011 and ending on about 7~~2~~ July 2012, the adjusted *Dates for Practical Completion* are, by operation of clause 9A(c) of the Contract, extended to the following dates:
>
> (i) Separable Portion 1 – 24~~19~~ October 2013;
>
> (ii) Separable Portion 2 – 27~~22~~ October 2013;
>
> (iii) Separable Portion 3 – ~~29 December 2013~~ 3 January 2014;
>
> (iv) Separable Portion 4 – 7~~2~~February 2014;

(v) Separable Portion 5 – 13~~8~~ February 2014;

(vi) Separable Portion 6 – 24~~19~~ February 2014;

(vii) Separable Portion 6A – 24~~19~~ February 2014; and

(viii) Separable Portion 7 – 7~~2~~ March 2014.

(c) in respect of the period between 8 October 2011 to 21 December 2011 the Dates for Practical Completion for each of the Separable Portions were extended as agreed and admitted to in paragraph [23] hereof;

(d) any outstanding Early Works under the Early Works Contract not completed by 21 December 2011 would be completed after WUC had commenced; and

(e) if there was a Qualifying Cause of Delay in respect of Early Works not completed after 21 December 2011, any such delay would be claimed under Clause 34 of the Contract and any delay granted would adjust any of the relevant Dates for Practical Completion for the WUC.

(the V601 asserted 'Clause 9A Agreement').

670 The Clause 9A Agreement asserted by V601, on a partly written, partly oral and partly implied basis is particularised at paragraph 23 of V601's pleading referred to above.

671 Further, V601 pleads in paragraph [23C] of its Amended Reply and Defence to Counterclaim that:

> 23C. Further and alternatively:
> (a) by reason of clause 41.1 of the Contract, insofar as the Defendant seeks to make claims for further extensions of time arising from the 'soft start' for SP3 and SP4 and in respect of the other separable portions of work, it was required to submit a Prescribed Notice or Notice of Dispute within 20 business days of the event occurring;
> (b) the Defendant did not give a Prescribed Notice or Notice of Dispute to the Plaintiff within 20 business days of the event occurring of which the claim is based; and
> (c) as a consequence, by reason of clause 41.2 of the Contract, the Defendant is precluded from submitting any claim or initiating and continuing any action or proceeding against the Plaintiff and the Defendant has released discharged the Plaintiff from this alleged.

672 V601 also pleads by paragraph [23D] of its Amended Reply and Defence to Counterclaim that:

> (c) By an agreement made between the Plaintiff and the Defendant in or about 16 January 2013 the Defendant agreed to carry out the Coles fit out works for SP1 ('SP1 Side Agreement').
> (d) Pursuant to the SP1 Side Agreement, the parties agreed that:
> (1) Practical Completion for SP1 would occur at the completion of the Coles fit out works;
> (2) the Plaintiff would not impose liquidated damages in respect of any delays to the agreed Dates for Practical Completion for SP1 of 8 April 2013 (as detailed in paragraph 23 above); and
> (3) the Defendant would not make any EOT claims in relation to SP1 or make any other claim in relation to SP1 including delay costs, bonus payments or acceleration costs.

V601's contentions in relation to when Early Works Completion was achieved

673 V601 submits that relocation of the Grosvenor Street powerlines and poles and installation of the High Voltage Conduit were not part of the Early Works. V601 also argues that Early Works completion was achieved by 22 December 2011.[562]

674 V601 asserts in relation to the '9A Agreement' that the issues in dispute are:

(a) the effect of the cl 9A Agreement and whether it relates to completion of the Early Works; and

(b) whether V601 and Probuild agreed that delays to the Early Works after 21 December 2011 would be the subject of extension of time claims and entitlements to such extension of time, pursuant to cl 34 of the Contract;[563]

(c) alternatively, whether V601 and Probuild acted under a common assumption that Early Works Completion was achieved on 25 January 2012 and Probuild's entitlements under cl 9A(c) had been dealt with under EOT1.

675 V601 also submits that the provisions of the Early Works Agreement support V601's common sense interpretation of cl 9A; namely, that the proper interpretation of the

562 V601 Closing Submissions, 12 June 2019, [161].
563 V601 Closing Submissions, 12 June 2019, [130].

relevant terms demonstrates that Early Works Completion is so closely linked with WUC commencement that the commencement of the WUC is itself sufficient to constitute Early Works Completion.

676 V601 relies on the terms of the Early Works Agreement, including:

Under clause 1 of the Early Works Agreement:

(a) 'completion' is defined as completion of the Services;

(b) the Services are defined as:

> all the agency and other services in Annexure Part B which the Construction Manager is or may be required to carry out, complete or supply under the Contract, including the Preliminaries, the work and all variations but excluding the work to be carried out by the contractors.

Annexure Part B describes the Early Works as including:

> … the management of any and all works associated with the 'Early Works' (EW) of the project that are required to prepare and construct the necessary elements up to the point at which Probuild's main Works Under the Contract (WUC) can be commenced in full …

The Additional Information contained in Annexure Part B also notes that:

> … elements of the EW will continue past the substantial completion e.g. anchor destressing, temporary ramp removal as mutually agreed between V601 and Probuild
>
> i.e. agreed not to interfere with the Probuild main WUC or such interference / delays etc are mutually agreed.

677 These provisions, V601 argues, clearly link completion of the Early Works with the date on which the Site can be put to use; that is, the commencement of the WUC. On this basis, V601 also argues that if Early Works are completed after Early Works Completion, the parties must:

(a) agree that such further works will not interfere with the WUC; or

(b) agree to any interference caused to the WUC.

678 V601 asserts that it was always necessary for elements of the Early Works to be carried out after Early Works Completion; for example, the anchors could not be de-stressed until the WUC had been completed to a point where the structure could take the load restrained by the anchors. V601 submits that the same position obtains in relation to removal of the Basement Access Ramp, which Probuild would need in order to carry out foundation works for the buildings.

679 In support of its above assertions, V601 relies, amongst other things, on the following circumstances — that Probuild:

(a) made no further extension of time claims after EOT1 for delays relating to the Early Works;

(b) at no time requested that a further adjustment of the Dates for Practical Completion be made under cl 9A(c); and

(c) did not serve a Notice of Dispute in relation to V601's failure to further adjust the Dates for Practical Completion under cl 9A(c).

680 V601 contends that if, at the time of entering into the 9A Agreement, Probuild intended to make a further claim under cl 9A(c) in relation to delay after 21 December 2011, it was obliged to reveal that to V601. V601 submits that Probuild gave no indication of what it now argues are its cl 9A(c) rights until it issued a Notice of Dispute on 18 August 2014.[564]

681 V601 relies in its defence on an absence of Probuild notices under cls 34.2 and 34.3(b) in relation to the additional time extensions now sought by Probuild.[565] V601 asserts that Probuild agreed that it would claim any extension of time to the WUC under cl 34, for any and all extensions of time resulting from delays to the Early Works after 21 December 2011. V601 submits that Probuild has neither pleaded nor adduced evidence that, after 21 December 2021, it submitted any further cl 34

564 Maitland First Witness Statement, [71A] and [71B].
565 Probuild Closing Submissions, 11 June 2019, [52].

extension of time claims in relation to Early Works delays.[566]

682 V601 also asserts that, on about 25 January 2012, the parties reached agreement in relation to the inter-relationship between the Early Works scope of works and timing, the commencement of the WUC works, and the program for those works. V601 submits that this '9A Agreement' was formally reflected in Bready's email dated 7 February 2012, which identified adjusted Dates for Practical Completion and noted the consequential adjustments to the Contractor's Program flowing from those adjustments.[567]

683 Bready's email of 7 February 2012 included the following content:

> The Revised proposed schedule of dates as follows:
>
> | **Activity** | **SP #** | **Date** |
> |---|---|---|
> | Site Possession | | 22/12/11 |
> | Retail – A1 | SP1 | 8/4/13 |
> | Commercial – C1 | SP2 | 11/4/13 |
> | Building D | SP3 | 18/6/13 |
> | Building E | SP4 | 22/7/13 |
> | Building C – Res C2 | SP5 | 29/7/13 |
> | Building B | SP6 | 9/8/13 |
> | Building A – Res A2 | SP6 | 9/8/13 |
> | Practical Completion | SP7 | 20/8/13 |
>
> Can you please have a quick look and confirm from your end?
>
> What I would then propose is a lightening quick update of our Contractors Programme (hopefully our planner is still around) so we can include it in this month's PCG Report. Dom is already on the warpath for the PCG Report.
>
> I think the Updated Contractors programme will send a positive message to the stakeholders that the somewhat challenging transition from EW to WUC has been handled appropriately by the project team.
>
> I also think having an agreed baseline for the WUC will be of benefit to us all

566 A claim must be submitted in accordance with cl 34.3 in order for Probuild to have any entitlement to an EOT and, in this regard, time is of the essence. See cl 34.4(b)(i) of the Contract.

567 FCB2298–2299 (email from Bready to Mackenzie and Sleeman, 7 February 2012); V601 Closing Submissions, 12 June 2019, [132]–[150].

> as we leave the majority of the EW behind us. As we contemplated at the very start of this process, the framework provided for in the WUC will enable a clear path for resolving any challenges and issues post 21/12, be they left overs from the EW or new ones we don't even know about yet!

684 On 8 March 2012, Sleeman, the commercial and risk manager for Probuild, emailed the following to the Project Manager:[568]

> John,
> The intention of the parties at the time of negotiating the contract was, in our minds, that any delays to 7/10/11 for EW completion would be via the counting of working days as per normal, however we recognise the words in the contract don't quite reflect that, which we would say this is a classic error in the contract. (ie the lawyers didn't quite get the intention of the parties articulated into the words of the contract.) It is my understanding that the revised interpretation of the contract operation and the discussions between Colin and Matt is that the 22/12/11 was the start of the WUC and any lingering delays to any area would be dealt with as EOT's under the WUC regime which is why we did the Salvo counting of calendar days for the movement of the start/end of all the SP's resulting from the EW completion (ie 7/10/11 to 22/12/11) and then separately did an EOT no 1 for the 9 working days from 22/12/11 to 25/1/12 when EW finished in SP3 and SP4 (Buildings D&E) and the delay to the commencement of SP3/SP4 caused by the EW was closed out.
> The commencement of SP3 and SP4 may be interpreted as the following :
> 1. a further delay of 9 working days from the initial start of WUC 22/12/11 to 30/1/12 (SP3 revised PC 2/7/13 and SP4 revised PC 2/8/13) or
> 2. an initial delay of 115 'days' counted from 7/10/11 to 25/1/12 as per cl 9A(c) which results in the SP3 revised PC 19/7/13 and SP4 revised PC 29/8/13.
>
> We initially considered that no 1 above was the right answer but since we received your previous Notice yesterday we have revisited the head contract and are now of the view that no 2 is more likely.
> Additionally, the review of cl 9A(c) has given rise to the interpretation where all SP's are extended by the same amount, being the duration from 7/10/11 to the date the EW were actually complete 25/1/12. (ie 'the Dates for PC under the Contract shall be extended for each day after the 7/10/11 that EW Completion has not been achieved.')
> This interpretation is somewhat mute since the mutual agreement for the commencement of the WUC between Colin and Matt but certainly may be applied to SP3 and SP4.
> Please review my comments and arrange a meeting to close out. Cheers

685 V601 submits that the parties' cl 9A Agreement was fully implemented by the Project Manager's Certificate of 9 May 2012 which identified the revised Dates for

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568 FCB2452–2453.

Practical Completion and granted EOT1 in full to Probuild.

686 The Project Manager's relevant Certificate communicates an extension of time of nine Working Days in relation to SP3 and SP4, as a result of '*Critical Path Activities delaying due to Early Works completion to the North of the Site affecting buildings D & E*'.[569]

687 Based on the above, V601 submits that the Court should conclude that the parties agreed that the cl 9A Agreement dealt with the following matters:

(a) Early Works Completion would occur on 21 December 2011;

(b) WUC would commence on 22 December 2011; and

(c) any lingering Early Works carried out after 21 December that delayed WUC would be the subject of an extension of time claim under cl 34 of the Contract.

688 V601 contends that the Early Works Agreement supports its interpretation of cl 9A. Part of V601's submission in this regard is that it is clear (on V601's contention) that the terms of the Early Works Agreement demonstrate that Early Works Completion is closely linked with the WUC commencement, and in a way which recognises that commencement of the WUC works signifies the achievement of Early Works Completion.

689 V601 also submits in relation to its earlier raised entitlement to rely upon the absence of notices from Probuild, pursuant to cls 34.2 and 34.3(b) of the Contract, that Probuild agreed in relation to the Early Works that it would advance any delay claim for extension of time as a result of delays to the Early Works after 21 December 2011, pursuant to cl 34 of the Contract, and Probuild did advance a claim in relation to the Early Works as EOT1. That claim was granted in full by the Project Manager and V601 argues that Probuild has neither pleaded nor adduced any evidence which establishes that any other extension of time claims were submitted in relation to

569 V601 Closing Submissions, 12 June 2019, [151].

Early Works delays.[570]

690 V601 also argues that Probuild would obtain a windfall if its Early Works claim succeeded. Probuild would obtain the benefit of six months of progress on the WUC, effectively performed outside the Contract period, and also attain a bonus payment resulting from that progress.

691 V601 contends that no reasonable business person would understand the Contract to allow for this outcome.

692 V601 argues in relation to the scope of Early Works that:

(a) Annexure Part B of the Early Works Agreement including authority works and preliminary activities does not expressly refer to removal of powerlines; further, V601 submits that the definition of 'Services' in the Early Works Agreement only includes 'agency and other services' in Annexure A Part B, which the Construction Manager is or may be required to carry out, complete or supply.

(b) OH&S management plan identifies 'relocation of authority assets (if required by others)' as part of the Early Works; however, there is no express reference to powerline removal. V601 also submits that the substantive terms of the Early Works Agreement and the Contract override the designation in the OH&S management plan.[571]

(c) V601 further submits that the inclusion in Program 5A and the Schedule of Clarifications, which note removal and relocation of powerlines and poles, does not mean that removal was part of the Early Works.

(d) V601 also submits that Probuild's submissions ignore the significance or the fact that V601 was responsible for arranging the removal and relocation of

570 V601 Closing Submissions, 12 June 2019, [159].
571 V601 Closing Submissions, 12 June 2019, [180].

powerlines. That work does not come within Probuild's scope of works under the Early Works Agreement and is not a precondition of completion of the Early Works Agreement. Indeed, the definition of 'services' excludes work to be carried out by V601 and its contractors (including CitiPower, which removed the powerlines).

693 Furthermore, V601 asserts that the late completion of the relocation and removal of powerlines was due to Probuild's failure to notice that the cables and poles scheduled to be removed by CitiPower were insufficient for the purposes of performing the WUC. V601 asserts that Probuild was involved in meetings and discussions relating to the scope of the CitiPower work for almost a year, before it raised the fact that additional poles and cables were required to be removed.[572]

694 In his evidence, the Project Manager stated that Probuild had first notified him of the requirement to remove powerlines crossing over Grosvenor Street in December 2011. Nave's evidence was to the effect that it was only ever intended that the powerlines running parallel to Grosvenor Street would be removed.[573]

695 V601 asserts that Bready's email of 17 January 2012 appears to acknowledge that the need to remove the powerlines in issue was an error on the part of Probuild, and that Probuild did not notice this error until December 2011.[574]

696 V601 contends that any suggestion by Probuild that the plan to remove powerlines running parallel to Grosvenor Street related only to powerline relocations necessary to perform the Early Works is undermined by Mr Clifford's email of 11 February 2011,[575] which dealt not only with the placement underground of powerlines, but also dealt with relocation of the substation that was to supply power to buildings forming part of the WUC.

572 FCB0723–0724; FCB5061–5066; FCB2258–2260; FCB2266–2268.
573 T651–T656.
574 FCB5071–5075.
575 FCB0723–0724.

Access ramp removal

697 V601 submits that the Early Works Agreement specifically contemplates that the access ramp may be removed after Early Works Completion, and further submits that the Schedule of Clarifications reflects that the access ramp is required to be removed to comply with Head Contractor requirements, therefore it was always for Probuild to determine how to deal with the access ramp.

698 Finally, V601 cites the opinions of the programming experts, Abbott and Picking, in the Programming Experts Joint Report 1, who agreed that the access ramp should not have caused any delay after the commencement of the WUC. Those experts consider that:

(a) a reasonable DNC contractor would have adjusted the ramp to progress the WUC in relation to Building C by modifying the ramp without impacting Building E;

(b) a reasonable DNC contractor would not have moved the ramp so as to prevent the completion of slab B8 and, in any event, Picking does not consider that the ramp did delay the completion of slab B8; and

(c) various alternatives to the use of the access ramp were available to the WUC if Probuild had decided to remove the access ramp.

Installation of high voltage conduit

699 V601 observes that Probuild has argued that the high voltage conduit (HV conduit) was part of the Early Works because its installation was to be organised by V601, pursuant to the Early Works Contract, and because the OH&S Management Plan includes the installation of assets by Authorities as part of the scope of Early Works.

700 V601, however, submits that the HV conduit work was not part of the Services to be performed by Probuild under the Early Works Agreement, and therefore its completion could not be required for Early Works Completion.

The asserted common assumption/estoppel in relation to the Early Works

701 V601 claims in the alternative that it planned and managed the Project on the basis that WUC commencement was agreed as 22 December 2011, on the common assumption that Probuild would not seek any further adjustment to Dates for Practical Completion under cl 9A(c) of the Contract. V601 complains that it would be unconscionable for Probuild to now assert a contrary position, and adds that Probuild gave no indication whatsoever that it intended to claim further adjustments of the Dates for Practical Completion under cl 9A(c) of the Contract, until 18 August 2014, when it served a Notice of Dispute under cl 42.1 making a claim for the adjustment of Dates for Practical Completion under cl 9A(c) of the Contract.

702 V601 also asserts that the parties accepted Early Works Completion of Stage 1 by 21 December 2011 and Stage 2 by 25 January 2012, and that contractual formalities occurred in reliance upon the common understanding referred to above. Those contractual formalities included an Early Works Completion certificate in relation to the completion of Stage 2 on 25 January 2012, and the grant of an extension of time of nine Working Days to SP3 and SP4 in response to Probuild's EOT1.

703 Finally, V601 claims that it acted to its detriment in reliance upon the above assumptions. In this regard, V601 asserts that Maitland of V601 would not have agreed to Probuild commencing WUC on 22 December 2011, if he had known of Probuild's intention to claim adjustments of the Dates for Practical Completion under cl 9A(c). V601 adds that, from 22 December 2011, it undertook the Contract on the basis that Early Works Completion had been achieved pursuant to cl 9A(c) on 21 December 2011. V601 also asserts that it might have directed Probuild to carry out the WUC differently but for the parties' agreement that the WUC commenced on 22 December 2011 and V601's asserted common assumption that Probuild would not seek any further adjustment to the date for Practical Completion under cl 9A(c).

704 Notwithstanding the many arguments referred to above, at [9(a)] of its Closing Submissions, V601 ultimately submitted that the issues in dispute in relation to this

Probuild claim were confined to:

(a) the parties agreed that Early Works Completion would occur on 21 December 2011 and that any delays caused by the Early Works after that date would give rise to an EOT claim under cl 34 of the Contract;

(b) alternatively, a proper construction of cl 9A shows that Early Works Completion was in fact achieved on 21 December 2011; and

(c) alternatively, the parties acted under a common assumption that Early Works Completion was achieved on 25 January 2012, and that Probuild's entitlements under cl 9A(c) had been dealt with under EOT 1.

Probuild's responses and answer to V601's contractual and estoppel case in relation to the Early Works claim

705 Probuild denies the existence of V601's asserted '9A Agreement'.

706 Probuild argues that V601 is selective in relation to its reliance upon emails and letters said to give rise to the alleged cl 9A Agreement, and submits that V601 does not in terms identify the cl 9A Agreement relied upon by it. Probuild emphasises that V601 has failed to identify any document establishing that Probuild and V601 agreed to waive Probuild's entitlements pursuant to the express terms of cl 9A(c) of the Contract.

707 Probuild argues that the documents sought to be relied upon by V601 establish only that there were discussions between the parties about how they would effect the transition from Early Works to the WUC. Probuild argues that no concluded agreement in relation to this transition or the asserted 'cl 9A Agreement' came into existence.

708 Probuild principally relies upon its entitlement to extensions of time under cl 9A(c) of the Contract.

Considerations/conclusions

709 Clause 9A(c) of the Contract is clear in its terms and provides for an extension of time to the Contractor for each day after October 2011 by which Early Works completion has not been achieved. By cl 9A(c), the parties agreed on the basis of an independent and added entitlement to extensions of time to the Dates for Practical Completion under the Contract, notwithstanding the provisions in the Contract contained in cl 34, in circumstances where Early Works completion was delayed after 7 October 2011.

710 I am satisfied that Probuild's above entitlement to extensions of time pursuant to cl 9A is not expressly or impliedly predicated upon any entitlement to an extension of time, based upon when Probuild commenced performing the work pursuant to the Early Works Agreement. Nor in my view does Probuild's extension of time entitlement, pursuant to cl 9A of the Contract, depend on Probuild establishing a delay on the critical path of the Approved Contractors Program in respect of the WUC or the Early Works themselves.

711 Further, V601 has conceded that the operation of cl 9A(c) does not depend upon Probuild submitting an extension of time claim pursuant to cl 34 of the Contract. It has also conceded that cl 9A(c) entitles Probuild to an extension of time for every day beyond 7 October 2011 that Early Works completion has not been achieved.[576]

712 Clause 9A of the Contract provides for an extension '*for each day*' after 7 October 2011 that Early Works completion has not been achieved. Clause 9A(c) also expressly and clearly provides for an extension in defined circumstances to 'the Date**s** for Practical Completion under the Contract',[577] thereby clarifying the intent of the parties that any applicable extension resulting from delayed completion to the Early Works gives rise to an entitlement to an extension of time to all dates for practical completion; that is, all of the dates for practical completion of the Separable Portions

576 T12.27–T13.6.
577 Emphasis added.

under the Contract.

713 Further, in my view, Early Works Completion pursuant to cl 9A(c) is not achieved until the Early Works have been completed in accordance with 'the construction management agreement and respective trade contracts', as provided in cl 9A(b)(i).

714 On 13 December 2011, Probuild proposed that any Early Works not completed by 22 December 2011 which affected the progress of works for the WUC were to be dealt with *initially* in accordance with cl 34 of the Design and Construct Contract. However, I consider that neither on 13 December 2011, nor at any time thereafter, did the parties conclude their discussions in relation to a proposed agreement concerning how elements of the scope of Early Works not completed by 22 December 2011, and which affected the progress of WUC, would be dealt with. Neither did the parties finally agree whether, pursuant to cl 9A(c) of the Contract, all Separable Portion Dates for Practical Completion were amended or the extent of such amendments.

715 Probuild's email dated 13 December 2011 attaches a proposed revision of a document dated 9 December 2011, which is in the nature of a revised draft of an earlier proposed agreement, pursuant to which the Commencement Date under the Design and Construct Contract between V601 and Probuild would be 22 December 2011, notwithstanding whether or not Practical Completion had been granted for the Early Works at that time. The proposed agreement also sought to clarify the position regarding elements of the Early Works not completed by 22 December 2011 which affected the progress of WUC works, and stated that such works would be 'dealt with' initially in accordance with cl 34 of the Design and Construct Contract.

716 The proposed agreement, dated 9 December 2011 (communicated by Bready to Mackenzie and Maitland and the Project Manager, Nave, on 13 December 2011), was under cover of an email which in my view is clearly in the nature of a further written step in the parties' discussions, as part of an attempt to agree many of the above

Early Work and WUC commencement issues. The Bready email of 13 December 2011 requests that V601 'review and provide your comments, or alternatively it may be more expeditious to have a quick meeting to finalise?'

717 In the final paragraph of Probuild's email to V601 of 13 December 2011, Probuild foreshadows the inclusion of certain details in a forthcoming Probuild WUC December Progress claim 'in anticipation of the final agreement', including, it appears, those details referred to above in relation to the WUC works commencing and in relation to the Early Works.[578]

718 For the above reasons, I am not satisfied that Probuild and V601 ever reached agreement in relation to what V601 asserts as the 'cl 9A Agreement', or in relation to Probuild's entitlement to extensions of time arising from the Early Works after 22 December 2011, either pursuant to cl 34 of the Contract or otherwise. I am also not satisfied that Probuild at any time accepted or agree that its time extension entitlements under cl 9A(c) of the Contract were varied or waived.

719 Further, I am far from satisfied that V601 has established any form of relevant common intent or estoppel, as alleged. Maitland's evidence does not in my view establish the asserted common assumption, nor does his evidence, or any other evidence, establish representations by Probuild capable of founding the estoppel which V601 seeks to establish. In this regard, it is in my view significant and tells against V601's case that it was not put to Bready that the parties had proceeded under a common assumption in light of the parties' agreement to WUC commencement on 22 December 2011, and that Probuild had communicated or agreed that it would not seek any further adjustment of the Dates of Practical Completion under cl 9A(c) of the Contract.

720 After 13 December 2011, the parties continued their discussion of adjusted dates under cl 9A(c) and the calculation of dates for practical completion, which would be

578 FCB2261–2262.

dealt with 'initially' in accordance with cl 34 of the Contract using calendar days or, alternatively, Working Days as the calculation of delay and the commencement of the WUC, rather than completion of all elements of the Early Works.

721 The communications between the parties by email and other documents do not, in my view, reflect any agreement to the effect that Probuild's right of extensions of time pursuant to cl 9A of the Contract was extinguished or modified. Concomitantly, in my view, the parties did not agree upon what the ultimate contractual or factual effect of delays to elements of the Early Works after 21 December 2011 would be.

722 For the above reasons, I am not satisfied that between 13 December 2011 and 22 December 2011, V601 and Probuild had reached a concluded agreement as to the application of cl 34 of the Contract to delayed elements of the Early Works not completed by 22 December 2011. Nor, it follows in my view, had the parties agreed by 22 December 2011 that cl 9A of the Contract would be displaced or modified in relation to delays to Early Works completion after 7 October 2011.

723 Furthermore, in my view, the terms of the Contract and the matters in issue in relation to the Early Works and the WUC, and the alleged Early Works contract, lend no support to V601's thesis that cl 9A was intended to prevent Probuild from performing WUC work alongside the Early Works, so that Probuild did not have the opportunity to obtain windfall bonus payments under cl 34.8.

724 Clause 9A(b) contemplated that the Early Works and the WUC could be performed concurrently, although the default position was that this would not occur (cls 9A(b)(i) and 9A(d)). By cl 9A(b)(ii), the parties acknowledged that the WUC might begin in parts of the site where Early Works Completion had been achieved, and do so before all components of the Early Works were complete. Similarly, the parties remained free to agree other commencement dates, including staggered dates (cl 9A(b)(iii)). Furthermore, Probuild could be directed by the Project Manager to carry

out the WUC concurrently with the Early Works as a variation (cls 9A(b)(iv) and 9A(d)). Clause 9A(c) is to be interpreted in light of these provisions and matters.

725 If the sole purpose of cl 9A(c) was to maintain the 'Contract period', as V601 contends, then the parties would likely have included a clear express provision to that effect in cl 9A, and cl 9A would not have accommodated early commencement of the WUC in parts of the Site. It does not.

726 Critically, the parties agreed that there would be an extension of time pursuant to cl 9A(c), applicable to each Separable Portion, as V601 accepted at [47] of the V601 Amended Opening Submissions dated 6 February 2019.

727 Accordingly, I reject V601's claim that Probuild is estopped and precluded from asserting that the parties were in accord that delays to the Early Works after 22 December 2011 would be dealt with under cl 34 of the Contract, and that Probuild is precluded from arguing that the Early Works were not complete as at 25 January 2012.[579]

Scope of Early Works – relocating Grosvenor Street powerlines and poles

Considerations/conclusions

728 In cl 1 of the Contract, 'Early Works' is defined to mean the Early Works carried out on behalf of the Principal, in respect of which the Contractor has separately been appointed as the Construction Manager, including demolition, excavation, piling and other associated Early Works.

729 The scope of Early Works to be completed under the Early Works Contract is broadly defined in the Contract, including by cl 1 (Interpretation and construction of contract) in relation to 'Early Works'. It is to be noted that the scope of Early Works is defined to include 'other associated early works'.[580]

579 V601 Closing Submissions, 12 June 2019, [195].
580 FCB0068.

730 I am satisfied that the broadly defined scope of the relevant Early Works, and the evidence of the content of those works referred to at [40]–[47] of Probuild's Closing Submissions dated 11 June 2019, describe and identify the scope and extent of Early Works under the Early Works Agreement, particularly by reference to Bready's evidence in his Reply Witness Statement.

731 I consider Bready's evidence, in this regard and generally, as the most persuasive evidence available, because it reflects a contemporaneous, detailed, whole of work site conversance with the Precinct Project, including a detailed day to day work face knowledge of the events, and relevant work scope and timing-related communications on Site.

732 Further, the quality, detail and accuracy of Bready's evidence in relation to what occurred day to day on the Project, and the effect of those events, was I consider further enhanced by his comprehensive reference to contemporaneous Precinct Project site records, and other contemporaneous documents and communications. V601 put on no comparably detailed or equally substantiated evidence.

733 I find that the relocation of the Grosvenor Street powerlines and poles were within the scope of the Early Work, and I further find that the contemporary documentary evidence establishes that the powerline relocations contemplated in early 2011 were limited to those required for the Early Works and not for the WUC.[581]

734 Further, Probuild's evidence, which I accept, was that it had alerted the Project Manager to the powerline removal issue prior to December 2011,[582] and that the agreement to remove powerlines running parallel to Grosvenor Street related only to powerline relocations necessary to perform the Early Works.[583] I prefer Bready's evidence on this issue.[584]

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581 Bready Reply Witness Statement, [47]–[53].
582 T651–T652.
583 Probuild Closing Submissions, 11 June 2019, [43].
584 Bready Amended Reply Statement, [47]–[53].

735 The Early Works included the scope of work concerning relocation of the Grosvenor Street powerlines and poles, as reflected in the Contract program, where Appendix 5A included the activity:

> Undergrounding of overhead cabling and Relocation of Power Poles Affecting Crossovers Complete.[585]

736 The Early Works Contract, Appendix Part B, also identified the scope of those works as including 'authority works and preliminary activities',[586] and provided for the proprietor, V601, to arrange 'for all required service Offers, terminations, removals and relocations'.[587]

737 Further, the Contract refers to the scope of Early Works in cl 9A(b)(i), including 'associated Early Works', and the Contract's Schedule of Clarifications stipulates that overhead powerlines and associated poles are to be removed and/or relocated to facilitate construction, and that these works are to be undertaken at no cost to Probuild, and at a time which is suitable to the program for the works.[588]

738 At [96] in Bready's First Witness Statement, Bready, Probuild's Construction Manager, states that:

> Mr Nave had said at the PCG meeting on 7 September 2011 that the forecast completion date for these undergrounding works was January 2012 (although the minutes incorrectly record this as January 2011).[589] He also said at Construction Meeting #4 on 14 October 2011 that Citipower Pty (Citipower) expected this activity to be completed by 19 January 2012. Those powerlines were removed on 7 July 2012.[590]

739 At [47] in Bready's Reply Witness Statement, Bready states:

> At paragraph 229 of the Nave Statement, Mr Nave gives evidence about the power cables running along Grosvenor Street being removed on 12 February 2012. However, the powerlines running across Grosvenor Street were not

585 FCB0053 at FCB0286.
586 FCB0001 at FCB0039.
587 FCB0001 at FCB0039; FCB0053 at FCB574 (FCB0053 at FCB0552: the Contract, by its Occupational Health & Safety Management Plan, referred the relocation of Authority assets (to be undertaken by third parties) as a component of the scope of Early Works).
588 FCB0053 at FCB0240, cl 8.
589 FCB0914–0916.
590 FCB3924–3998.

removed until 7 July 2012. Mr Nave said that, if Probuild had advised him that the powerlines across Grosvenor Street needed to be removed earlier, then they would have been removed on 12 February 2012. This is not correct.

740 At [48] in Bready's Reply Witness Statement, Bready states:

> The program at Appendix 5A to the Contract included various site establishment activities to be completed by 7 October 2011 (that is, the anticipated date for completing the Early Works at clause 9A(c) of the Contract). These activities included:
>
> (a) 'Undergrounding of overhead cabling completed (Vic St & Grosvenor Street)'; and
> (b) 'Relocation of Power Poles Affecting Crossovers Complete'.
>
> Item 8.0 to the Schedule of Clarifications to the Contract said that 'Overhead power lines ... and all associated poles required to be removed and /or relocated to facilitate construction will be completed by others at no cost to the Contractor and at times to suit the programme.'

741 At [49] in Bready's Reply Witness Statement, Bready states that:

> Probuild's planning for the Project was premised on the powerlines being removed before the WUC commenced, as outlined in the program at Appendix 5A to the Contract:
>
> (a) Probuild's construction management plan approved by the Council included a loading zone in Grosvenor Street.[591] The traffic management report prepared by TraffixGroup, traffic engineers, included in the construction management plan also included such a loading zone.[592] In that report Grosvenor Street was noted as being a local road connected to the local road network with parking on both sides. It was considered suitable as a loading zone and for site access and egress.
> (b) However, the area designated for the loading zone in Grosvenor Street could not be used for that purpose until the powerlines running along the site adjacent to Grosvenor Street were removed in early July 2012. While the powerlines remained, the cranes on site could not efficiently or safely oversail the powerlines to lift plant, materials and equipment from the loading zone into the Site.
> (c) In the absence of being able to efficiently use the Grosvenor Street loading zone, an area inside the Site was designated as a loading zone. This was adjacent to the access ramp that remained on Site. The intersection between Flockhart Street and Shamrock Street was the most appropriate because of the wider space in which trucks could move. This is illustrated by the 'mud map' dated 17 February 2012 prepared in connection with Construction Meeting #10.
> (d) Mr Nave's statement at paragraph 209 of the Nave Statement that,

591 FCB1163–1527.
592 FCB1163–1527 at page 12 of the Report.

> until one of the tower cranes was fully operational, Probuild would have needed the access ramp to gain access to the Site is also incorrect. Even after the first tower crane was operational from around 3 April 2012, the access ramp was still required to bring plant, materials and equipment onto the Site until the loading zone along Grosvenor Street could be prepared and used.

742 Bready's evidence was that Probuild had on a number of occasions advised the Project Manager of the urgency of the underground powerlines in Grosvenor Street; however, no steps were taken to remove them.

High Voltage Conduit

743 I also hold that the High Voltage Conduit was within the Early Works scope, because the Contract OH&S Management Plan called up the relocation of the Assets of Authorities. The relocation of this electrical installation was to be undertaken by V601 and was not completed until 23 April 2012.[593]

Access ramp

744 The Basement Access Ramp was also, I consider, within the scope of the Early Works, because the Schedule of Clarifications, Item 3(v), specified that the Contractor was required to remove that ramp.[594] Furthermore, consistently, the Basement Access Ramp removal works were not within the scope of WUC. The Basement Access Ramp remained on site until 2 July 2012.[595]

V601's miscellaneous additional defences

745 In my view, V601's reliance on any alleged non-compliance by Probuild with formal claim-related provisions of the Contract, namely, cls 34.3(d), 34.4(b)(i) and 41.1, is no bar or defence to Probuild's additional time claims under cl 9A of the Contract. Clause 9A of the Contract does not refer to, or require, that Probuild advance or notify a claim pursuant to cl 9A in compliance with cls 34.3(d) and 34.4(b)(i).

746 Similarly, given Probuild's express entitlement to additional contractual time under cl 9A(c) of the Contract, I consider that Probuild's cl 9A entitlement is not analogous

593 Bready Reply Witness Statement, [15]–[22].
594 FCB1163 at 1195.
595 FCB3622.

to a claim of the type commonly provided for elsewhere in the Contract; for example, in cls 32.5(b) and 34.3(d). Therefore, I consider that Probuild was not required to notify V601 of its entitlement pursuant to cl 41.1 of the Contract.

747 Further, at all events, V601 has conceded that Probuild's subject entitlement does not require a claim to be submitted by it under the Contract.[596] For those reasons, I do not consider that Probuild was subject to any formal claim requirements under the Contract in relation to Probuild's cl 9A(c) entitlements.

748 Probuild's standalone entitlement is expressly provided for in cl 9A(c), under which the Dates for Completion shall be extended for each day after 7 October 2011 that Early Works completion has not been achieved. Accordingly, no claim time bar or requirement for a Prescribed Notice or Notice of Dispute is applicable.

749 Further, at trial, V601 did not press its pleaded assertion that 'the SP1 Side Agreement' somehow precluded Probuild's further entitlement to extensions of time under cl 9A of the Contract.[597]

750 V601 also did not argue that under, or in relation to, a claim requesting extension of Dates for Practical Completion pursuant to cl 9A(c), it would be necessary for Probuild to demonstrate that its work was critically delayed. Nor did V601 argue that the reference to an extension to Dates for Practical Completion in cl 9A(c) was not applicable to all Separable Portions of the WUC.

751 Accordingly, for the above reasons, I am satisfied on the evidence, particularly Bready's, that:

(a) The completion of the relocation of poles and powerlines along Grosvenor Street was not achieved until 7 July 2012. Relocation of the Grosvenor Street powerlines and poles formed part of the Early Works,[598] with delay in

596 T12–T13.
597 Amended Reply and Defence to Counterclaim, 21 September 2018, [23D(d)].
598 Probuild Closing Submissions, 11 June 2019 [40(a)]–[40(d)].

completing relocation of the powerlines and poles causing delay to Probuild's WUC works, the efficiency and progress of lifting materials from Grosvenor Street, and the timely removal of an access ramp.

(b) The Basement Access Ramp referred to above could not be removed until the Grosvenor Street powerlines were relocated. It was not removed until 2 July 2012. Relocation of the access ramp came within the scope of Early Works.[599] I reject V601's claim that, pursuant to V601's asserted Early Works Agreement, the Basement Access Ramp could be removed after completion of the Early Works. I see no contractual support for that being contemplated or agreed by the parties. I am also persuaded by Bready's evidence that the delay in removing the Basement Access Ramp caused delay to and hampered Probuild's works, and I therefore reject the opinions of Abbott and Picking that the access ramp should not have caused delay. That was Abbott and Picking's opinion. However, I consider that Bready's factual evidence founded on personal and actual on-Site knowledge is much more persuasive as to the effect on Probuild of removing the Basement Access Ramp.

(c) The relocation of assets belonging to authorities, including the high voltage conduit, formed part of the Early Works.[600] Onelec, an organisation engaged by V601 to relocate the relevant high voltage conduit on site, completed that relocation on 23 April 2012.

752 As a result of late completion of the above Early Works, Probuild is entitled to an extension of time, pursuant to cl 9A of the Contract, until 7 July 2012.

753 I consider that the above works — relocation of the powerlines and poles along Grosvenor Street, including the Basement Access Ramp works, and the high voltage relocation work — are works falling within the Contract definition of Early Works, which includes other associated Early Works in relation to the main Early Works

599 Schedule of Clarifications, Item 3(v).
600 OH & S Plan, FCB0043 at 52.

referred to in cl 1 of the Contract.

754 Further, I am satisfied that Probuild's agreement to treat the WUC as having commenced on 21 December 2011 — including Sleeman's reference in his email of 8 March 2012 to the parties' agreement concerning commencement of the WUC works — did not alter or affect whether the Early Works were complete, and did not give rise to any representation or agreement that Probuild would not rely upon cl 9A(c) in respect of elements of the Early Works not completed as at 21 December 2011, or in respect of subsequent delay to the Early Works being completed. In my view, Probuild did not agree to waive or vary its entitlements under the clear terms of cl 9A of the Contract.

755 I reject V601's assertion that the parties agreed to WUC commencement on 22 December 2011, on 'the common assumption that Probuild would not seek any further adjustment to the dates for practical completion under cl 9A(c) of the Contract'. I am not satisfied that the evidence sought to be relied upon by V601 in relation to this issue establishes that common assumption. Nor am I satisfied on the evidence that the assumption asserted by V601 'was encouraged by Probuild's conduct by submitting an EOT1 claim'.

756 Further, in my view, neither Probuild's submission of its claim for EOT1 or the Project Manager's certification of Early Works completion, nor the grant of nine Working Days' time extension by the Project Manager in relation to SP3 and SP4, materially support or establish the common understanding asserted by V601.

757 Neither am I persuaded that V601 acted to its detriment in reliance upon its abovementioned asserted common understanding or assumptions; and I am not satisfied that V601 would not have agreed to Probuild commencing WUC on 22 December 2011, if V601 had known that Probuild intended to make a claim for an extension of time under cl 9A(c) at a later date, which I have found that Probuild had a clear right to do, pursuant to cl 9A of the Contract.

758 Similarly, I am not satisfied that V601 acted to its detriment in reliance upon the Early Works completion having been achieved for the purposes of cl 9A(c) on 21 December 2011. In my view it was clear, including from the text of Probuild's email of 13 December 2011, that Probuild was seeking to preserve its rights to additional time in relation to delays in the completion of the Early Works, and in relation to elements of the Early Works not completed by 22 December 2011.[601]

759 Finally, in this regard, I observe that there is no evidence that V601 might have directed Probuild to carry out the WUC differently, had it perceived up to 22 December 2011 that Probuild intended to claim additional time under cl 9A(c) of the Contract in relation to Early Works completion being delayed beyond 7 October 2011.

760 For the above reasons, I am satisfied that Probuild is entitled to additional contractual time claims in relation to its cl 9A claim.

Decision (EOT1)

761 Probuild is entitled to extensions of time pursuant to cl 9A, and in particular the express terms of cl 9A(c) of the Contract, of:

(a) 165 days from 25 January 2012 to 7 July 2012, for SP3 and SP4; and

(b) 199 days from 22 December 2011 to 7 July 2012, in respect of SP1, SP2, SP5, SP6, SP6A and SP7.

762 I also note that the above periods of cl 9A extension of time are, to an extent, concurrent with Probuild's other time extension entitlements, pursuant to Probuild's cl 34 time extension claims dealt with below.

763 Finally, I note that there does not appear to be any proof or submission by Probuild in relation to financial recovery regarding the Early Works Delay Claim.[602]

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601 FCB2262, [1], [2], and [3].

602 Probuild Amended Defence and Counterclaim, 25 February 2019, [76(ii)].

EOT2A (Soft Spots)

764 Probuild makes the following claim in relation to EOT2A (Soft Spots):

EOT Claim	Qualifying Cause of Delay	Delay	Notices
2A Soft Spots	Latent Condition (admitted at [27] of the Amended Reply and Defence to Counterclaim)	• SP3 – 10 working days – 27 April 2012 to 10 May 2012 • SP4 – 35 working days – 10 May 2012 to 5 July 2012 • SP7 – 35 working days – 10 May 2012 to 5 July 2012	Clause 34 • Point not pleaded • Clause 25.2 does not require a notice as a precondition to any EOT • In any event, 6 March 2012: Bready First Witness Statement, [296] and/or 5 April 2012: Bready First Witness Statement, [300] Clause 41 • 17 October 2012: Bready First Witness Statement, [313]–[314] Delay damages • 9 March 2012: Bready First Witness Statement, [297] • 5 April 2012: Bready First Witness Statement, [300]

Background – piles for foundations

765 Each of the buildings was designed to have piles below the founding material. The piles were designed to take the load of the columns and slabs above. The northern portion of the Project, where the foundations for Buildings D and E are located, was found to contain 'soft spots' which could not take the load of the piling equipment. This delayed the boring of the piles.

Lift core

766 Probuild was also required to construct a lift core in each building. The lift cores required a pit below the level of the basement slab. Each pit accommodated the lift buffer springs and associated equipment, and varied in depth.

767 The Contract also required piles in the lift core areas to extend below the base of the pits. Following the piles installation, the soil between the piles had to be mechanically excavated and the piles cut off to a level below the bottom of the core.

After removing the piles in the vicinity of the core, further work was required to ensure that the pit would be constructed safely.

768 Due to the core of Building E (Core E) having to be constructed in the area of the soft spot, good construction methods and safety requirements necessitated the construction of a steel cage within which the pit could be constructed. This involved driving sheet piles into the ground, extending below the base of the pit, and placing a reinforced concrete beam around the top of the sheet piles to place them in tension (the Ring Beam).

769 As a consequence of the above, the following sequence of works was required to construct Core E:

(a) install piling bench;

(b) drill core piles to a depth below the base of Core E;

(c) install sheet piling;

(d) remove piling bench from Core E area;

(e) cut back sheet piling to ground level;

(f) cut back core piles to ground level;

(g) construct a Ring Beam around the top of the sheet piles;

(h) excavate earth from between the piles;

(i) cut piles off to the base of Core E; and

(j) construct pit.

770 Once the Ring Beam was placed, the contract works (planned before the discovery of soft spots) were no longer delayed by the soft spots, and progress with planned construction activities could resume.

771 The Ring Beam for Core E was completed on 26 April 2012.

Chronology of significant events

772 I accept Probuild's Annexure 3 (Closing Submissions, 11 June 2019) Chronology of Facts relevant to EOT2A, as supported by Bready's evidence, and the evidence cross-referenced to the Final Court Book as follows:

Date	Event	Evidence
15 July 2011	Mr Bready emails Mr Nave referring to the latest report from Golders, stated that: • the report raised an unexpected issue in relation to the Early Works basement construction; • the results of borehole 'BH-N5' and the test pits generally indicated significantly increased depths of fill than those contemplated in the report; and • HWM Contractors Pty Ltd (HWM Contractors) had raised concerns about the potential impact that could have on the design for the retention piles. HWM Contractors was subsequently engaged as Probuild's piling excavations subcontractor for the WUC. V601 separately engaged it to remove contaminated fill material encountered on site.	Bready 2, [30(a)] FCB0817 FCB0816 FCB0819
28 July 2011	Mr Nave emails Mr Bready stating that he noted the potential problems with the fill material, which would result in time and cost implications.	Bready 2, [30(c)] FCB0823
10 August 2011	Mr Bready emails Messrs Nave and Mackenzie with an update on the extent of the Soft Spots and says that: • he wanted to see the results of the latest tests from Golders the next day; and • there would be costs for additional preparatory work.	Bready 2, [30(d)] FCB0857 FCB0859 FCB0860
14 September 2011	At Construction Meeting #1 Mr Bready states that: • the processes for approving significant project changes needed to improve; and • Probuild needed instructions to work out how to deal with the fill material.	Bready 1, [134] FCB1110
Mid-October 2011	Probuild becomes increasingly aware of the extent of the Soft Spots as piling excavation work is performed along the edge of the Site's boundary. Probuild does not know the extent of the Soft Spots within the Site's boundary until it performs excavation work in the affected areas.	Bready 1, [123] and [139] FCB 1113 FCB1114 FCB1123 FCB1128 Bready 2, [29]

Date	Event	Evidence
5 November 2011	Mr Lumb of Probuild emails Mr Grant of HWM Contractors stating that: • the Soft Spots found at the basement level needed to be remediated to ensure the piling bench was safe to operate a piling rig; and • Probuild would be in a better position to assess the best method of remediating any Soft Spots once the area had been excavated.	Bready 1, [144] FCB1528
10 November 2011	Mr Grant of HWM Contractors emails Mr Bready stating that: • HWM Contractors were being completely hamstrung by the two contaminated stockpiles; and • HWM Contractors had effectively run out of room for further earthworks.	Bready 1, [147]
18 November 2011	First Urban and HWM Contractors enter into agreement to remove Category C contaminated material.	Bready 1, [150] and [152] FCB 1539 FCB1541 FCB1542 FCB1544 FCB1536 FCB1537
25 January 2012	Mr Lumb of Probuild emails Mr Nave setting out the stages in which work to remediate the Soft Spots was to be performed and the piling bench was to be installed.	Bready 1, [161] FCB2282 FCB2280 FCB2281
30 January 2012	Mr McKerrell of Vibro-Pile, Probuild's piling subcontractor, emails Mr Lumb of Probuild stating that: • no further piling work was available for the piling rig; • he would like notification at the earliest possible opportunity when the northern fill area platform was ready so Vibro-Pile could begin work.	Bready 1, [162] FCB2749
Early February 2012	HWM Contractors installs the piling bench in the northern part of the site affected by Soft Spots.	Bready 1, [188] FCB2302 FCB2364
13 February 2012	Mr Lumb of Probuild emails Mr Nave, stating that Probuild is at the point where it urgently needs direction on how to dispose of the poor quality soil.	Bready 1, [165] FCB2355
24 February 2012	Mr Lumb of Probuild emails Mr Nave asking him to make arrangements with HWM Contractors to remove landfill material. Construction meeting #11 is held and Mr Bready states that: • issues might arise with the construction of core E1 because it was a deep core in the area affected by Soft Spots; and	Bready 1, [168] FCB2413 Bready 1, [199] FCB2431

Date	Event	Evidence
	• Probuild would commence preparing a 'sheet piling design' for this area.	
Early March 2012	Work to pull back the piling bench continues into early March 2012. Work progresses to install the pile caps and the raft slab for the core of Building D.	Bready 1, [189] FCB2451 Bready 1, [190]
6 March 2012	Probuild submits its claim for EOT2 in relation to delays arising from the soft spots. Separately, Mr Bready emails Mr Nave stating that: • the piling bench works had caused Probuild delay at the northern end of the site; and • the stockpiles that remained would impede the free movement of the sheet piling rig.	Bready 1, [296] FCB2441 FCB2442 Bready 2, [34(a)] FCB2443
7 March 2012	Mr Lumb of Probuild emails Mr Nave attaching photographs and marked up drawings, and stating that: • the landfill material from the cores of Building D and core E3 to Building E was still stockpiled and needed to be removed before the piling bench was removed; • Probuild was close to resolving a procedure that would allow work on pile caps in the landfill material to commence, but this work would be hindered if the landfill stockpiles could not be removed and the piling bench could not be accessed.	Bready 1, [169] FCB2445 FCB2447 FCB2448 FCB2449 FCB2450
8 March 2012	Construction meeting #13 was held at which: • Mr Lumb states that: A. an alternative method for constructing the pile caps had been resolved; B. investigations conducted in the area of core E1 to Building E indicated that sheet-piling would be required; C. HWM Contractors had made claims for extensions of time; and • Mr Nave states that the balance of non-clean soil stockpiled to the east of Building D would be removed the following day by HWM Contractors.	Bready 1, [201] FCB2576
9 March 2012	Probuild submits its delay damages claim in relation to EOT2.	Bready 1, [297] FCB2454 FCB2456
14 March 2012	A PCG meeting is held at which Mr Nave states that design work for sheet-piling was proceeding should it be required.	Bready 1, [202] FCB2857
Mid-March 2012	Work to pull back the piling bench is completed, except where it was required for sheet-piling work in the footprint of Building E.	Bready 1, [191] FCB2585 FCB2584
15 March 2012	Mr Sleeman of Probuild emails Messrs Mackenzie and Nave listing various delays for which he said	Bready 1, [173]

Date	Event	Evidence
	V601 would be responsible should they affect the WUC, including arrangements for testing and removal of deep fill.	FCB2541
16 March 2012	Mr Lumb of Probuild emails Mr Nave stating that: • further investigations on site had revealed that the landfill ground conditions in the area of core E1 in Building E were highly unstable and soft; and • HWM Contractors had recommended the use of sheet-piling.	Bready 1, [203] FCB2692
19 March 2012	Mr Lumb of Probuild emails Mr Nave setting out the proposed scope of work to complete the piling for Building E's core, the anticipated cost of that sheet-piling work and its time implications. Mr Nave emails Mr Lumb stating that Probuild should proceed with placing the order for the sheet piles.	Bready 1, [204] FCB2684 Bready 1, [174] FCB2554
29 March 2012	Mr Lumb of Probuild emails Mr Nave setting out the options to address the Soft Spots when excavating the area in core E1 for Building E.	Bready 1, [205] FCB2684
30 March 2012	Probuild submits a variation claim for the sheet-piling work. This claim is subsequently approved.	Bready 1, [204] FCB2688 FCB2689
Late March 2012	In-ground services are still being installed in the available areas in Stage 2, and sheet-piling work in the footprint of Building E has started.	Bready 1, [193] and [206] FCB4973 FCB2584 FCB2584
Early April 2012	The slab on ground could not be prepared and poured in the areas covered by the access ramp into the site and the lay-down areas. They are moved a few metres north, further into the footprint of Building E, exposing additional workfronts in the footprint of Building C.	Bready 1, [216]
2 April 2012	The slab on ground in the area immediately adjacent to the access ramp and lay-down area is poured.	Bready 1, [215] FCB2438
5 April 2012	Probuild issues its claim EOT2A and its claim for delay damages in relation to the Soft Spots.	Bready 1, [300] FCB2773 FCB2774
19 April 2012	Mr Nave sends Probuild a notice stating that its EOT2A claim is not approved, and requesting that Probuild provides further information in relation to this claim.	Bready 1, [302] FCB 2803
23 April 2012	Construction Meeting #16 is held at which Mr Bready states that: • the standing arrangement with HWM Contractors had not been working effectively on site because the materials remaining on	Bready 1, [178] and [206] FCB2849

Date	Event	Evidence
	site were hindering Probuild's work; and • the removal of non-clean spoil needed to recommence that week as excavation work to core E1 continued. By this stage excavation work necessary for the sheet-pile beams had been completed, and the concrete footings to keep the galvanised steel sheets in place were to be poured the following day.	
27 April 2012	Start of the delay period for SP3 (Building D) – 10 working days.	Joint Programming Report 3, [5]
8 May 2012	Mr Nave sends Mr Bready an email requesting that Probuild provide further information regarding its EOT2A claim regarding the Soft Spots.	Bready 1 [304] FCB2860
9 May 2012	PCG meeting at which Mr Bready states that sheet-piling works around core E1 of Building E were complete, and overrun construction had begun.	Bready 1, [207] FCB3360
10 May 2012	End of the delay period for SP3 (Building D) – 10 working days. Start of the delay period for SP4 (Building E) – 41 working days.	Programming Experts Joint Report 3, [5]
26 May 2012	Piles have been placed in the footprint of Building C and the slab on ground is poured in that area.	Bready 1, [216]
31 May 2012	Work around sheet-piles for the main core of Building E takes place, fill material is removed, and reinforcement work for the main core is ongoing.	Bready 2, [64(h)] FCB3359 FCB3358
6 June 2012	PCG meeting at which Mr Bready states that the duration of Probuild's EOT2A claim regarding the Soft Spots had been extended, and the date the basement slab was poured would define the end of the delay.	Bready 1, [212] FCB3657
8 June 2012	At Construction Meeting #21 at which Mr Bready states that the basement slab west of the access ramp was being prepared with the intention of pouring it after the Queen's Birthday long weekend. Work to remove the ramp has started.	Bready 2, [64(j)] FCB3363
9 June 2012	By this date: • sheet-piling had been adopted in the core E1 excavation to address the Soft Spots; and • the concrete raft at the bottom of the core E1 excavation had been poured, and the pile caps surrounding core E1 had been completed.	Bready 1, [208] FCB3363
27 and 28 June 2012	The overrun for the main core of Building E is poured. The last of the pile caps are poured and the bulk of the concrete fill behind the sheet piles is poured.	Bready 2, [64(o)] and [64(p)] FCB3357 FCB4159
4 July 2012	The foundation piles are poured. Formwork for the Building E slab area commences.	Bready 1, [217] Bready 2, [64(t)] FCB3558 FCB3680

Date	Event	Evidence
5 July 2012	End of the delay period for SP4 (Building E) – 35 working days.	Programming Experts Joint Report 3, [5]
12 July 2012	Work to install the formwork and reinforcement for the Building E slab area is completed.	Bready 2, [64(t)] FCB3558 FCB3680
13 July 2012	The slab on ground in the area of Building E is poured.	Bready 1, [217]
19 July 2012	Probuild finalises and delivers its submission to TBH in relation to its EOT2A claim regarding the Soft Spots.	Bready 1, [308]–[309] FCB3699 FCB3826 FCB3692 FCB3693 FCB3690 FCB3687
4 September 2012	Mr Bready sends Mr Mackenzie an email saying: • 'We are all in a bit of a quandry as to what is going on with the assessment of EOT's [sic] 2A and 3 by TBH?'; and • that Probuild had not heard anything about this issue since providing its submission to TBH on 19 July 2012.	Bready 1, [310] FCB4156
4 September 2012	Mr Nave approves Variation Request 53 in relation to blinding work to address the Soft Spots.	Bready 1, [198(b)] FCB4158
7 September 2012	Probuild receives a letter from Mario Salvo, on the Salvo Property Group's letterhead, enclosing a draft assessment from First Urban of its EOT2A and 3 claims. Mr Salvo's letter includes a mitigation report prepared by TBH and a recommended delay costs report prepared by WT Partnership.	Bready 1, [311] FCB4263 FCB4271 FCB4281 FCB4282 FCB4291 FCB4292 FCB4285 FCB4303 FCB4293 FCB4307
20 September 2012	Mr Nave issues his assessment of Probuild's EOT2A claim regarding the Soft Spots. In his determination he purports to reduce the Dates for Practical Completion on account of the mitigation measures he says were available to Probuild.	Bready 1, [313] FCB4362 FCB4363
26 September 2012	Mr Nave approves Variation Request 80 in relation to sheet-piling work to address the Soft Spots.	Bready 1, [198(a)] FCB3557 FCB3359
17 October 2012	Probuild issues a Notice of Dispute in relation to Mr Nave's assessment of its EOT2A claim regarding the Soft Spots.	Bready 1, [314] FCB4478 FCB4480

V601's overall and ultimate position

773 V601 does not dispute that Probuild is entitled to an extension of time in relation to the Soft Spots. On V601's own submission, the only issue is when the delay finished, which it claims was on 26 April 2012.[603]

774 V601 asserts that Probuild was able to return to progressing WUC after 26 April 2012; that is, from 27 April 2012.[604]

775 V601 maintains that the delay to SP4 commenced on 18 March 2012, and finished on 26 April 2012 when the Ring Beam was complete, being a delay of 22 working days.

776 Probuild relies on Lyall's conclusion that the delay continued until slab B8 was poured on 5 July 2012.

777 EOT2A was assessed by the Project Manager, and First Urban granted an extension of 25 working days to SP4 for the period from 21 March 2012 to 4 May 2012.

Probuild's submissions

778 Probuild notes in its submissions that the Site had been used for various purposes before V601 acquired it for the Project, including being occupied by a brickworks with associated clay pits (quarries), being occupied by a scales manufacturer, and later for storage purposes.

779 Probuild observes that, under cl 25 of the Contract, V601 expressly took the risk of the time and cost consequences arising from latent conditions that might exist on Site, including as a result of these earlier uses.

780 Probuild encountered soft ground conditions in the northern part of the Site, particularly in the footprint of Building E, the second tallest building on the Project.

781 Probuild highlights that V601 admits that the relevant Soft Spots constituted latent

603 V601 Closing Submissions, 12 June 2019, [9(b)].
604 V601 Closing Submissions, 12 June 2019, [204].

conditions and also a Qualifying Cause of Delay for the purposes of the Contract.[605]

782 Bready's evidence establishes that Probuild encountered Soft Spots arising from these earlier uses in the northern part of the site, particularly in the vicinity of the footprint of Building E.

783 Upon discovery of the full extent of the Soft Spots, Probuild adjusted its performance of the foundation piling works in the affected areas, including by:

(a) installing a piling platform to enable access by piling rigs;

(b) adjusting the sequence in which the foundation piles were installed and the 'slabs on ground' were poured;

(c) using less efficient construction methods such as sheet-piling; and

(d) relocating the access ramp installed along the Site's eastern boundary to create additional work fronts within Building C's footprint.[606]

784 Probuild's evidence establishes that it took some time to identify the full extent of the Soft Spots, which meant Probuild was required to adjust how it performed its foundation piling works in the affected areas. I find that this included Probuild:

(a) installing a piling platform to enable access by piling rigs;

(b) adjusting the sequence in which the foundation piles were installed and the slabs on ground were poured;

(c) using more involved and slower methods such as sheet-piling; and

(d) installing the access ramp midway along the Site's eastern boundary, and then relocating the ramp so as to create additional work fronts within the footprint of Building C.

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605 V601 Closing Submissions, 12 June 2019, [204].
606 Bready First Witness Statement, [127] and [182]–[217].

V601's identification of the remaining EOT2A issues

785 V601's case in relation to Probuild's EOT2A claim is submitted by V601 as being straightforward and narrow in ambit. V601 defines its case and the scope of dispute with Probuild in relation to EOT2A, as being limited to the issue of when the alleged EOT2A delay finished. V601 contends that Probuild is not entitled to an extension of time in relation to this claim for delay after 26 April 2012.[607]

786 V601 admits that the relevant Soft Spots, which are the focus of Probuild's EOT2A claim, constitute a Latent Condition under the Contract, and in particular cl 25.1 of the Contract.

787 V601 also accepts that the relevant Soft Spots constitute a Qualifying Cause of Delay, as defined in cl 1 of the Contract (Qualifying Cause of Delay), in particular Qualifying Cause of Delay (h); namely, 'a Latent Condition'.[608]

788 V601's pleading at [32] of its Amended Reply and Defence to Counterclaim dated 21 September 2018 alleges the following:

> The Plaintiff denies the allegations in paragraph 32. Further, the Plaintiff says that the Project Manager properly assessed delays claimed in relation to EOT2A in accordance with clause 34.4 of the Contract and properly notified the parties of the EOT (if any) granted, so assessed in accordance with clause 34.5 of the Contract.
>
> Particulars
>
> (1) The Defendant submitted EOT Claim 2A and EOT Claim 3 as follows.
>
> (i) On 6 March 2012, the Defendant submitted EOT Claim 2 relating to 'Soft Spots to the area of Building D and E'. In EOT Claim 2, the Defendant requested an EOT to SP3 and SP4 of 25 Working Days.
>
> (ii) The Defendant submitted EOT Claim 2A on 5 April 2012. In EOT Claim 2A, the Defendant updated its claim for a request of an EOT of 52 Working Days for SP3, SP4 and the 'affected elements' of SP7.
>
> (iii) EOT Claim 3 was also submitted by the Defendant on 5 April 2012. In EOT Claim 3, the Defendant claimed an EOT of 64 days to SP1 and SP6 and 'affected elements' of SP7.
>
> (2) On 20 September 2012, the Project Manager assessed both EOT Claim 2A and EOT Claim 3 and issued (cumulatively) the following EOTs:

607 V601 Closing Submissions, 12 June 2019, [9(b)].

608 V601 Amended Reply and Defence to Counterclaim, [27] and [30].

(i) 16 Working Days EOT to SP1 (relating to EOT 3);
(ii) Reduction of 30 Working Days to SP2 (as a 'resulting delay impact' after taking into account mitigation strategies);
(iii) 8 Working Days EOT to SP3 (relating to EOT 2A);
(iv) 25 Working Days EOT to SP4 (relating to EOT 2A);
(v) 13 Working Days to SP5 (as a 'resulting delay impact' after taking into account mitigation strategies);
(vi) 26 Working Days EOT to SP6 (relating to EOT 3);
(vii) 26 Working Days EOT to SP6A (relating to EOT 3); and
(viii) 16 Working Days EOT to SP7 (relating to EOT 2A).

Considerations/conclusions (EOT2A)

789 Probuild also largely supported V601's submission; the only dispute in relation to EOT2A is when the relevant delay finished.[609] Probuild also defines the issue between the parties as ultimately being whether the relevant delay continued beyond 26 April 2012 in the Ring Beam to the E1 core.[610]

790 Probuild's claim 2A (Soft Spots) case is in essence that the unstable ground conditions in the northern half of the Site, which the parties refer to as 'soft spots', delayed SP3, SP4 and SP7 for the period earlier specified.

791 Probuild contests V601's case on this claim as simplistic and at odds with all the facts. V601 asserts that, as soon as the E1 core Ring Beam was placed, Probuild was no longer delayed.

792 However, Probuild maintains that this limited appreciation of the works and circumstances which were delaying them, ignores the fact that there were many soft spots across the northern part of the Site. Further, Probuild points out that V601's limited perspective fails to appreciate the delaying effect of having to treat the poorer material generated by the Soft Spots; and the impact that the unanticipated works referred to had on the progress of suspended slabs at the north of the Site. Probuild also submits that, on Probuild's EOT2 claim, V601's position fails to appreciate or engage with the effect on Probuild's work methods and efficiency caused by the accumulated effect of the delaying factors referred to above.

609 V601 Closing Submissions, 12 June 2019, [9(a)].
610 Probuild Reply Closing Submissions, 12 June 2019, [113].

793 As a result of the above findings and conclusions in relation to the Project Manager's lack of independence and impartiality, and the other breaches of cls 20.2(a) and 20.2(b) of the Contract in relation to the Project Manager's performance of its duties and obligations as assessor and certifier under the Contract, and further on the basis of my findings elsewhere as to the accuracy and reliability of Nave's evidence on matters in dispute, I reject V601's assertions and defence based on the Project Manager having properly assessed delays claimed in relation to EOT2A in accordance with cl 34.4 of the Contract; and on the same bases, I also reject V601's claim that the Project Manager properly notified the parties of the EOT so assessed, in accordance with cl 34.5 of the Contract.[611] I have earlier found that the Project Manager's purported assessments, determinations and certifications referred to in cl 20.2 of the Contract are, for reasons including those outlined above, a nullity in respect of assessments and certifications in dispute, and I have also found those assessments, determinations and certifications should be set aside.

794 I also hold that the Project Manager did not in any event assess Probuild's EOT2A claim but rather adopted the TBH analysis of that claim; and I am also satisfied that TBH did not analyse Probuild's claim and the delaying effect of that claim, but simply statused the WUC at 30 July 2012, together with identifying certain areas of the WUC where it believed that Probuild could mitigate delay.

795 I am satisfied on Bready's evidence of the relevant facts, and on Lyall's analysis of Probuild's EOT2A claim and his expert opinion in that regard, that the identified Soft Spots which are the subject of Probuild's EOT2A claim delayed excavation work in the area of critical slabs, as well as the final pour of the basement slab for Building D (SP3) until 10 May 2012, and also delayed SP3 until 10 May 2012, and SP4 and SP6 (by delaying the remainder of the Project) until 5 July 2012.

796 I also find that, after slab B8 was poured by Probuild on 5 July 2019, Probuild's work in this area was able to proceed, thus enabling the final pour for the basement slab in

611 V601 Amended Reply and Defence to Counterclaim, 21 September 2018, [32].

Building E (SP4) to occur on 13 July 2012.

797 Further, I am satisfied that the delays in relation to EOT2A did not affect just the piling bench work and the piling under what would be Buildings D and E, but also retarded the work required to address the several Soft Spots on site, and as a consequence delayed other work, including the reinforcement of critical slabs. These slabs were ultimately poured on 13 July 2012.[612] Bready's evidence in relation to Building E, slab B8, was that the Site Diaries show that reinforcement in that area was being placed between 4 July 2012 and 12 July 2012.[613]

798 Accordingly, I reject as not made out on the evidence (the only remaining issue which V601 identified in closing submissions) that the delay to the relevant area of the works did not continue after the pouring of the ring beam in the vicinity of E1 on 26 April 2012, and I accept Probuild's submission that V601's response to the effect of Soft Spots did not take into account a number of other delays addressed in Probuild's evidence.[614]

799 For the above reasons I find that Probuild was delayed by Soft Spots until 5 July 2012, and is entitled to an extension of time in relation to SP3 of 10 working days to 10 May 2012, and in relation to SP4 and SP7, of 35 working days to 5 July 2012.

V601 – contractual bars

800 V601 also contends that Probuild did not make a valid claim for delay damages in relation to EOT2A, and is therefore barred from pursuing such a claim by reason of the provisions of cl 41.2 of the Contract.[615]

801 In my view, Probuild's time extension claims, save in relation to its Early Work's claim which is principally advanced under cl 9A of the Contract, including EOT2A,

612 Bready First Witness Statement, [127], [212]–[217]; Bready Second Witness Statement, [28]–[64], [60]–[65]; Bready Third Witness Statement, [48]–[50].
613 Bready Second Witness Statement, [61].
614 Bready First Witness Statement, [179]–[217]; Bready Second Witness Statement, [64]–[65]; T1132–T1135.
615 V601 Closing Submissions, 12 June 2019, [219].

are claims under cl 34.3(d) of the Contract.

802 Although I again note that, at trial, V601 appeared to ultimately only put in issue when Probuild's EOT2 and EOT2A claim ended, for completeness, I deal with the following matters raised at various times in these proceedings by V601.

The Clause 41 Argument

803 In my view, for reasons I have expanded on elsewhere, the EOT claims regulated by cl 34 of the Contract are excepted from the application of cl 41 thereof. At all events, I consider that Probuild issued a cl 41 notice on 17 October 2012 (that is, within 19 business days of First Urban's determination). I am also satisfied that Probuild submitted its notice in relation to its delay costs entitlement on 5 April 2012. Finally I find that, were it contractually relevant, Probuild's derved claim notifications of 6 March 2012 and 5 April 2012 (which included a delay cost claim notice).

(a) First Urban properly assessed Probuild's entitlement

In my view, for the reason earlier outlined, including in relation to Probuild's EOT2 claim, the Project Manager's assessments, determinations and certifications are a nullity.

Further, I find that on the above factual basis, the Project Manager's assessment and certification are unsupportable.

(b) Not all delays were caused by a Qualifying Cause of Delay, although V601 fails to specify which other factors contributed

Bready's evidence and Lyall's analysis, in relation to the delays substantiating Probuild's EOT2A claim, identify the causal connection between the relevant Soft Spots on Site and the resulting delays that Probuild sustained. Further, I am not satisfied that V601's assertion that Probuild delayed the installation of tower cranes is made out on the evidence.

(c) Probuild is precluded from claiming a further extension of time by reason of V601's alleged 'SP1 Side Agreement'

Lyall's evidence is to the effect that Probuild suffered no critical delay to SP1 as a result of Soft Spots. Accordingly, I consider that V601's claim that an 'SP1 Side Agreement' negates any Probuild entitlement in relation to delay of SP1 is irrelevant and no bar to success of Probuild's EOT2A claims in relation to SP3, SP4 and SP7.

804 I also reject V601's additional defences to Probuild's EOT2A Soft Spots claim on the following bases:

(a) Abbott opines that Probuild's claim is 'global'. I am not satisfied that there is any convincing basis for this view. I have accepted Lyall's methodology and analysis in relation to critical delay as logical and rigorous. I have also found Lyall's opinions and conclusions based on his methodology and analysis to be probative and persuasive.

In my view, Probuild's claim is not in the nature of a rolled-up claim in respect of which it is impossible to ascribe and apportion all or part of the delay claimed to all or part of the occurrences and circumstances alleged in the aggregate to have caused the relevant period of delay. Further, Probuild's claim does not arise in circumstances where it would be practically impossible to attribute delay to occurrences, and identified non-compensable delay is able to be sufficiently excluded;

(b) V601's defence that wet weather caused some relevant delay, which has not been attributed, fails to take account of the fact that the delay caused by the soft spots existed before, during and after the wet weather that V601 relies upon and cannot, therefore, be properly characterised as an 'overlapping' non-Qualifying Cause of Delay to be apportioned under cl 34.4(a);

(c) V601 also relies on there being a day's delay associated with industrial action over the period of the Soft Spot delay claimed by Probuild; however, I am satisfied that Lyall's analysis has taken that industrial delay into account;

(d) V601 also contend in relation to Probuild's EOT2A claim that Probuild's earthworks subcontractor, HWM Contractors Pty Ltd, applied inadequate resources for the Project. This is, however, not supported by any persuasive evidence establishing the impact or effect of inadequate resources. Furthermore, I accept Bready's detailed evidence to the contrary;[616]

(e) V601 asserts that Probuild failed to take reasonable measures to minimise the resulting delay in relation to the Soft Spots by, inter alia, relocating the access ramp onto the Site, and because Probuild did not 'quickly appraise itself of the impacts of the risks the issue the Site condition poses [sic] and rapidly instigate a design response in a proactive manner'. I consider that Bready's evidence[617] establishes what really occurred and effectively rebuts the above alleged failures by Probuild. Lyall's expert evidence also persuades me that no lack of resources on Probuild's part caused delay.[618]

Provisional delay period

805 V601 also seeks to have the 10-day 'Provisional Period for Delay' deducted from Probuild's extension of time entitlements, because it contends that they were included in the contractually specified dates for Practical Completion.

806 As separately outlined in relation to V601's submission about the impact of the provisional period of delay on Probuild's time extension claims, I consider there to be no basis to justify a deduction from Probuild's EOT2A extension of time entitlements, nor any other Probuild delay entitlement found herein, on the basis of a deduction of the Provisional Period of Delay.

807 Further, in the context of the overall body of evidence referred to in relation to the EOT2A claim, I also consider it to be immaterial that Bready did not give evidence as to the impact of pouring a suspended slab or removing the ring beam (if necessary)

616 Bready Supplementary Reply Statement, [6]–[23].
617 Bready First Witness Statement, [128]–[217].
618 Lyall First Report, [68], [78]; Lyall Third Report, [188].

after 26 April 2012, as raised by V601.[619]

808 In my view, Bready's evidence as to the date on which it was possible to pour the slab on ground for Building E, namely 13 July 2012, together with Lyall's evidence as to the effect of events delaying Separable Portions (SP3, SP4 and SP7), sufficiently establishes a critical delay caused by Soft Spots to the relevant separable portions.[620]

809 V601 also argued that Probuild was responsible for delay caused by encroachment of the access ramp on SP4 after 26 April 2012.[621] This issue was the subject of the Expert Reports of both Lyall and Picking.

810 Picking was of the view that the access ramp did not cause delay to Building E. I accept that evidence. Picking was in my view an Expert witness of considerable practical construction experience and I consider his evidence on this issue to be persuasive. Furthermore, there was a dearth of work face based practical evidence from V601 in support of its case on this issue.

811 V601 also argues that the correct delay analysis in relation to EOT2 is that set out in the Programming Experts' Joint Reports 2 and 3, as extracted in Column D of V601's Closing Submissions of 12 June 2019 at [211]. That section of the Programming Experts' Joint Reports refers to the relevant delays to SP3, SP4 and SP7 ending on 27 April 2012, as set out below:

SP	A	B	C	D	E
	Probuild Claim	Mr Nave Analysis	Mr Lyall Retrospective	Experts' Agreed Prospective[622]	
				Delay Ending 27/4	Delay Ending 5/7
SP3	82 wd	8 wd	10 wd	10 wd	28 wd
SP4	82 wd	25 wd	35 wd	6 wd	26 wd
SP7	82 wd	16 wd	35 wd	13 wd	30 wd

619 V601 Closing Submissions, 12 June 2019, [210].
620 Bready First Witness Statement, [217]; Lyall First Report, [75]–[77]; Lyall Second Report, 10.
621 V601 Closing Submissions, 12 June 2019, [213].
622 This agreed position excludes concurrent delays, as a result of the experts' different approaches to wet weather delays.

812 V601 argues that there was no delay caused by the encroachment of the Basement Access Ramp after 26 April 2012, because Bready stated that Probuild was back undertaking WUC work from 27 April 2012,[623] and the WUC works were able to continue thereafter.

813 Alternatively, V601 contends that any delay after 26 April 2012 was caused by Probuild's unreasonable decision to move the Basement Access Ramp which caused encroachment affecting parts of Building E.

814 I reject the above arguments for reasons that I have outlined earlier, as to the delay caused by the Basement Access Ramp and why it was reasonable for Probuild to remove that ramp.

815 The effect of the Soft Spots was, as I have earlier noted, the subject of extensive and persuasive evidence from Bready which was neither challenged during the course of Bready's evidence, nor addressed and traversed by direct lay evidence adduced by V601 or by Abbott on behalf of V601.[624]

816 I reject V601's assertion that Probuild's relocation of the access ramp to a location impinging upon Building E caused Probuild delay in relation to the WUC from 26 April 2012. This assertion by V601 is not established by the evidence, nor is there evidence supporting the proposition that Probuild either caused its own delay or acted unreasonably in relation to relocation of the Basement Access Ramp.

817 On the contrary, I accept the evidence given by Bready that the Basement Access Ramp was required until about early July 2012, as a result of the Grosvenor Street powerline not being relocated.[625] Similarly, there is no persuasive evidence that relocation of the access ramp delayed Building E.

818 For these reasons, I also accept Probuild's submission that relocation of the Basement

623 T1012.22–28.
624 Bready First Witness Statement, [179]–[217]; Bready Second Witness Statement, [64]–[65]; T1132.27–T1135.
625 Bready Second Witness Statement, [47]–[53].

Access Ramp was a reasonable mitigation measure, and that its relocation exposed additional work fronts in the vicinity of Building C.

Decision (EOT2A)

819 For the above reasons, I am satisfied that the Soft Spot soil condition occurrences caused critical delay to SP3, SP4 and SP7, as set out below:[626]

EOT Claim	Qualifying Cause of Delay	Delay
2A Soft Spots	Latent Condition (admitted at [27] of the Amended Reply and Defence to Counterclaim)	• SP3 – 10 working days – 27 April 2012 to 10 May 2012 • SP4 – 35 working days – 10 May 2012 to 5 July 2012 • SP7 – 35 working days – 10 May 2012 to 5 July 2012

Delay Damages (EOT2A)

820 Probuild also claims delay damages under cl 34.9 of the Contract, in the apportioned sum of $25,851 (SP3) and $715,514 (SP4).

821 I have elsewhere in these Reasons for Judgment decided that delay damages should be apportioned between Separable Portions, because to apply delay damages in respect of a period of delay for one Separable Portion would probably result in double damages payable to Probuild. Additionally, I have observed that Cox, Probuild's quantum Expert, has undertaken a calculation which I consider to be logical and reasonable, by which he apportions Probuild's delay costs to Separable Portions.

822 Ultimately, I am satisfied that Probuild is entitled to apportioned delay costs in respect of its successful EOT2A claim in the sum of $25,851 in relation to SP3 and $715,514 in relation to SP4.[627]

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626 Refer List of V601's Abandoned Issues which includes, at [7], that the earlier pleaded and mentioned 'concurrent delay' issues [V601's case] were not addressed by V601 in the V601 Closing Submissions, 12 June 2019, and were apparently abandoned.

627 The quantum of Probuild's claims is addressed in more detail below in these Reasons for Judgment.

EOT3 (Hydrocarbon Contamination)

823 Probuild makes the following claim in relation to EOT3 (hydrocarbon contamination):

EOT Claim	Qualifying Cause of Delay	Delay	Notices
3 – Hydrocarbon Contamination	Latent Condition (admitted at [27] of the Amended Reply and Defence to Counterclaim)	• SP1 – 28 working days – 5 April 2012 to 24 May 2012 • SP6 – 28 working days – 5 April 2012 to 24 May 2012 • SP6A – 28 working days – 5 April 2012 to 24 May 2012	Clause 34 • Point not pleaded • Clause 25.2 does not require a notice as a precondition to any EOT • In any event, 5 April 2012: Bready First Witness Statement, [301] Clause 41 • 17 October 2012: Bready First Witness Statement, [313]–[314] Delay damages • 5 April 2012: Bready First Witness Statement, [301]

Background

824 Hydrocarbon contamination from the Site's previous uses was discovered in the south-western corner of the Site in July 2011. Over the following months, the full extent of the affected area was identified within the footprint of Buildings A and B. This caused a potential health threat, which was remedied by the installation of a vapour barrier and a drain. Until this problem was remedied, the pouring of some of the basement slabs in Buildings A and B (SP1, SP6 and SP6A) was delayed.

825 On 5 April 2012, Probuild submitted EOT3, seeking an extension of time for the delay caused by the hydrocarbon contamination. EOT3 sought:

(a) an extension of 28 Working Days to SP1, SP6 and SP6A from 5 April 2012 to 24 May 2012;

(b) alternatively, 5 Working Days for SP1 and SP6A and 16 Working Days for SP6.

826 V601 concedes that Probuild was delayed in pouring slabs to parts of the basement

of SP1, SP6 and SP6A as a result of the hydrocarbon contamination. The issue is when the relevant period of delay started and when it ended. V601 contends that the hydrocarbon contamination only caused delay to the relevant separable portions during the period between 18 April 2012 and 24 May 2012.[628]

827 V601 admits that the subject contamination constitutes a latent condition and a Qualifying Cause of Delay for the purposes of the Contract.[629] V601 however disputes that the claimed EOT3 delay commenced on 5 April 2012.

Probuild's case – EOT3

Probuild's chronology of relevant events (EOT3)

828 Probuild's chronology of relevant events relating to EOT3 includes: [630]

Date	Event	Evidence
14 July 2011	Workers encounter Hydrocarbon Contamination in the south-western corner of the site while performing the Early Works. Mr Bready notifies Mr Nave of the issue, and suggests that Cardno Lane Piper (CLP), V601's environmental consultant, be instructed to resolve the issue as a matter of urgency.	Bready First Witness Statement, [219]
19 July 2011	CLP instructs Probuild at a site meeting to stockpile the contaminated soil. Mr Nave states that he had requested, but not received, a statement of environmental audit for Stage 2 of the Site.	Bready First Witness Statement, [228]; FCB0820
1 August 2011	Ben Lumb of Probuild emails Mr Nave a bundle of soil tracking sheets showing that some of the material was potentially contaminated.	Bready First Witness Statement, [230]; FCB0828, 0830, 0837, 0842 and 0848
6 February 2012	Tim Richardson of Probuild emails Mr Nave, stating that: • Probuild had been advised a ventilated vapour barrier would be needed in the south-western area of the site; and • Probuild would make provision for the collection of vapours to minimise delays.	Bready First Witness Statement, [237]–[238]; FCB2289 and 2293
6 February 2012	Mr Richardson of Probuild emails Mr Nave stating that CLP would be providing a design for the vapour	Bready First Witness Statement, [240];

628 V601 Closing Submissions, 12 June 2019, [209].
629 V601 Amended Reply and Defence to Counterclaim, [33], [36]; Probuild Closing Submissions, 11 June 2019, [68(b)].
630 Probuild Closing Submissions, 11 June 2012, Annexure 3: EOT3.

Date	Event	Evidence
	barrier.	FCB2294
13 February 2012	CLP provides a 'Soil Vapour Barrier Advice'.	Bready First Witness Statement, [243]; FCB2303
15 February 2012	Mr Bready emails Mr Nave in relation to CLP's 'Soil Vapour Barrier Advice', noting that it is a mixture of guidelines and recommendations but not a design. Mr Crowe of Probuild emails Mr Nave and confirms from a discussion on site the previous day that Bicon needed to be directly engaged by First Urban, and that Probuild could facilitate the process but would not be directly involved in it.	Bready First Witness Statement, [245]; Bready Second Witness Statement, [68]; FCB3666
20 February 2012	The first vapour barrier workshop is held.	Bready Second Witness Statement, [69]
28 February 2012	The second vapour barrier workshop is held.	Bready Second Witness Statement, [69]
5 March 2012	Bench preparation for slab B2 in the footprint of Building B is completed.	Lyall First Report, [141]
15 March 2012	Mr Sleeman of Probuild emails Messrs Mackenzie and Nave listing various delays for which he said V601 would be responsible should they affect the WUC, including the Hydrocarbon Contamination.	Bready First Witness Statement, [173]; FCB2541
15 March 2012	Mr Bready emails Mr Mackenzie stating that he did not see how any reasonable person could say that Probuild could have done more to try and guide the process of implementing the vapour barrier.	Bready First Witness Statement, [256]; FCB2542
19 March 2012	Mr Nave emails Mr Bready stating that Bicon's engagement would 'remain under Probuild as a Variation to the WUC'. Mr Bready replies to Mr Nave stating that: • Probuild did not want to undermine the protection clause 25 of the Contract provided it for the 'treatment' of site contamination; • Probuild would provide direction regarding the sequencing of this work; and • Probuild's project team had been directed by its senior management to confirm they had absolute sign-off from CLP on the combined design elements.	Bready First Witness Statement, [222]–[223]; FCB2557
21 March 2012	In reply to an email sent by Mr Richardson regarding the final revision of the sub-surface drainage solution, Mr Nave states that work should proceed immediately for the additional sub-soil drainage. Separately, Mr Bready emails Mr Nave stating that: • his timetable for installing the sub-soil drainage would affect the work in the area adjacent to the contamination; • proceeding immediately with installing the drainage would impact the slab pour; and	Bready First Witness Statement, [258]–[259]; FCB2568, 2570, and 2571

Date	Event	Evidence
	• they should reschedule the work to install the sub-surface drainage so they could progress the gantry installation ahead of drainage.	
22 March 2012	Mr Nave emails Mr Lumb of Probuild regarding a quote received by Bicon to install a vapour barrier. Mr Bready replies stating that, as per his previous email, Bicon's work was in relation to contamination and it was therefore V601's responsibility.	Bready First Witness Statement, [276]; FCB2574
23 March 2012	Slab B1 is poured.	Lyall First Report, [112]
28 March 2012	Mr Bready emails Mr Nave stating that, in relation to the vapour barrier mitigation process: • there was still no sign of CLP's report; and • Probuild now had to work around the petrochemical area with changes to slab sequences.	Bready First Witness Statement, [277]; FCB2586
30 March 2012	The 'final' CLP report is delivered in relation to vapour barrier.	Bready First Witness Statement, [278]; FCB2703, 2707, 2708, 2709 and 2711
30 March 2012	Mr Richardson emails Mr Nave expressing concerns with CLP's revised response, and noting that there was no confirmation the design was fit for purpose or would be signed off by a suitably qualified and insured professional.	Bready First Witness Statement, [278]; FCB2741
3 April 2012	Mr Bready emails Mr Nave, expressing further concerns regarding CLP's revised response. Mr Nave responds, saying that he was not clear 'why this continues to go around in circles'.	Bready First Witness Statement, [280]; FCB2756 and 2764
4 April 2012	The progress photo attached to the minutes for Construction Meeting #15 show that, had the vapour barrier not been required, slabs B2 and B4 could have been constructed by 4 April 2012.	Lyall First Report, [144]; FCB2805
5 April 2012	Construction Meeting #15 is held at which: • Mr Nave states that CLP's design would be issued on 10 April 2012; and • Mr Bready states that Probuild had obtained quotes from BP Plumbing for in ground works in connection with the vapour barrier.	Bready First Witness Statement, [282]; FCB2907
5 April 2012	Probuild submits its EOT3 claim and claim for delay damages in relation to the Hydrocarbon Contamination.	Bready First Witness Statement, [301]; FCB2776 and 2777
5 April 2012	Start of the delay period for: • SP1 (Building A (commercial)) – 28 working days • SP6 (Building B) – 28 working days; and • SP6A (Building A (residential) – 28 working days.	Programming Experts' Joint Report 3, [5]
14 April 2012	Mr Nave receives a quote from Bicon to install the vapour barrier.	
19 April 2012	Mr Nave sends Probuild a notice stating that its EOT3 claim is not approved, and requesting that Probuild provides further information in relation to this claim.	Bready First Witness Statement, [303]; FCB2801

Date	Event	Evidence
8 May 2012	Mr Nave sends Mr Bready an email requesting that Probuild provide further information regarding its EOT3 claim regarding the Hydrocarbon Contamination.	Bready First Witness Statement, [304]; FCB2860
9 May 2012	A PCG meeting was held and Mr Bready states that the sub-soil ventilation for the vapour barrier was nearing completion.	Bready First Witness Statement, [263]; FCB3360
16 May 2012	Bicon begins work on site to install the vapour barrier. Mr Richardson emails Mr Nave notifying him that the vapour barrier had been installed and asking whether Probuild could proceed with the concrete pour in the absence of a final report from CLP.	Bready First Witness Statement, [226] and [267]; FCB4964, 2925, 2926 and 3353 Bready First Witness Statement, [267]; FCB3353
21 May 2012	Bicon finishes working installing the vapour barrier.	Bready First Witness Statement, [267]; FCB3353
22 May 2012	Mr Bready emails Mr Nave and states that Probuild needed a clear direction to proceed with the concrete works in the absence of the CLP report.	Bready First Witness Statement, [282]; FCB2907
23 May 2012	CLP certifies the vapour barrier.	Bready First Witness Statement, [226]; FCB2925–2926
24 May 2012	Probuild starts preparing the area to lay the basement slab above the vapour barrier.	Bready First Witness Statement, [226]; FCB2918–2919
24 May 2012	End of the delay period for: • SP1 (Building A (commercial)) – 28 working days • SP6 (Building B) – 28 working days; and • SP6A (Building A (residential) – 28 working days.	Programming Experts' Joint Report 3, [5]
19 July 2012	Probuild finalises and delivers its submission to TBH in relation to its EOT3 claim regarding the Hydrocarbon Contamination.	Bready First Witness Statement, [308]–[309]; FCB3699, 3826, 3692, 3693, 3690 and 3687
4 September 2012	Mr Bready sends Mr Mackenzie an email saying: • 'We are all in a bit of a quandry as to what is going on with the assessment of EOT's [sic] 2A and 3 by TBH?'; and • that Probuild had not heard anything about this issue since providing its submission to TBH on 19 July 2012.	Bready First Witness Statement, [310]; FCB4156
7 September 2012	Probuild receives a letter from Mario Salvo, on the Salvo Property Group's letterhead, enclosing a draft assessment from First Urban of its EOT2A and 3 claims. Mr Salvo's letter includes a mitigation report prepared by TBH and a recommended delay costs report prepared by WT Partnership.	Bready First Witness Statement, [311]; FCB4263, 4271, 4281, 4282, 4291, 4292, 4285, 4303, 4293 and 4307
20 September 2012	Mr Nave issues his assessment of Probuild's EOT3	Bready First Witness Statement, [313];

Date	Event	Evidence
	claim regarding the Hydrocarbon Contamination. In his determination he purports to reduce the Dates for Practical Completion on account of the mitigation measures he says were available to Probuild.	FCB4362 and 4363
17 October 2012	Probuild issues a Notice of Dispute in relation to Mr Nave's assessment of its EOT3 claim regarding the Hydrocarbon Contamination.	Bready First Witness Statement, [314]; FCB4478 and 4480

829 On 5 April 2012, at Construction Meeting 15, the Project Manager informed Probuild that Cardno Lane Piper (CLP), V601's consultant in relation to the hydrocarbon contamination on site, would issue a design to address hydrocarbon contamination on 10 April 2012.

830 Upon discovery of the contamination, V601 sought to propose a suitable remediation plan and carry out that plan. Probuild was involved in this process, both in relation to the work undertaken by V601's consultants, and in coordinating its work with that of V601's remediation contractor, which installed a vapour barrier on site. These activities affected the progress of Probuild's work in certain areas of the site, which are described in Bready's First Witness Statement, [25], and also between [219] and [226].

831 Bready, in his First Witness Statement, states at [281]–[285]:

> 281. At Construction Meeting #15 on 5 April 2012 Mr Nave said that CLP's design would be issued on 10 April 2012. I said that Probuild had obtained quotes from BP Plumbing for in ground works in connection with the vapour barrier, and these quotes had been progressively provided to First Urban. I also said that sub-soil drainage works had started in the Site's south-western corner. BP Plumbing relocated to this part of the Site because its work in the northern part of the Site was being restricted by the delays to HWM Contractors' work.[631]
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> 282. On 22 May 2012 I sent an email to Mr Nave in which I said that Probuild needed a clear direction to proceed with the concrete works in the absence of the CLP report.[632] I also said that Probuild needed that direction 'to provide clear and unambiguous acceptance of the client for any risks / impacts from proceeding without the formal approval of your relevant consultant. I also said that the duration of the concrete pour was a significant concern, and that the pour needed

631 FCB2805–2812.
632 FCB2907–2909.

to be big because we could not install stop-ends without puncturing the vapour barrier. I also said that 'We are on extremely strict working hours restrictions with council and if the pour runs over this could have longer term implications for the project.'

F.4 Effect of the Hydrocarbon Contamination

283. Probuild's ability to progress the work in the Site's south-western corner was hindered by:
   (a) the delay in designing, installing and certifying the vapour barrier to address the Hydrocarbon Contamination; and
   (b) the additional time then required to return to progress the WUC in that area to the same stage as the surrounding areas.

284. We could not pour the affected basement slabs until the vapour barrier had been designed, installed and certified. The vapour barrier was completed and certified on 23 May 2012. This also required that Probuild re-sequence the WUC so that work in the adjacent areas unaffected by the Hydrocarbon Contamination could continue before the vapour barrier was installed. For example,[633] is a photograph taken from the Site's south-western corner taken in around March 2012. It shows the slabs on ground poured in the Site's southern half, but not in the area affected by the Hydrocarbon Contamination.

285. From 24 May 2012, once the vapour barrier had been certified, Probuild progressed the WUC in the affected area.[634] The basement slab in that area was poured on 25 May.

832 On 5 April 2012, Probuild submitted its EOT claim and a claim for delay damages in relation to the hydrocarbon contamination delays.

Qualifying Cause of Delay

833 V601 asserts that the Project Manager correctly assessed and determined Probuild's entitlement in relation to EOT2A and EOT3. The Project Manager assessed and certified an extension of time of 16 Working Days in relation to SP1, and 26 Working Days in respect of SP6 and SP6A.

834 I reject V601's contention that Probuild's EOT2A and EOT3 entitlements have been correctly assessed and determined. I have found that this was not the position, as outlined earlier in my findings and conclusions concerning the Project Manager's lack of independence and impartiality, and that the Project Manager's breachd of cls 20.2(a) and 20.2(b) of the Contract.. I have held that the Project Manager's conduct

633 FCB4973.
634 FCB3363–3437 and FCB2918.

renders void and of no effect the assessment, determination and certification sought to be relied upon by V601.

835 V601 submits[635] that the only dispute between the parties in relation to Probuild's EOT3 claim is when the alleged EOT3 delay started, and whether Probuild failed to prove that this delay commenced on 5 April 2012, as opined by Lyall.

836 On the key issue concerning when the contamination delay commenced, V601 contends that Probuild has not discharged the relevant onus and established that, but for the hydrocarbon contamination, it could have commenced preparing the relevant slabs on 5 April 2012, and would have been able to pour slabs B2 and B4 on 5 April 2012.

837 V601 contends that Probuild does not address the question of when the EOT3 delays started, but relies on Lyall's factual conclusion that Probuild could have poured slabs B2 and B4 on 5 April 2012. V601 further contends that the evidence demonstrates that Lyall could not be certain of his conclusion, in relation to slabs B2 and B4 being able to be poured on 5 April 2012.[636]

838 It is to be noted that V601 concedes that Probuild is entitled to an extension of time in relation to the Hydrocarbon Contamination on site.[637] V601 contests however that Probuild should be granted any additional extension of time in relation to the delay caused by hydrocarbon contamination.

Quantum

839 V601 also submits that Probuild did not make a valid claim for delay damages and is barred by cl 41.2 of the Contract from recovering delay damages.

840 V601 adds that, to the extent that the EOT3 delay damages claim is accepted, V601 relies upon Birchall's quantum assessment of this claim in the sum of $59,668.18.

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635 V601 Closing Submissions, 12 June 2019, [9(c)].
636 V601 Closing Submissions, 12 June 2019, [226]–[235].
637 V601 Closing Submissions, 12 June 2019, [221].

Duration of delay

841 Bready's evidence addresses the duration of the claimed EOT3 delay and describes not only the effect of the hydrocarbon contamination remediation-related delays, but also the related delays including those to the WUC in the south-west corner of the Site, and in the vicinity of the sites of hydrocarbon contamination. Bready's evidence is that, once the necessary vapour barrier had been certified, Probuild was able to progress the WUC in the affected area and the Basement Slab was able to be poured on 25 May 2012.[638]

842 V601 also recognises in its submissions that Probuild was able to commence preparing slabs B2 and B4 for placement of concrete after 21 May 2012, and that those slabs were poured on 24 May 2012.[639]

843 Lyall provided expert evidence that SP1 (Building A Retail), SP6 (Building B) and SP6A (Building A Residential) were delayed from 5 April 2012, because slabs B2 and B4 could not be poured as a result of the need for V601 to install a vapour barrier to address hydrocarbon contamination. Lyall's expert programming and delay-related evidence was to the effect that the hydrocarbon delay (the subject of EOT3) concluded on 24 May 2012. This was the day after the vapour barrier installed by V601 was certified.[640]

844 V601's case contends, on the basis of Abbott's evidence, that the date on which the delay caused by hydrocarbon contamination ceased was 21 May 2012, based on the CP02 program relied upon by Abbott.[641]

845 Bready's earlier evidence was that:[642]

> 284. We could not pour the affected basement slabs until the vapour barrier had been designed, installed and certified. The vapour barrier was completed and certified on 23 May 2012. This also required that

638 Bready Amended First Statement, [284]–[285].
639 V601 Closing Submissions, 12 June 2019, [223].
640 Lyall First Report, [316]–[318]; Programming Experts' Joint Report 3, [12]; Bready First Witness Statement, [226].
641 Programming Experts' Joint Report 3, [14].
642 Bready First Witness Statement, [284]–[285].

> Probuild re-sequence the WUC so that work in the adjacent areas unaffected by the Hydrocarbon Contamination could continue before the vapour barrier was installed. For example,[643] is a photograph taken from the Site's south-western corner taken in around March 2012. It shows the slabs on ground poured in the Site's southern half, but not in the area affected by the Hydrocarbon Contamination.
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> 285. From 24 May 2012, once the vapour barrier had been certified, Probuild progressed the WUC in the affected area.[644] The basement slab in that area was poured on 25 May.

846 During the Programming Experts evidence of Lyall and Abbott,[645] V601 accepted the end of the delay period as 24 May 2012:

> MR MASON: What is your current - - -
> WITNESS ABBOTT: - - - discussion we had.
> MR MASON: - - - opinion as to the end of the delay period?
> MR MAGEE: Your Honour, can I just rise to say Mr Abbott's opinion may be valuable on that. V601 accept it as 24 May.
> HIS HONOUR: You'll accept it, won't you, Mr Mason?
> MR MAGEE: You've beaten us down.
> MR MASON: It's not often, Your Honour, that one's advocacy's rewarded so quickly.
> HIS HONOUR: No. Grab it with both hands and move on.
> MR MAGEE: Grab it with both hands and move on.

847 The immediately preceding concession strongly supports Probuild's case that the EOT3 delay concluded on 24 May 2012.

848 The foregoing evidence also impugns the reliability of Abbott's reliance upon CP02 as a program that accurately reflected what was occurring on site. Abbott's hypothetical programming had a delay cessation date of 21 May 2012.

849 I am not persuaded by V601's contentions, including those put to Probuild's witness, Bready,[646] that Probuild's management of its in situ structural subcontractor, in early 2012, resulted in delay to the WUC, or that Probuild was in any way responsible for delays to the design or installation of the vapour barrier.[647]

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643 FCB4973–4973.
644 FCB3363–3437; FCB2918.
645 T1409.10–21.
646 T983.
647 Bready First Witness Statement, [264], [284], [285]–[290], [316], [323]–[324], [326]; Bready Second

850 Ultimately, I am satisfied by Lyall's evidence that the hydrocarbon contamination-related delay to Probuild's work commenced on 5 April 2012.[648] I also consider that Bready's evidence of the events on site and the photograph and CM#15 referred to, provide a sound factual basis for Lyall's opinion as to the commencement of the EOT3 delay.[649]

Probuild's notification of EOT3

851 I find that Probuild notified V601 of its claim in relation to EOT3, and also provided notification of its delay and delay costs claim by email of 5 April 2012.[650]

852 Further, I consider that because cl 25.2 of the Contract provides for notification in relation to Latent Conditions to the Project Manager, the provisions of cl 41.1(b) except Probuild's Latent Conditions claim from the requirement to provide a prescribed notice.

853 I also note that Probuild notified a dispute in relation to the Project Manager's purported assessment of the Probuild hydrocarbon contamination delay claim of 20 September 2012.[651]

854 In relation to its delay damages claim, I find that Probuild provided notification of its claim on 9 March 2012 and 5 April 2012.[652]

SP1 side agreement

855 By its Amended Reply and Defence to Counterclaim, V601 asserts that a side agreement made between Probuild and V601, in April 2013, defeats Probuild's claim for delay in relation to hydrocarbon contamination (EOT3).

856 Paragraph [86] of the Maitland Second Witness Statement states:

Witness Statement, [72].

648 Lyall First Report, [143]–[145].

649 Bready Amended First Statement, [283]–[301]; Amended Reply Statement, [66]–[74]; EOT3 Chronology, 4 April 2012 and 5 April 2012.

650 FCB2776–2777; Bready First Witness Statement, [296] and [300].

651 FCB4363.

652 Bready First Witness Statement, [297], [300].

After the meeting on 7 December 2012, I spoke with Mr Bready and I said to him that:

(a) V601 would direct First Urban to issue Practical Completion for SP 1 at the completion of the Coles fit out works, which was forecast to be 3 July 2013;

(b) V601 would not impose liquidated damages in respect of any delays to the Dates for Practical Completion for SP1 of 8 April 2013 provided that SP 1 achieved Practical Completion by the 3 July 2013; and

(c) Probuild would not make any EOT claims in relation to SP 1 or make any other claim in relation to SP1 including delay costs, bonus payments or acceleration costs, other than the agreed variations for carrying out the landlord works.

857 Probuild's Amended Rejoinder and Reply to the Defence to Counterclaim, [16], [26(d)], [30(d)], and [34(d)] responds to the alleged SP1 Agreement asserted by V601. In essence, Probuild denies that the SP1 Site Agreement alleged by V601 precluded Probuild from making claims for an extension of time in respect of SP1.

858 Probuild submits that there is no evidence to support the alleged SP1 Side Agreement.

859 Further, Probuild notes that by April 2013, when Maitland claimed the SP1 side agreement was reached, Probuild had already formally notified its EOT3 claim under the Contract; and there is no evidence adduced by V601 to the effect that Probuild agreed to waive its entitlement to the EOT3 claim it had submitted.

Conclusion/Decision (EOT3)

860 Bready's evidence at [288]–[291] of his First Witness Statement was:

288. Probuild also progressed the WUC in the area surrounding that affected by the Hydrocarbon Contamination. It did so by arranging for the base slab in that area to be installed and for work to progress above it. [PRE.005.005.3276] is a document which shows in red the area affected by the vapour barrier. The area hatched in green was immediately adjacent to the area we were to pour the slab. Mr Cirianni prepared this document and sent it to Mr Richardson by email on 3 April 2012. I was copied to that email.

289. The process of pouring the slab in this adjacent area required that we install timbers bridging the trench for the vapour barrier. This was so we could progress preparing the formwork for the adjacent slab. That slab was poured before the vapour barrier was installed.

290. Work then continued on pouring further slabs in the areas immediately adjacent to the area affected by the Hydrocarbon

Contamination.[653] Probuild used a cantilevered formwork system when laying some of the slabs in this area. This was to allow work to progress as close to the area affected by the Hydrocarbon Contamination as possible, but installing this type of formwork system was more time-consuming.

291. However, despite these difficulties in progressing work around the areas affected by the Hydrocarbon Contamination, Probuild's ability to redeploy our resources to other work fronts was limited. At that time:

(a) the Soft Spots were affecting progress in the north-eastern part of the Site, and particularly around core E1 to Building E (as I detail in section E.3, above);

(b) work to Building C was reaching a point at which the documentation incorporating the proposed childcare centre into that building was not sufficiently developed for work to progress (as I detail in section H.3, below);

(c) work in the Site's southern half were otherwise progressing well (as I detail in section E.1, above); and

(d) work to Building D was progressing well, but for the area occupied by the Citipower substation kiosk (as I detail in section G, below).

861 I accept Lyall's evidence at [314]–[318] of his First Report that:

314. As part of my investigation into the delays associated with Building B I have noted that Probuild had achieved progress in the basement slabs in comparison to the HKA Revised Baseline programme. Slabs B1 and B3 were poured on 23 March 2012 and 29 March 2012 respectively, and Probuild had progressed to have bench prep complete in slab B2 by 5 March 2012, and in ground services installed in B4 by 24 March 2012.

315. In relation to the B4 slab, but for the hydrocarbon contaminated soil, there was only 8 working days of construction remaining to complete the basement of Building B. These activities being the bench prep, reo installation, formwork and pour of the slab. These durations are shown in the excerpt from the HKA Revised Baseline programme below under the heading remaining duration:

Activity ID	Activity Name	Original Duration	Remaining Duration
Ground Works & Basement Slab B4		39	35
BS1240	B4 – Poured Piers	5	7
BS1250	B4 – Break Piles	5	3
BS1260	B4 – Pile Caps	5	4
BS1270	B4 – Inground Services	5	12
BS1280	B4 – Bench Prep	5	3
BS1290	B4 – Rio	5	2
BS1300	B4 – Formwork	5	2
BS1310	B4 – Pour	5	1

653 FCB4964.

316. Based on the working day calendar in the HKA Revised Baseline programme, had Probuild been able to progress the remaining works unhindered by the requirement to install the vapour barrier, the basement slab could have been completed on 4 April 2012 (being 8 working days after 24 March 2012). This forecast is supported by the evidence that the partial pour of part of the B4 slab unaffected by the hydrocarbon contaminated soil was completed on 2 April 2012.[654]

317. Probuild's progress photo attached to the minutes for construction meeting 15 dated 5 April 2012 supports the position that had the vapour barrier not been required, the entire of basement slabs B2 and B4 could have been constructed by 4 April 2012.

318. The effect of the hydrocarbon issue was to delay Probuild's progress in completing the basement slabs until 24 May 2012, which is a delay to the planned critical path activity(the pour of the B4 slab) on the Approved Programme of 50 calendar days from 5 April 2012 to 24 May 2012 inclusive. When measured in accordance with the APAB method of analysis against the HKA Revised Baseline Programme, this constitutes a delay of 23 calendar days.[655]

862 I am satisfied that the discovery of hydrocarbons impacted the area in which slab B2 (and the B4 slab) were to be placed.[656] I am also persuaded by Bready's evidence and Lyall's delay analysis that Practical Completion of SP1, SP6 and SP6A was delayed by 28 working days, as a result of the consequences of hydrocarbon contamination.[657]

863 I am persuaded on the evidence that but for the discovery of hydrocarbon contamination, the unexpected need to address that contamination by means of a vapour barrier, and the consequential impact of that work on related work, as at 5 April 2012, Probuild could have poured slabs B2 and B4.

864 For these reasons, I am persuaded that the unexpected need for the design and installation of a vapour barrier delayed the pouring of critical slabs until 24 May

654 Daily Site Diary, 24 April 2012 [FCB2834–2834.003]: Continued with lower ground frames/tables to suspended slab south end, formwork to columns Basement B4 slab pour 2/3. Completed QA items to Basement Pour 4 prior to concrete placement, including trench mesh locally around RC3 150mm thickening. Delivery of material and column reo for B4 and B6.

655 23 calendar days being the difference between the planned finish of the Building B basement slabs of 1 May 2012 and the actual finish of the Building B basement slabs of 24 May 2012.

656 Lyall First Report, [81].

657 Programming Experts' Joint Report 3, [12].

2012, when the Basement slab could be poured in the affected area.[658]

865 Further, I agree with Probuild's submission that the way in which Lyall's cross-examination was conducted in relation to the facts relevant to the commencement of the EOT3 delay, on 5 April 2012, confused this expert witness rather than weakened his expert evidence. V601's questioning on this aspect sought to identify, among other things, the relevant slab (B4) by reference to a particular tower crane.[659]

866 In evidence in re-examination, Lyall clarified this point:[660]

> WITNESS LYALL: Yeah.
> MR MASON: As endorsed on 0008.
> WITNESS LYALL: No. That core would be to the – um, to the, um, of the – the opposite from Victoria.
> HIS HONOUR: To the north.
> MR MASON: The northern side.
> WITNESS LYALL: To the north, yes.
> MR MASON: So that would be outside the area covered by slab B4?
> WITNESS LYALL: That's correct.
> MR MASON: So would you agree, then, that that core is within the footprint of slab B6?
> WITNESS LYALL: That was my original assumption as to that core.
> MR MASON: And your current assumption, taking into account the extent of the slab B4 and your answer about the core being – this core being on the northern side?
> WITNESS LYALL: I would have to say that that – on re-examination of this drawing, that that core would be in B6.
> MR MASON: And the four columns that are depicted in that drawing, do they fall in slab B4 or some other slab?
> WITNESS LYALL: They would fall within some other slab.
> MR MASON: I beg your pardon?
> WITNESS LYALL: It would fall within some other slab.
> MR MASON: Thank you, Mr Lyall.
> HIS HONOUR: When you say some other slab, on what I understand your evidence is in this last phase were those – those columns that are marked 1, 2, 3 and 4 on drawing 0008, referenced to the pour diagram, appear to be – as I understand what you've just said, they appear to be more in the two segments of B6 than in B4. Is that how I understand what you're saying, Mr Lyall?

867 Lyall also stated in this part of his evidence that:[661]

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658 Bready First Witness Statement, [285].
659 T1427–T1432; T1445–T1450; T1448.14–23.
660 T1439.1–T1440.2.
661 T1440.6–11.

> WITNESS LYALL: As – as I've said, I – I – I'd just like to clarify that I just – from this – I – I think the identification by someone who is a factual evidence has - - -
> HIS HONOUR: Could be necessary, yes. I see.
> WITNESS LYALL: Be necessary on this.

868 V601 did not, however, pursue cross-examination of Bready as it did Lyall on this issue, even though it was Bready and not Lyall who was the relevant factual witness. Importantly, I consider that Bready's evidence in relation to the photograph by which V601 attempted to suggest to Lyall that he had not correctly understood the location of the B4 slab, on the contrary suggested that V601 had incorrectly understood the location of the B4 slab.[662] Ultimately, for these reasons I am not satisfied that Lyall's evidence was based on any confusion as to the location of the B4 slab. The correct location of slab B4 appeared to clarify that V601 was incorrectly identifying the B4 slab area in the photograph which V601 put to Bready.[663]

869 Further, V601 did not seek to clarify the precise state of slab B4 and its surrounding area on 5 April 2012 with Bready. Nor did V601 adduce evidence from its own on-site witnesses as to the state of slab B4 at that date.

870 Finally, on this aspect, I am not satisfied that V601's reliance upon any other documentation relating to a partial pouring of slab B4, on 21 April 2012, is probative of the condition in the area of slab B4 on 5 April 2012.[664] Contrary to V601's case, I consider that Probuild's work was sufficiently advanced in the area of slab B4, on 5 April 2012, for Probuild to be able to finalise that area in preparation for placement of concrete to slab B4 at that time, or immediately after 5 April 2012.[665]

871 For the above reasons, and on the basis of Lyall's opinion in relation to the commencement of delay, I accept that the subject delay to SP1, SP6 and SP6A

662 T1029.
663 T1029.10–11.
664 FCB2755.001; FCB2755.002.
665 Bready Amended First Statement, [228]–[291]. Ref also: T1760.19–T1762.21; Lyall First Report, [314]–[317]; Lyall Programming Expert Joint Report 3, 12 [5] EOT3 (SP1, SP6 and SP6A).

commenced on 5 April 2012 and concluded on 24 May 2012.[666]

Float

Probuild's submissions

872 Probuild correctly points out that Lyall's analysis identifies when a relevant delay consumes the float in the Contractor's program.[667] In this regard, I accept Probuild's submission that cl 34.3(a) of the Contract, by implication, reflects that the parties to the Contract intended that the Contractor 'owned the float' in the construction program, as part of the time and risk allocation under the Contract.

873 Clause 34.3(a) of the Contract provides:

> Subject to clause 34.4, the *Contractor* shall be entitled to such EOT as the *Project Manager* assesses, if the *Contractor* is or will be delayed in reaching *Practical Completion* by a *Qualifying Cause of Delay*.

874 Clause 34.4(b)(ii) of the Contract provides:

> The Contractor is not entitled to an EOT unless:
> …
> (ii) the delay has affected an activity which is, in the reasonable opinion of the *Project Manager*, on the critical path of the *Approved Contractor's Program* as it existed at the time of the occurrence of the *Qualifying Cause of Delay*; and
>
> …

875 Further, cls 32.1(a) and 32.3(g) of the Contract obliged the Contractor to proceed with the WUC regularly and diligently, with due expedition, and without delay. Those provisions of the Contract also prohibit the Contractor, without reasonable cause, from departing from the Approved Contractor's Program.

876 Given the contractual context referred to above, and also because the Contract gives rise to no impediment to the Contractor completing activities, including critical activities, earlier than programmed and thereby accruing a float of contractual time for performance, in my view, the Contractor is entitled to the benefit of, and 'owns'

666 Programming Experts' Joint Report 3, [14].
667 Probuild Further Reply Closing Submissions, 18 June 2019, [35]–[36].

the float, which exists from time to time by reference to the relevant Construction Program and the Contract specified dates for completion.

877 Further, the above construction is supported by the Contractor being entitled, pursuant to cl 34.3(a) of the Contract, to an extension of time if it is or will be delayed by a Qualifying Cause of Delay in reaching practical completion. This reflects that the Contract does not predicate the Contractor's time extension entitlements on it being delayed beyond the contractually stipulated Date for Practical Completion.

878 The Contractor is entitled to an extension of time (subject to other contractual preconditions) if relevant delay has affected an activity which is on the critical path of the Approved Contractor's Program, whether or not the delayed activity would have been completed before the date upon which it was programmed to be completed.

879 Finally, I observe that in its Closing Submissions of 17 June 2019, V601 did not reject or traverse Probuild's earlier submissions asserting ownership of the 'float' in the relevant Construction Program.[668]

Decision (EOT3)

880 For the above reasons, I find that Probuild is entitled to the following extensions of time in relation to its EOT3 claim:

(a) SP1 – 28 working days – 5 April 2012 to 24 May 2012.

(b) SP6 – 28 working days – 5 April 2012 to 24 May 2012.

(c) SP6A – 28 working days – 5 April 2012 to 24 May 2012.

668 V601 appeared at T1801.14–16 to submit that the 'float' and other issues were irrelevant.

EOT6 (Childcare Centre Variation): V601's application to amend its Amended Reply and Defence to Counterclaim (relevant to V601's defence of EOT3)

Introduction

881 On 2 July 2019, after the conclusion of the trial in this proceeding on 14 June 2019, V601 informed the Court of its intention to bring an application seeking leave to file and serve a further Amended Reply and Defence to Counterclaim.[669] The proposed amendment of contention is paragraph [53D] of the Amended Reply and Defence to Counterclaim, in respect of which the parties filed and exchanged written submissions, and agreed to have the matter decided on the papers.[670]

882 I outline below my reasons for allowing the proposed amendment to paragraph [53D] of the Amended Reply and Defence to Counterclaim.

Proposed amendments

883 V601 proposes to amend the particulars to paragraph [53D] of the Defence to Counterclaim in relation to EOT6, in substance to argue that concurrently with the EOT6 delay claimed by Probuild in relation to SP5, there was a delay as a result of the design of works involving a post-tensioning rod linking slab G15 to slab G10. This post-tensioning design change, V601 contends, resulted in the preparation of those slabs for placement of concrete being undertaken at the same time. Further, the addition of a post-tensioning rod also rendered it easier and more convenient to pour concrete for those two slabs at the same time (the post-tensioning issue).[671]

884 Specifically, V601 applies to amend its pleading as follows:

> 53D. Further or alternatively, the Plaintiff says that if there was a delay:
> (a) such delay is not a *Qualifying Cause of Delay* (cl 34.3(d));
> (b) the delay did not affect the critical path of the Works; and
> (c) the Defendant failed to take all reasonable steps to preclude the occurrence of any resulting delay by re-sequencing or reprogramming the Works (cl 34.3(c)).

669 Letter from Baker McKenzie, 2 July 2019.
670 V601 Submissions, 7 August 2019; Probuild Submissions, 9 August 2019.
671 V601 Submissions, 7 August 2019, [2].

Particulars

~~Further particulars will be provided after the Defendant provides full and proper particulars which substantiate its alleged delay claim.~~

Any delay to SP5 was a result of the post-tensioning rod, linking slab G15 to slab Gl0, such that slab G15 could not be poured until slab Gl0 was ready to be poured.[672]

V601's submissions (for leave in relation to the proposed amendments)

885 V601's primary contention is that the post-tensioning issue is already before the Court for determination and therefore the amendment should be allowed.[673] V601 points out that both Lyall and Bready were questioned about the impact of the post-tensioning design and associated work referred to above. V601 submits that it is desirable for V601 to have leave to file particulars that formally detail this part of its time extension defences, so as to ensure that V601's pleadings reflect the case run by V601 at trial. V601 argues that, given the nature of the post-tensioning issue and the evidence already given at trial on this issue, an amendment should not be strictly necessary for the Court to consider this aspect of the case.[674]

V601's defences to Probuild's EOT6 claim

886 V601 also submits that, contrary to Probuild's Reply Closing Submissions dated 12 June 2019, the post-tensioning issue is not and cannot be one of 'concurrent delay' because, as set out in paragraphs [239] to [249] of V601's Closing Submissions dated 12 June 2019, the Childcare Variation did not cause delay to SP5 because the relevant delay was caused by post-tensioning alone. V601 relies on Abbott's assessment of delay in relation to Probuild's EOT6 claim, which supports this conclusion; V601 adds that Lyall's prospective analysis also supports this conclusion.[675]

887 While V601 accepts that the childcare changes constituted a Variation and therefore, under the Contract, a Qualifying Cause of Delay, as outlined above, V601 does not accept that any delay was caused by the Childcare Variation to any particular part of

672 Amended Reply and Defence, 13 June 2019, [53D].
673 V601 Submissions, 7 August 2019, [3].
674 V601 Submissions, 7 August 2019, [3].
675 V601 Submissions, 7 August 2019, [4] and [6].

the Works.

888 V601 submits that causation in respect of any specific delay is a question of fact and is subject to assessment in accordance with cl 34 of the Contract. V601 also highlights that Probuild has the onus of proof to establish delay.[676] V601 further submits that its primary case in this regard is consistent with its pleaded position and its written submissions; namely, that any delay was not caused by a Qualifying Cause of Delay.[677]

Timing

889 V601 submits that the following matters are relevant to when Probuild became aware of the post-tensioning issue, which is the subject of V601's proposed amendment:

(a) it was open to Probuild to amend its pleading in relation to the post-tensioning issue as early as April 2018, after Lyall's expert report identified SP5 as a Separable Portion, which was delayed by Probuild's EOT6;

(b) further it was not until Probuild's amendment, on 25 February 2019, that Probuild's Counterclaim made mention of SP5 as a Separable Portion affected by the delays referred to in Probuild's EOT6 claim;

(c) at paragraph [55] of V601's Amended Opening Submissions, dated 6 February 2019, V601 observed:

> In its pleadings, Probuild did not make any claim in relation to SP5, but claimed an extension of 38 Working Days to SP2 only. However, it has now abandoned its claim in relation to SP2 and, accordingly, there is no longer a dispute in relation to EOT 6.

(d) in or about early February 2019, and once Probuild clarified that it would re-enliven its SP5 claim in relation to EOT6, V601 acted promptly to ensure that both parties had as much time as practicable to consider the post-tensioning

676 V601 Submissions, 7 August 2019, [5].
677 V601 Submissions, 7 August 2019, [5]–[6].

issue;

(e) V601 appreciated that Lyall's Expert Reports were being relied upon, including to quantify the duration of extensions of time already pleaded and claimed by Probuild in the Counterclaim. V601 did not consider that Probuild was relying on Lyall's expert evidence to raise a new claim not pleaded by Probuild; and

(f) when the post-tensioning evidence became relevant, Lyall had the opportunity to reconsider his conclusions in relation to the EOT6 delays. Probuild could have sought an adjournment to consider the evidence, as it did on various other occasions during the trial. Instead, Probuild relied on the circumstance that its programming expert had not revised his opinion as providing a basis for the Court to reject evidence given during the trial, in relation to the post-tensioning issue. The post-tensioning issue and the evidence at trial regarding it have also been the subject of closing submissions by both V601 and Probuild.[678]

890 V601 submits that the post-tensioning issue was clearly raised in evidence at trial and was addressed with lay and expert witnesses in the proceedings, including at trial. Further, the post-tensioning issue was the subject of closing submissions and, accordingly, that issue is before the Court; although V601 applies to formally particularise this issue, leave to amend should not be necessary.[679]

Probuild's submissions

891 Probuild opposes V601's application to amend the particulars to paragraph [53D] of its Amended Reply and Defence to Counterclaim. In support of Probuild's opposition to V601's application to amend, Probuild submits that:

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678 V601 Submissions, 7 August 2019, [7]–[11]; Probuild Closing Submissions, 11 June 2019, [224]–[228]; Probuild Reply Closing Submissions, 12 June 2019, [84(a)], [126]–[132]; Probuild Further Reply Closing Submissions, 18 June 2019, [45]; T1777.11–T1779.12.

679 V601 Submissions, 7 August 2019, [12].

(a) V601's contention that the post-tensioning rod issue is already before the Court is incorrect, as demonstrated by V601 bringing the application to amend;

(b) the post-tensioning issue was at no stage raised by V601 as a cause of delay to SP5, and specifically to Building C;

(c) if, as V601 contends, a relevant delay was caused by the post-tensioning issue, that delay is unrelated to the delays in relation to Building C, therefore any delay caused by the post-tensioning rods would be a concurrent delay, yet V601 does not appear to seek leave to raise a relevant concurrent delay;

(d) there is no substance to V601's contention that the post-tensioning issue only arose, or became material, on 7 February 2019, when Probuild's EOT6 claim was revised to claim a delay affecting SP5. V601, from April 2018, knew that Probuild relied upon the Lyall First Report which explained that EOT6 was a claim that included delay to SP5; and

(e) V601's Senior Counsel acknowledged at the directions hearing on 4 February 2019 that V601 was not prejudiced by Probuild relying on Lyall's analysis.[680] From about early April 2018, V601 should have sought leave to amend its case to raise any defences in relation to EOT6 delays which the Lyall First Report opined affected SP5, rather than attempt to amend its case after the trial and closing submissions.[681]

892 Probuild opposes V601's application to amend its Amended Reply and Defence to Counterclaim and submits that V601 is seeking to exploit the late stage at which V601 has appreciated that it needed to raise and address the post-tensioning issue.

893 Probuild also submits that Lyall, its programming expert, was not aware of the post-tensioning issue now sought to be raised by V601 before the Experts' Conclave and therefore could not, and did not, deal with that issue at the Expert Conclave.

680 Transcript, 4 February 2019, T6.28–31.
681 Probuild Submissions, 9 August 2019, [2]–[9].

Probuild submits that this deprived Probuild's lay witnesses of an opportunity to lead evidence-in-chief about this issue. Probuild also rejects that Probuild's expert 'was offered an opportunity to reconsider his conclusions but refused to do so'.[682]

894 Probuild submits that it is unjustified for V601 to attempt to characterise its present application as merely seeking to bring its particulars into line with the case run at trial.[683]

895 Finally, Probuild submits that if V601 is granted leave in the terms for which it applied, V601's defence should in any event be rejected on the merits, because V601 has not discharged the evidentiary burden that it bears on the post-tensioning rod issue. V601 has done no more than seek to draw an inference that the G10 and G15 slabs were poured together, 'because G10 was not prepared until 17 August 2017', and there is no evidence to support this inference. Nor has V601 pointed to any evidence brought by Probuild about this situation, if it did occur.[684]

Decision – V601's application to amend

896 I grant V601 leave to amend paragraph [53D] of its Amended Reply and Defence to Counterclaim, in the terms set out above, and to formalise its pleading by particularising, in summary, that the alleged delay to SP5 was a result of the post-tensioning rod linking slab G15 to slab G10, with slab G15 not being able to be poured until slab G10 was ready to be poured.

897 Neither during the interlocutory phase of this proceeding, including when the parties' lay and expert witness statements were developed, nor at the time that the parties delivered their closing submissions in this matter, did V601 formally plead what is now particularised in paragraph [53D] of V601's Amended Reply and Defence to Counterclaim, in relation to Probuild's EOT6 delay case. This issue was however raised before about mid-February 2019 and was addressed at trial.

682 Probuild Submissions, 9 August 2019, [10].
683 Probuild Submissions, 9 August 2019, [11]–[12].
684 Probuild Submissions, 9 August 2019, [13].

898 At trial, both Bready, albeit in passing and in a constrained way because he was responding to cross-examination, and Probuild's expert programming witness, Lyall, in the Programming Experts' Joint Report 3 (Issue 52 page 8) referred to the issue in relation to post-tensioning rods linking slabs G10 and G15 and the delay to SP5 asserted by V601, and its Expert Abbott.

899 Lyall stated that he did not have sufficient time to address and opine on that new post-tensioning point; however, he made this point in mid-February 2019, at Issue 52 of the Programming Experts' Joint Report 3. It was more than three weeks later that Lyall was questioned at trial; in my view, this afforded adequate time for Probuild to adduce any further evidence that it desired to put before the Court, in relation to the post-tensioning, by agreement or with leave.[685]

900 Although not pleaded, Probuild delivered short closing submissions in relation to the concurrent delay, which V601 argues was caused by a post-tensioning design change that impacted how G10 and G15 would be constructed.[686]

901 I accept that, because of Probuild's late advanced case that its EOT6 claim affected SP5, V601 was delayed in identifying and raising the issue of the G10–G15 post-tensioning delay allegations.

902 I also accept that V601's late exposure of the post-tensioning issue, and its failure to formally allege the particulars that are now the subject of its application for leave to amend, have probably had some negative effect in relation to Probuild's programming expert, Lyall, who at mid-February 2019 was unable to opine on this issue in the Programming Experts' Joint Reports . However, as touched on above, Lyall could in my view have further addressed this issue at trial in March 2019 and, similarly, given the issue in question was exposed by mid-February 2019, Bready could also have addressed the issue when he gave evidence in late February 2019. There was no application by Probuild to do so.

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685 T1483.8–12.

686 Probuild Closing Submissions, 11 June 2019, [224]–[228].

903 Ultimately, although not formally raised at trial, the witnesses that I have referred to for both V601 and Probuild gave evidence in relation to the late-raised delay asserted by V601, in relation to EOT6, as it affected SP5. I am not persuaded, in the circumstances outlined above, that the extent of prejudice to Probuild in the way that this issue has evolved, and been dealt with, is sufficient to deprive V601 of the leave that it seeks to formalise its pleading on this aspect, given that the opportunity to attempt to obviate any such prejudice was available to Probuild but not taken. Further, to refuse leave for V601 to amend at this point would result in there being no reference in V601's pleadings to this issue, which is now the subject of evidence and submission at trial.

904 For the above reasons, I grant the leave sought by V601 to add proposed paragraph [53D] to its Amended Reply and Defence to Counterclaim.

EOT6 (Childcare Centre Variation)

905 Probuild makes the following claim in relation to the EOT6 claim (Childcare Centre Variation):

EOT Claim	**Qualifying Cause of Delay**	**Delay**	**Notices**
6 – Building C childcare centre	• Act, default or omission of V601 or the Project Manager • Variation	• SP5 – 21 working days – 18 July 2012 to 17 August 2012	Clause 34 • Point not pleaded • In any event, 31 January 2013: Bready First Witness Statement, [474] Clause 41 • Notice not required because the Project Manager did not make a determination about this claim • In any event, 12 February 2013: Bready First Witness Statement, [477] Delay damages • Notice not required because the Project Manager did not make a determination about this claim • In any event, 12 February 2013: Bready First

EOT Claim	Qualifying Cause of Delay	Delay	Notices
			Witness Statement, [477]

906 Probuild has clarified that its EOT6 claim no longer seeks any extension of time in relation to SP2.

Background

907 Building C was originally intended to be a five-storey building divided into two halves, with a basement over two levels. The western half was designated as residential space (SP5), while the eastern half was designated as commercial space (SP2).

908 From about May 2011, V601 contemplated altering the commercial part of Building C to provide a space to accommodate a childcare centre. From late 2011 to about mid-2012, work continued on the redesign of aspects of Building C.

909 For a considerable period, V601 appears to have avoided or deferred making a decision as to the intended use of Building C's commercial half (Separable Portion 2).

910 Bready, Probuild's Construction Manager, explained the general uncertainty regarding the intended use of that part of Building C and how this uncertainty, including in relation to the scope of work and detail of that part of the Project, affected Probuild's ability to progress the entire building and delayed progress of Probuild's work in the residential part of Building C (Separable Portion 5).[687]

911 In July 2012, V601 decided to remove work from Probuild's scope in an effort to resolve delays. This was effected by way of a variation to the WUC. It is to be noted, however, that the variation was not approved by V601 until February 2013.

912 Probuild's Programming Expert, Lyall, opines that Probuild has suffered critical delay to its works as a result of events associated with EOT6 and relating to the Childcare Centre design uncertainties, and that Probuild is entitled to an extension

687 Bready First Witness Statement, [490]–[509].

of time to SP5 (Building C (residential)) of 21 working days from 18 July 2012 to 17 August 2012.

V601's submissions

913 V601 submits that the only remaining issue in dispute, in relation to EOT6, is V601's contention that Probuild has failed to show that any delay to SP5 was caused by a Qualifying Cause of Delay.[688]

914 V601 contends that Probuild has failed to prove that the childcare Variation caused any delay in pouring slab G15. V601 also contends that, on the evidence, slab G15 could not have been poured until slab G10 was ready, and that slab G10 was not ready until 17 August 2012. On this basis, V601 submits that it had until 17 August 2012 to make a decision about the childcare Variation without causing delay in the areas concerned. By then, a decision had been made and the slabs were poured. Any uncertainty prior to that time was irrelevant.

915 V601 also submits that Lyall has not made any finding that Probuild was ready to pour G15 on 18 July 2012.[689]

916 V601 does not press that the factors giving rise to Probuild's EOT6 claim do not give rise to Qualifying Causes of Delay under the Contract.[690] Consistently with this position, V601 did not address Probuild's EOT6 'Qualifying Causes of Delay' submissions in its Closing Submissions of 12 June 2019, nor did it do so in its Further Closing Submissions of 17 June 2019 or its closing oral submissions.[691]

917 Similarly, V601 do not ultimately appear to press that Probuild failed to provide Notices of Dispute in respect of its claims, including the EOT6 claim, or that Probuild failed to preclude or prevent the EOT6 claim delays as required by the Contract.[692]

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688 V601 Closing Submissions, 12 June 2019, [9(d)].
689 V601 Closing Submissions, 12 June 2019, [243].
690 Probuild Closing Submissions, 11 June 2019, [217]–[219].
691 T1777.11–16.
692 Probuild's list of V601's abandoned issues (provided to the Court on 13 June 2019); Probuild Closing Submissions, 11 June 2019, [231]–[233] (EOT6) and [229]–[230], in relation to failure to preclude or

918 However, notwithstanding V601's above position, I find that the Variation ultimately approved by the Project Manager, pursuant to cl 36 of the Contract, in relation to the proposed Building C Childcare Centre changes to the original scope of work, constitutes a Qualifying Cause of Delay pursuant to cl 1(i) (Interpretation and Construction of Contract) 'Qualifying Cause of Delay', because the existence of a Variation under cl 36 constitutes a qualifying cause of delay.

Amendment-related issue

919 In his evidence, Bready described the problems, complications and delays caused by V601 and the Project Manager in relation to finalisation of V601's requirements concerning the Building C childcare centre as follows:[693]

> H. Extension of Time No. 6 – Building C proposed childcare centre
> *H.1 Background*
> 393. The original concept for Building C was for a five-storey building to the residential side and a four-storey building to the commercial side divided into two halves (plus a two level basement). The western half of the building was designated as residential space, while the eastern half of the building was designated as commercial space.
> 394. In about August 2011, while the EarlyWorks were being performed, Paul Harris of First Urban said that the option of altering the designated use of the commercial half of Building C from commercial space to space allocated for a childcare centre was under consideration. That proposal was still in its concept phase, and its feasibility had not been fully explored. V601 continued to investigate this option's viability while the Early Works were being performed and as the WUC commenced.
> 395. However, despite this, and given the status of the Early Works and the WUC, it was necessary to progress the design work for this proposal. For example, in late 2011 Probuild reviewed the proposed foundations for Building C to see whether they could accommodate the additional level or terrace that might be included as part of this proposal. From late 2011 and into 2012 work continued to redesign aspects of Building C so that it could accommodate a childcare centre. That work mainly affected the lower ground and ground floors in Building C. This was because the floor heights on those levels, as originally designed, could not accommodate the requirements for a childcare centre.
> 396. These redesign issues affected parts of the WUC to be performed at a comparatively early stage, and particularly that building's core. This

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prevent delay. V601 did not address Probuild's EOT6 'Qualifying Causes of Delay' submissions in the V601 Closing Submissions, 12 June 2019; V601 Further Closing Submissions, 17 June 2019; or in V601's closing oral submissions (see, including, T1777.11–16).

693 Bready First Witness Statement, [393]–[398].

was where that building's lift shaft was located. The core had penetrations for the lift openings on to the various floors, and it was therefore necessary to know the floor heights when scheduling the reinforcement and designing the formwork for the core. The core could not be prepared and poured without this information. The horizontal slabs which tie into the core could also therefore not be poured.

397. This affected work in both the residential and commercial halves of Building C, which comprised different separable portions. Work to these parts of Building C could only be performed concurrently because they shared the core.

398. This meant that we could not progress the construction of Building C at the rate we had originally intended, and that it was necessary to re-sequence the work so we could progress unaffected areas. In my conversations with my colleagues, particularly Mr Sleeman, we would refer to this combination of factors involving Building C as being like 'death by a thousand cuts'.

920 In Bready's Amended First Witness Statement, Bready provides a detailed chronology of the piecemeal and delayed clarifications by V601, through its Project Manager, of what was to be done by Probuild in relation to the Building C Childcare Centre; and of the piecemeal instructions received by Probuild from time to time by V601, via the Project Manager. I also consider that Bready's evidence establishes the confusion, delay and inefficiency suffered by Probuild as a result of V601's uncertainty, prevarication, delay in making decisions, and changes to scope and detail in relation to the eastern half of Building C, its use and specification.[694]

921 Further, Bready[695] extensively details the effect of delays in relation to the proposed Building C Childcare Centre, as a result of matters including the piecemeal requests for information by V601, V601's piecemeal provision of information and instructions to Probuild, and town planning and coordination issues which also affected and delayed Probuild's Building C works. Bready also described works which were rendered redundant by V601's conduct and instructions, through the Project Manager, as to the precise extent of the variations that Probuild was to undertake on that part of the proposed childcare centre in Building C.

694 Bready First Witness Statement, [393]–[489].
695 Bready First Witness Statement, [490]–[509].

922 I accept, persuaded by Bready's evidence, that it was not until about 25 July 2012, when Coraci of First Urban emailed details of Building C deletions and the status of town planning approval requirements[696] that Probuild was adequately informed by V601 that, because of a plan to accommodate a childcare centre in the commercial part of Building C, Probuild's work in that part of the Project would be reduced to a 'cold shell'.[697]

Effect of delay

923 I also accept Bready's evidence that substantive work required for the residential part of Building C (Separable Portion 5) was interrelated with the work required for the fully commercial part of Building C and that, as a result of Building C being designed with a shared core, this resulted in the core of Building C being delayed pending the resolution of all other issues related to design, including town planning approval, being resolved and completed by V601 in relation to the planned Childcare Centre.[698] I am satisfied by Bready's evidence that the planned Childcare Centre in the Commercial section of Building C (Separable Portion 2) substantially delayed the progress that Probuild could make with the Residential section of Building C (Separable Portion 5).

924 Bready's evidence included that:[699]

> Accordingly, the documentation for the proposed childcare centre in Building C was not sufficiently developed for work to progress once Probuild had completed pouring the lower ground slab on 15 June 2012. It was not possible to progress the core in this building until the required design changes were known, such as the distance between the lower ground and ground slabs and the resulting penetrations to the core for the commercial part of Building C. It was then necessary to obtain town planning approval for this design adjustment, and then to update the construction documentation to incorporate it.

925 Further, I am persuaded by Lyall's evidence in relation to delay to SP5, which was caused by the above issues in relation to proposed Building C Childcare Centre,

696 FCB3876 and attached Schedules and Drawings.
697 Bready First Witness Statement, [399]; Bready Second Witness Statement, [117].
698 Bready First Witness Statement, [490]–[509].
699 Bready First Witness Statement, [508].

wherein SP5 was delayed by 21 working days between 18 July 2012 and 17 August 2012.[700] Lyall assessed the effect of late instructions to Probuild to convert Building C Commercial space to a Childcare Centre.[701]

926 In relation to the critical path through the SP5 works, Lyall noted[702] that delays in relation to resolution of the design of Building C, due to the Childcare Centre modifications, delayed the Building C structure, and delayed ground floor slabs and ground floor slab construction until 18 July 2012.

927 In relation to SP5, Lyall's expert evidence was also that:[703]

> It is my assessment that the delay to the construction of Building C structure is on the actual critical path to SP5 completion, and caused a critical delay of 31 days[704] to SP5 completion. This is calculated as the difference between the planned completion of the ground floor slab, being 10 July 2012, and the actual completion of the ground floor slab on 17 August 2012.

928 I am satisfied that Probuild was delayed in relation to the construction of Building C and I accept Lyall's retrospective critical path delay analysis, which I prefer and find more persuasive than the analysis put forward by Abbott, for reasons I have earlier explained. The design changes to Building C, which affected the Commercial part of that building (made for the purpose of constructing a Childcare Centre), delayed the placement of the critical ground floor slab until 18 July 2012, in turn retarding the completion of the ground floor slab work until 17 August 2012.[705]

929 As early noted, Probuild no longer presses its earlier claim for delay to SP2, in connection with the childcare centre events relevant to EOT6.[706]

930 I reject Abbott's evidence that Probuild has not been delayed by the matters that it

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700 Programming Expert's Joint Report 3, [12].
701 Lyall First Report, [110].
702 Lyall First Report, [276] (and [277]).
703 Lyall First Report, [278].
704 The sum of delays incurred on the actual critical path to SP5 completion from 16 June 2012 to 8 October 2012.
705 Bready First Witness Statement, [469(b)] and [494(c)].
706 Probuild Closing Submissions, 11 June 2019 – Summary of Probuild's claims EOT6 (SP5 – 21 working days) 18 July 2012–17 August 2012.

raises in its EOT6 claim. I reject Abbott's expert evidence for the reasons outlined earlier, in relation to how the Construction Program 'float' should be treated in delay evaluation under the Contract. I reject Abbott's opinion that Probuild should not be compensated in respect of its EOT6 delay claim because the 'float', which Abbott asserts, obviated critical delay in relation to the works involved with the ground floor slab of the Commercial section of Building C. I also accept, for reasons which I have earlier addressed, that Lyall's as-build retrospective analysis reflects the more likely impact of the events relied upon by Probuild, in relation to its EOT6, and Probuild's other delay claims; and conversely, I do not accept that the CP02 program relied upon by Abbott provides a sound basis for identifying the actual delay which the Contractor suffered in the execution of the works, or a sound basis for identifying the relevant dates for practical completion.

Post-tensioning works – linking GF10 and GF15 slabs

931 V601, at [241] of its 12 June 2019 Closing Submissions, alleges that Bready admits that approved drawings showed G10 and G15 were connected by a post-tensioning strand,[707] and gave evidence to the effect that it would be easier to pour these two slabs together, and also stated that although these slabs could be poured separately, they would need to be prepared at the same time for the placement of concrete.[708]

932 I am not persuaded by V601's defence to Probuild's EOT6 claim, which argues that Probuild's work in relation to slab GF10 concurrently delayed Probuild, and that Probuild's design changes linked to those two slabs therefore concurrently delayed Probuild.

933 V601 did not plead concurrent delay in relation to Probuild's EOT6 claim; further, I am not persuaded that Abbott's inclusions and opinion in relation to the design and performance of this part of the works is either supported by instructions from V601 in relation to factual matters relied on by Abbott, or establishes that Probuild was

707 T1147.19–20.
708 FCB5227.

responsible for the post-tensioning redesign interlinking slab GF10 and GF15 works.

934 In short, there is no persuasive evidence adduced by V601 that Probuild is responsible for any concurrent delay in respect of the GF15 slab. Furthermore, as Probuild points out in its submissions, Bready was not cross-examined in relation to the post-tensioning design nor was Bready cross-examined to the effect that Probuild had caused concurrent delay in relation to the GF15 slab works. Given that this contention was raised late by V601, it is particularly significant that Bready was not afforded the opportunity to address this assertion now being made by V601.

935 Accordingly, in my view, V601 has failed to establish the case that it sought to belatedly raise in defence of Probuild's EOT6 claim; namely, that Probuild was responsible for concurrent delay to G10 as a result of re-design for which it was wholly responsible and had failed to obviate delay by reprogramming that part of the WUC.

936 I reject as unsubstantiated, and also not addressed or pressed at trial by V601, that Probuild failed to take all reasonable steps to preclude or minimise delay, or any resulting delay in relation to the events associated with Probuild's EOT6 claim.[709] Bready's evidence established that Probuild rescheduled work and made other efforts to avoid and minimise delay, both in relation to the delays related to EOT6, and also in relation to each other relevant delay.[710]

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709 Picking Second Report, [32].

710 Bready Amended First Witness Statement: [40] (completion of early works and WUC commencement); [43] (possibility of a 'soft start'); [127] (Soft Spots and foundation piling works); [186]–[188] and [194]–[196] (resequencing piling work and slab pours (Soft Spots)); [198] (Building E (Soft Spots)); [199] (Core E1; pre-emptive step (Soft Spots); [202]–[203] (sheet piling & core E1 (Soft Spots)); [216] (relocation of access ramp (Soft Spots)); [264] (vapour barrier (Hydrocarbon Contamination)); [284] (re-sequencing WUC (Hydrocarbon Contamination); [285]–[290] (post-certification of vapour barrier: resource concentration to get back in sequence; work occurring around the area affected by the HC (Hydrocarbon Contamination)); [316], [323]–[324] and [326] redesign to provide V601 with additional time to arrange for kiosk removal (Citipower Kiosk)); [320] and [343] (staged construction of Building D (Citipower Kiosk)); [374] ('looking for ways to catch up' (Citipower Kiosk)); [382] (acceleration to reduce delay (Citipower Kiosk)); [389] (Building D and working around the kiosk (Citipower Kiosk)); [398] (necessary to re-sequence work to progress unaffected areas (Childcare Centre)); [399] and [464] (commercial part of Building C to be constructed as a 'cold shell' (Childcare Centre)); [418] (design changes to be resolved asap to mitigate impact on

937 In relation to Probuild's childcare centre EOT6 claim, I note that the Project Manager considered that Probuild had been delayed and allowed 13 working days in relation to SP5, and also adjusted the Date for Practical Completion for SP2 on the basis that there had been some reduced scope of works to be carried out by Probuild as a result of negative variations.[711]

938 Abbott is an expert witness and not a witness of fact. In my view, his evidence does not inform whether there was a design change detailing post-tensioning works, nor does his expert evidence on this aspect inform whether such a design change constrained or delayed Probuild's work. Neither was Abbott in a position to give evidence as a matter of fact as to whether the post-tensioning design resulted in the G10 and G15 slabs being poured together on site.

939 Furthermore, I do not consider that there is any probative evidence that the post-tensioning design referred to in Structural Drawing S233 (Rev T3), dated 27 February 2012, constituted a design change for which Probuild is responsible.

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site works (Childcare Centre)); [432] façade changes (Childcare Centre); [441] (see (a)(iv); attempting to move forward in the absence of complete/undated docs (Childcare Centre); [449] (redirection of activities (Childcare Centre)); [469] (see (a); re-sequenced resources into Building C to minimise delay arising from vapour barrier (Childcare Centre)); [582] (see (d); sourcing locally rather than overseas (Glazing Delay)); [591] (premium required for production overtime by Melbourne Façades (Glazing Delay)); [596] (additional resources required by Melbourne Façades to meet site requirements (Glazing Delay)); [601]–[602] (incentive agreement between Probuild and Melbourne Façades (Glazing Delay)); [613] (internal fit-out commenced to address delays (Glazing Delay)); [615] (other measures implemented to reduce this delay (Glazing Delay)); [619]–[628] (team adjustments, including windows & services coordinators, a defects supervisor, and additional labour; additional forklift driver and forklift hire and operation; additional Alimak/lift driver; additional builder's lift; additional swing stages; site amenities relocation); [630]–[631] (rented another factory to provide additional space for Melbourne Façades (see also Bready Amended Supplementary Witness Statement; [86]–[87]); incentive agreement with MF); [632]–[633] (out-of-sequence work by plastering and painting subcontractors); [637] (acceleration of lift installation works in Building B); [642] (onsite efforts to accelerate WUC); Bready Amended Reply Witness Statement: [62] (reference to relocation of access ramp to open up a work-front that would otherwise not have been available; see also Bready First Witness Statement, [216]); [71] (WUC re-sequenced to enable work in adjacent areas to continue until vapour barrier installed (Hydrocarbon Contamination)); [91] (re-design of foundation piles (Soft Spots); see also Bready First Witness Statement, [127]); [94] Design solution to accommodate continued presence of kiosk (Citipower Kiosk); [117] and [153] ('cold shell' plan re childcare centre (Childcare Centre)); [162] (cost reduction associated with changing awning windows to glazed windows; see also, [165]–[166]); Bready Amended Supplementary Witness Statement: [44] (refers to pre-emptive action in relation to sheet piling design; see also Bready First Witness Statement, [199]).

711 FCB4363–4367.

940 Accordingly, I accept Probuild's submission that there is no basis upon which to conclude, as V601 submits, that Probuild was responsible for delay in concrete being poured to the G10 slab.

941 V601 also appears to raise the following further matters:

(a) The Clause 41 Argument

V601 admits that Probuild submitted its EOT6 claim for an extension of time. That claim was submitted on 31 January 2013. Previous notices regarding the delay arising from the Building C childcare centre had been issued on 18 April 2012, 22 September 2012 and 12 February 2013.[712] Further updates were sent by Probuild in following months. In my view, these Probuild notices, in substance, all satisfied cl 41. First Urban did not make any determination in respect of Probuild's claim.

Further, in any event V601 did not pursue its case against Probuild, on the basis that Probuild's EOT6 claim had not satisfied cl 41 of the Contract. Further, in this regard, I note that Probuild submitted contractual notices to V601 in relation to the effect of delays on Building C arising from the proposed childcare centre.[713]

Furthermore, I reject any V601 argument relying on cl 41 of the Contract in relation to Probuild's delay costs entitlement. In my view, Probuild was not required to submit a cl 41.1 notice absent a relevant First Urban determination or extension of time which could be the subject of such a notice.

At all events, Probuild also provided notice by email, dated 12 February 2013, to V601 in relation to applicable delay damages associated with EOT6.[714]

(b) Probuild failed to take all reasonable steps to preclude the occurrence of any resulting delay by resequencing or reprogramming the Works

712 Bready First Amended Statement, [416], [469], [477].
713 Bready First Witness Statement, [474]; FCB2795; FCB2796–F2798; FCB4816–4818.
714 Bready First Witness Statement, [477]; FCB4827–4830; FCB4831.

I am satisfied that Probuild did re-sequence and take other appropriate steps to avoid the Childcare design uncertainty and delays, including by delaying the pouring of an entire slab for almost a year to accommodate V601's indecision in relation to this part of the Project.[715] I also note that, although V601 makes this broad and general allegation, it fails to specify what 'reasonable steps' Probuild had failed to take.

(c) Probuild is precluded from claiming a further extension of time by an alleged 'SP2 Side Agreement'

I note that V601 does not allege any 'Side Agreement' applicable to SP5. Accordingly, it is not necessary to decide whether or not, as alleged by V601, a relevant side agreement existed between the parties in relation to SP2.

Conclusion/Decision (EOT6)

942 For the above reasons, I am satisfied that Probuild's SP5 works were critically delayed for 21 working days, between 18 July 2012 and 17 August 2012, and that Probuild is entitled, pursuant to cl 34 of the Contract, to an extension of time for SP5 in respect of that delay.

Delay Damages

943 For the reasons outlined below, in relation to Probuild's delay damages claims, I am also satisfied that Probuild is entitled to apportioned delay damages in relation to EOT6.

SP2 Side Agreement

944 V601 pleaded that Probuild was barred from claiming an extension of time in respect of SP2 as a result of an alleged side agreement in relation to that Separable Portion.[716]

945 In its written opening submissions, as well as submissions made during the hearing, Probuild abandoned its EOT6 claim in relation to SP2.[717]

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715 Bready First Witness Statement, [493]–[496].
716 Amended Reply and Defence to Counterclaim, [53C].
717 Probuild Opening Submissions, 7 February 2019, [59]; T911.20–22.

EOT7 (Window Glazing)

946 Probuild makes the following claim in relation to EOT7 (Window Glazing):

EOT Claim	Qualifying Cause of Delay	Delay	Notices
7 – Glazing	• Act, default or omission of V601 or the Project Manager • Variation • Delay caused by municipal, public or statutory authorities not caused by Probuild	• SP1 – 41 working days – 13 December 2012 to 6 March 2013 • SP3 – 65 working days – 17 May 2013 to 27 August 2013 • SP4 – 44 working days – 28 June 2013 to 3 September 2013 • SP5 – 44 working days – 1 May 2013 to 9 July 2013 • SP6 – 25 working days – 13 June 2013 to 22 July 2013 • SP6A – 42 working days – 23 December 2012 to 20 March 2013 • SP7 – 44 working days – 28 June 2013 to 3 September 2013	Clause 34.2 • 12 January 2012; Bready First Witness Statement, [521] Clause 34.3(b) • 14 December 2012; Bready First Witness Statement, [578] Clause 34.3(d) • 13 February 2013: Bready First Witness Statement, [582] Clause 41 • 28 March 2013: Bready First Witness Statement, [593] Delay damages • 13 February 2013: Bready First Witness Statement, [582] • 28 March 2013: Bready First Witness Statement, [593]

Background

947 This claim concerns delays that Probuild argues occurred as a result of it being delayed in placing an order for the Project's glazing requirements until mid-December 2012.[718]

948 The Contract acknowledged that the Glazing Specifications were not fully developed at the time of contract. In this regard, the Schedule of Clarifications included:[719]

(a) cl 6, in summary, that the Contract was based upon each of the consultants incorporating town planning permits and the Heggies letter dated 19 August 2010 in the designs and documents relating to environmental noise control;

718 The fundamentals to Probuild's glazing delay case are outlined in Bready's evidence: Bready First Statement, [5.10]–[5.14].

719 FCB0241–0242.

(b) cl 13, recorded that there was further design work required to ascertain thermal and acoustic compliance:

> The extent of aluminium-framed windows and doors included in the Contract Sum is in accordance with the drawings included in the Preliminary Design, with 30% of windows glazed in grey tinted glass and the balance in clear glass, and in accordance with the AS1288. The parties acknowledge that further design work is required to determine full compliance with both acoustic and thermal design requirements and any variance from the included specification noted above will constitute a variation to the contract

and more particularly cl 13 provided that any required change from the drawings, included in the Contract Preliminary Design, would constitute a variation to the Contract; and

(c) cl 23, provided that it was within the proprietor's scope of work to meet all relevant authority requirements.

949 It was also acknowledged and recorded, at PCG Meeting No 7 (14 March 2012), that amendments to the Planning Permit in relation to glazing requirements and changes required approval by the Victorian Civil and Administrative Tribunal (VCAT).[720]

950 Accordingly, the glazing needed for the Project was not fully specified when the parties executed the Contract in mid-2011.

951 Probuild claims that each Separable Portion of the WUC was delayed as a result of an Order made on 24 July 2012 by the Victorian Civil and Administrative Tribunal (VCAT Order) substituting an Acoustic Report in respect of acoustic window requirements on the Precinct Project. The period of delay alleged by Probuild was from 28 November 2012 until 20 March 2013.

952 Probuild alleges that substitution of the Acoustic Report referred to above by Victorian VCAT delayed it from being able to procure the required window frames and glazing for the WUC.

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720 FCB2857–2859 at [1.1].

953 Probuild refutes as unsubstantiated, V601's contention that town planning approval of the Project glazing was based on a report by Ms Williams of Heggies, which was provided as part of the Contract, and was not replaced by the Acoustic Report identified in the VCAT Order referred to above.

954 Probuild highlights that the VCAT Order, dated 24 July 2012,[721] directed that the following amendments be made to Condition 5 of the existing Planning Permit for the Precinct Project:

> a Delete the following part of condition 5(a):
>
> Treatment to the residential façades must be to the satisfaction of the Responsible Authority and in accordance with the three acoustical-treatment options of Ms. Williams, of Heggies, as set out in her statement of evidence (Section 4 and Appendix G), Plans TP10.2 – TP10.13 and plans titled 'Acoustic Treatment', submitted to the Tribunal, dated 10/23/2009 (signed by Read M on 26th March 2010)
>
> b Insert a new condition 5(b) as follows:
>
> Treatment to the residential façades must be to the satisfaction of the Responsible Authority and in accordance with the three acoustical-treatment options of Ms. Williams, of Heggies, as set out in her statement of evidence (Section 4 and Appendix G), Plans TP10.2 – TP10.13 and plans titled 'Acoustic Treatment', submitted to the Tribunal, dated 10/23/2009 (signed by Read M on 26th March 2010), with the exception of:
>
> i) apartments B-209, B-316, B-414, B510, B-511, B-512, B-513, B-514, B-601, B-612, B-701, B-801, B-901, B-1001, and E-321 which may have an alternative residential façade treatment in accordance with the report of 'Acoustic Logic' dated 20 April 2011, but which must include 12.76 mm fixed laminate glass to bedrooms where required acoustic metal louvres are not installed; and
>
> ii) apartments requiring Acoustic Treatment Option 1 in which the balcony soffits may be modified to be lined with 50mm thick glass wool insulation with minimum 32kg/m3 density to the slab soffit covered with minimum 20% open area perforated sheet metal.

955 Key accepted facts which are key constituents of Probuild's delay claim 7 are the Schedule and Clarification, and the following approvals:

(a) VCAT issued orders on 24 July 2012 in relation to the Project's glazing

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721 The VCAT Order, dated 24 July 2021, was made by consent: FCB3904–3907.

requirements;[722]

(b) the requirements referred to in (a) were endorsed by the responsible council in about mid-December 2012.

956 Bready's Amended First Witness Statement (at [510]–[617]), Amended Reply Witness Statement (at [120]–[206]), and Amended Supplementary Witness Statement (at [58]–[93]) refer extensively to a large number of contemporaneous documents dealing with the evolution of the glazing design, and the delays experienced by Probuild because of the way in which glazing evolved issues were dealt with (or not dealt with) by V601 and the Project Manager.

957 The changes to the scope and detail of the glazing requirement in relation to the WUC also included:

(a) amending the glazing required for the commercial half of Building C to reflect the reduction of Probuild's scope to constructing a 'shell' with basic services;

(b) replacing 425[723] awning windows across the project with fixed glazing, which provided V601 with a cost-saving;

(c) a proposal to split approximately 18 apartments across Buildings C, D and E, which V601 ultimately abandoned in mid-October 2012;

(d) a proposal to construct additional windows, and to relocate various windows, to the west side of Building E, which ultimately were not progressed because they did not comply with the endorsed town planning drawings; and

(e) changes to accommodate a retail tenant's requirements.

958 Bready's evidence detailed extensive changes, and potential changes, to the Project's

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722 Bready Amended First Witness Statement, [606]–[608]; Bready Amended Reply Witness Statement, [157]–[167].

723 V601 Further Closing Submissions, 17 June 2019, [18], refers to 450 windows.

glazing requirements.[724]

Probuild's submissions

959 Probuild contends that the Project's glazing specification and requirements evolved considerably during the course of construction, including as a result of the VCAT Order amending the requirements on 24 July 2012 giving rise to uncertainty in relation to the scope and detail of this component of the Works and resulting in delay to Probuild, and in particular initially by delaying Probuild in relation to entering into a subcontract for the fabrication of required frames and glazing.

960 Probuild notes that the above amendments to the framing and glazing scope and detail did not receive Council endorsement until about 12 December 2012 which caused delay because of the many design conflicts and uncertainties in relation to the glazing scope and requirements.[725].

961 Probuild also notes that throughout V601's finalisation of its glazing scope and design, V601 considered and, on occasions, directed changes to the Project's glazing requirements which were progressively recorded in updated versions of the Glazing Matrix, including:

(a) amending the glazing for the commercial half of Building C to reflect Probuild's scope being reduced to constructing a 'shell' with basic services;

(b) replacing 425 awning windows across the project with fixed glazing;

(c) V601's proposal to split approximately 18 apartments across Buildings C, D and E, which it ultimately abandoned in mid-October 2012;

(d) a proposal to construct additional windows, and to relocate various windows, to the west side of Building E, which ultimately were not progressed because they did not comply with the endorsed town planning drawings; and

724 Bready Amended First Witness Statement, [607]–[608]; Bready Amended Reply Witness Statement, [157]–[167].

725 Bready Amended First Statement, [603]–[608]; Bready Amended Reply Statement, [136]–[144].

(e) glazing changes to accommodate the tenant's requirements in the tenancy with First Choice Liquor.

962 Probuild submits that it was not until after 13 December 2012, that is after the responsible Municipal Council accepted and endorsed V601's glazing submission, that Probuild entered into the Glazing Subcontract with Melbourne Façades; and it was not until Melbourne Façades was contracted that the subcontractor commenced the preparation of required shop drawings for the required frames and glazing on the Precinct Project.[726]

963 Probuild's evidence was also that even after December 2012 and the engagement of Melbourne Façades, V601 continued to revise the glazing requirements.[727]

V601's defences to Probuild's EOT7 claim

964 V601 submits[728] that the dispute between it and Probuild, in relation to Probuild's EOT7 claim, comes down to V601's defences that:

(i) any delay in procuring the glazing was not caused by a Qualifying Cause of Delay, as Probuild had everything it needed to proceed and had been directed to do so;
(ii) the evidence shows that V601 took the risk of proceeding without secondary consent and Probuild was aware of this; and
(iii) Mr Lyall's delay analysis has identified the wrong activity and the wrong delay period and, accordingly, cannot be accepted;

965 V601 contends that Probuild's glazing claim does not recognise the effect on Probuild of delays in engaging its glazing subcontractor. V601 points out that Probuild's pleaded case refers to glazing-related delays up to 14 December 2012. V601 asserts that because town planning approval was obtained on 12 December 2012, it could not have given rise to any delay to Probuild beyond that date.

966 V601 contends that, even if there was some substitution of glazing requirements by reason of the VCAT Order of 24 July 2012, Probuild was told by the Project Manager to proceed on the basis that the VCAT Order would be made. V601 contends that

726 Bready Amended Statement, [608]–[609]; Amended Reply Statement, [182].
727 Bready Amended Reply Statement, [152].
728 V601 Closing Submissions, 12 June 2019, [9(e)].

Probuild agreed to proceed with the glazing on this basis. Further, V601 submits that the VCAT Order only impacted 15 apartments.

967 V601 contends that the real cause of delay in procuring the frames and glazing was Probuild's attempt to renegotiate a lower price with its sub-contractor. At the same time, V601 disputes that any glazing delays were critical delays.

968 V601 also contends that the EOT7 delays were concurrent with EOT5 delays, and further contends that Probuild elongated any EOT7 delays.

969 V601 notes that Probuild's pleaded case does not allege that town planning issues caused delay to the actual installation of its glazing works, nor does Probuild plead that installation of glazing was a critical path activity on CN19, or any other relevant program; neither does Probuild assert that CN19 was the Approved Contractor's Program when the relevant glazing delays occurred.[729]

970 V601 points out that the VCAT Order, dated 24 July 2012,[730] confirms that the glazing was to generally comply with the three options set out in the Heggies Report dated 19 August 2010,[731] which formed part of the Contract documentation.[732]

971 V601 highlights that the VCAT Order referred to amending the Planning Permit (Condition 5) to allow for 14 apartments as part of Building B, and to allow for one apartment as part of Building E, to be constructed in accordance with the Acoustic Logic Report.[733]

972 V601 also points out that the VCAT orders referred to above did not amend any conditions in relation to the glazing or acoustic requirements of Building A, Building C or Building D.

973 V601 submits that the evidence given by Bready in cross-examination, as it relates to

729 V601 Closing Submissions, 12 June 2019, [253]–[256].
730 FCB3904–3907.
731 FCB5174–5218.
732 FCB5174–5178.
733 FCB3806–3825.

Probuild's initial claim on EOT7, in relation to which Bready thought Probuild had not been given a copy of the Heggie Report even though it had been,[734] provides a basis for the Court to conclude that Bready and Probuild were prepared to make and maintain knowingly false claims to suit Probuild's purposes and, accordingly, Bready's evidence should be treated with caution on matters relating to Probuild's claims.[735]

974 V601 also contends that a contemporaneous analysis by Tracey (Senior Planner/Programmer, Probuild)[736] in mid-February 2013 shows very little delay to the works comprising SP1, SP6 and SP6A at that time, as a result of glazing procurement, and highlights what Probuild was saying at about 20 August 2012 that precast panel delays were occurring concurrently with any glazing delay.[737]

975 V601 asserts that the precast claim submitted as EOT5, and later withdrawn, amounts to a concession that this non-Qualifying Cause of Delay was delaying the WUC works concurrently with any cause of delay relating to glazing, and had the effect of delaying glazing installation.

976 V601 argues that Probuild was directed, and agreed, to vary the WUC on the assumption that VCAT would approve a glazing-related amendment to the relevant Planning Permit.

977 V601 asserts that, if Probuild had complied with the direction given to claim certain glazing, there would have been no delay to those works. V601 also submits that Probuild had recorded that it was proceeding on the basis of V601's directions.[738] V601 also refers to Nave directing Probuild to vary the glazing works.[739]

978 V601 contends that, by the end of August 2012, Probuild had received all that it

734 T1089.21–29; T1095.25–T1096.13; refer also cross-examination of Bready at T964.12–25.
735 V601 Closing Submissions, 12 June 2019, [261].
736 Bready Second Witness Statement, [81].
737 FCB5164–5165.
738 Construction Meetings mid-February to mid-May 2012; FCB2407; FCB2582; FCB3438.
739 T795.16–18.

needed to be able to procure the glazing package.[740]

979 V601 submits that, pursuant to cl 36.1 of the Contract, Probuild was obliged to vary the WUC in relation to the planning permit amendments, in accordance with VCAT orders, which stated that the relevant part of the Project was to be constructed with alternative glazing treatment, as specified by Acoustic Logic in its report concerning the relevant 14 apartments in Building B, and the one relevant apartment in Building E.[741] V601 also submits that, as a result, Probuild was required to provide V601 with an estimate of delay and cost of this variation.[742]

980 V601 contends that Probuild failed to notify V601 that it was not proceeding with the above variation until town planning approval was obtained, and that on this basis there would be a delay to the WUC. V601 contends that, by failing to complete the glazing matrix and proceeding with procurement of glazing and window frames, Probuild — not V601 — caused delay to the WUC.

981 V601 further submits that, pursuant to the Contract and its design and construct obligations, Probuild was supplied by V601 with a Preliminary Design (which V601 asserts contained all the information that Probuild required to progress the design)[743] which Probuild was required to develop as the Design Documents. The scope of Probuild's design obligations included the subject matter of Item 13 of the Schedule of Clarifications for Endorsement by the Responsible Authority.[744] V601 contends that neither it, nor the Project Manager, were required to check the Design Documents, as Probuild was responsible for errors and omissions in the Design Documents, pursuant to cl 8.3(j) of the Contract.

982 V601 argues that Probuild's programming expert, Lyall, has not analysed the

740 V601 Closing Submissions, 12 June 2019, [269].
741 FCB3806–3825.
742 V601 Closing Submissions, 12 June 2019, [270].
743 Abbott First Report, [6.4.7].
744 See cl 8.2, Item 11 of the Annexure to the Contract; cl 1 – Definition of WUC; and cls 8.2A, 8.3, and 8.3A of the Contract.

Probuild pleaded delay case in relation to EOT7, but rather analysed delay in relation to the installation of glazing.[745] V601 also observes that none of the programs relied upon by Lyall include an activity described as procurement of glazing, therefore Probuild advances no evidence as to when it planned to undertake this activity or the point at which this activity was on the critical path of the relevant works. V601 also observes that cl 32.2(f) of the Contract requires the Contractor's programs to include off-Site activities.

983 V601 submits that:[746]

> Probuild says in its submissions that the 'proper period under scrutiny is around September/October 2012 when, if the glazing could have been ordered, the 14-week lead time would have been accommodated such that the glazing arrived on Site without delay to Probuild's work'.[747] If this is so, then the true analysis is whether Probuild could have ordered the glazing by then in the circumstances and, if not, what actual delay was caused between this time and when the glazing was actually ordered.

984 V601 asserts that Probuild's failure to complete the glazing matrix and proceed with procuring the glazing and window frames on the Project was not caused by V601's decision to vary the windows that were the subject of the VCAT Order.

Considerations

Chronology

985 Probuild summarises, and I also consider has substantiated with the evidence it has both cross-referenced in this chronology and by Bready's evidence, the following chronology of relevant events, in relation to the EOT7 glazing delays:

Date	Event	Evidence
12 April 2010	The Council issues planning permit PL08/1088 for the Precinct Apartments Development project.	Nave, [410] FCB0725
19 August 2010	Heggies prepares an Acoustic Report addressing noise issues and providing acoustic treatment options.	FCB0607
24 August 2010	The Council confirms that the Acoustic Report prepared by Heggies satisfies condition 5 of	Nave, [412] FCB0813

745 V601 Closing Submissions, 12 June 2019, [293] and [296].
746 V601 Closing Submissions, 12 June 2019, [300].
747 Probuild Closing Submissions, 11 June 2019, [259].

Date	Event	Evidence
	Planning Permit PL08/1088.	
24 August 2010	The Council issues endorsed plans in accordance with Planning Permit PL08/1088, which includes the Acoustic Treatment Options identified in the Heggies report.	Nave, [414] FCB0607
25 November 2010	The Council issues updated endorsed plans.	Nave, [415] FCB0705
20 April 2011	Acoustic Logic prepares Acoustic Assessment (revision 0) containing an assessment of the external noise.	Bready 1, [516] FCB1131
23 May 2011	Probuild and V601 enter into Contract.	Bready 1, [22] FCB0053
23 August 2011	V601 and Acoustic Logic enter into consultancy agreement for acoustic engineering services in connection with the Precinct Apartments Development.	Nave [24(e)] FCB2601
7 September 2011	Mr Nave states at a PCG Meeting that all revised planning documentation was being prepared for the Council to be re- endorsed.	Bready 1, [519] FCB0914
28 October 2011	At Construction Meeting #7 Mr Nave states that some required planning documents had been delivered to the Council, including documents relating to acoustic requirements.	Bready 1, [520] FCB1966
6 February 2012	Acoustic Logic's appointment is novated from V601 to Probuild.	Nave, [24(e)]
17 February 2012	At Construction Meeting #10 Mr Nave states at that the planning approval process was to be broken into two sections: 1. VCAT would review the permit wording, the intersection between Flockhart and Victoria Streets, and the acoustics (including the change of consultant from Heggies to Acoustic Logic, issues with the CUB Brewery, the glazing selection and the mechanical selection; and 2. Council had had the balance of the documents for stamping for 5 weeks, and a response was expected by the end of March.	Bready 1, [524] FCB2407
14 March 2012	Mr Nave states at a PCG Meeting that VCAT was required to re-endorse the revised town planning submission because Council did not have authority to do so, and VCAT was expected to re-endorse it in late April 2012.	Bready 1, [525] FCB2857
5 April 2012	At Construction Meeting #14 Mr Nave states that the VCAT hearing to deal with acoustic issues had been postponed until the end of June 2012.	Bready 1, [528] FCB2805
6 June 2012	Mr Harris of First Urban states at a PCG meeting that the VCAT hearing was scheduled for 27 June 2012 and that it would resolve changes from the original Heggies report to the Acoustic Logic report.	Bready 1, [531] FCB 3657
3 July 2012	At Construction Meeting #24 Mr Nave states that VCAT had endorsed the town planning	Bready 1, [534] FCB3700

Date	Event	Evidence
	submission the night before the scheduled hearing, and no hearing was required.	
12 July 2012	Ms Coraci of First Urban requests that Probuild review proposed apartment splits and provide a price should V601 proceed with this option.	Bready 2, [172] FCB3668 FCB3669 FCB3670 FCB3671 FCB3672 FCB3673 FCB3674 FCB3675 FCB3676 FCB3911 FCB0913
19 July 2012	Probuild issues the windows and glass tender package to various subcontractors, including Melbourne Facades.	Bready 1, [539] Bready 3, [85] FCB3833 FCB4910 FCB4912
24 July 2012	VCAT makes an order directing that planning permit PL08/1088 to be modified, including by modifying condition 5 relating to glazing and acoustic requirements	Bready 1, [540] FCB3902 FCB3904
25 July 2012	Josie Coraci of First Urban sends an email to Mr Richardson of Probuild: • enclosing a list of deletions to Building C, and the status of town planning approval requirements; • stating that deletions would be made to Probuild's scope regarding the commercial half of Building C which would constitute a variation; and • requesting that Probuild prepare architectural, structural and services drawings to reflecting those deletions.	Bready 2, [153] FCB3876 FCB3878 FCB3882 FCB3890
3 August 2012	V601's further town planning submission is delivered to the Council, following the VCAT order dated 24 July 2012.	Bready 1, [545] FCB4134
10 August 2012	dKO issues revision 6 of the Glazing Matrix. The changes included: • changes to the First Choice tenancy in Building A; • changing the glass in the Building C ground floor café to be at full height, as requested by First Urban on behalf of V601; • changes required to accommodate the proposed childcare centre (including modifying the windows to the ground floor tenancy to accommodate structural changes, and extending wall windows on levels 1, 2 and 3 to accommodate the enlarged floor plate.	Bready 2, [189] FCB0053
14 August 2012	Melbourne Facades submits to Probuild its tender for the windows and glass subcontract package.	Bready 1, [549] FCB4078

Date	Event	Evidence
		FCB4079 FCB4080
23 August 2012	Probuild delivers a variation claim for the deletion of sunhoods.	FCB4334
17 September 2012	dKO provides First Urban with a proposal for apartment splits to be incorporated into revised town planning documentation.	Bready 2, [174] FCB4346 FCB4354
26 September 2012	Mr Nave sends an email to Probuild noting that 432 awning windows could be replaced with fixed glazing. dKO issues revision 8 of the Glazing Matrix. The changes included: • changing some Building A windows from clear to translucent glass; • increasing glass thickness from 6.38mm laminate to 10.76mm laminate for certain levels in Buildings B, C and E; • changing some windows to heat strengthened glass; and • increasing glass thickness from 6.38mm to 12.76mm in approximately 39 windows in Building E.	Bready 2, [158] and [190] FCB4369
3 October 2012	Mr Bready responds to Mr Nave's email about the replacement of 432 awning windows with fixed windows. Mr Bready stated that dKO had concerned about natural ventilation requirements and that the project could not afford dKO or any other consultant to be distracted from other issues then being addressed.	Bready 2, [158] FCB4427
4 October 2012	At Construction Meeting #32: • Mr Mackenzie states that the Salvo Property Group and First Urban were to conduct a final review of the acoustic report before instructing Probuild to proceed; • Mr Bready states that this information was critical and was required to finalise various trade packages, including the glazing; and • Mr Nave said that First Urban would issue a clear direction or documentation as to how Probuild was to proceed.	Bready 2, [149] FCB4432
10 October 2012	Mr Mackenzie states at a PCG Meeting that the proposed apartment splits would not proceed.	Bready 2, [176] FCB4490
16 October 2012	Revision 9 of the Glazing Matrix is issued. The changes included: • changes to comply with the acoustic design requirements; • further changes required by revision 9 of the Acoustic Brief; • further changes to accommodate the impact of the mechanical equipment to service the First Choice tenancy which was to be installed on the roof of Building A adjacent to the uppermost residential apartments in that building.	Bready 1, [566] Bready 2, [192]–[194] FCB4441 FCB4431

Date	Event	Evidence
18 October 2012	Ms Coraci of First Urban requests that Probuild provide a proposed variation for the removal of 425 awning windows, following a natural light and ventilation review by First Urban.	Bready 2, [160] FCB4483
19 October 2012	At Construction Meeting #33 Mr Nave states that Council had requested minor drafting issues be resolved before issuing stamped drawings for the July town planning submission.	Bready 1, [565(a)]
20 November 2012	dkO issues revision 11 of the Glazing Matrix which, amongst other things, incorporates the removal of the glazing for the commercial half of Building C.	Bready 2, [154] FCB4494
30 November 2012	dKO issues revision 12 of the Glazing Matrix, which introduces the deletion of window A01-04 at the street level of Building A in the First Choice tenancy. This change was a consequence of the fit-out architect having reconfigured the entrance airlock glazing.	Bready 2, [198] FCB4536
4 December 2012	dkO issues revision 13 of the Glazing Matrix. The changes included reductions in the number of windows in Building E with grey glazing to achieve the 30/70 ratio referred to in item 13.0 of the Schedule of Clarifications.	Bready 2, [199] FCB4779
12 December 2012	Council issues endorsed drawings of the Project's glazing requirements.	Bready 1, [512] FCB4583 FCB4585
13 December 2012	Probuild enters into a subcontract with Melbourne Facades for the windows and glazing package.	Bready 1, [575] FCB4607
13 December 2012	Start of the delay period for SP1 (Building A (commercial)) – 41 working days.	Programming Experts Joint Report 3, [5]
14 December 2012	Mr Bready sends an email to Messrs Nave and Mackenzie saying that, with the finalisation of the town planning and glazing process, Probuild would give some thought to time and cost implications, and advise in due course once it could ascertain the extent of the delay.	Bready 1, [578] FCB4771 FCB4773
17 December 2012	Probuild submits Variation Claim #109 for a credit in relation to the change of 425 awning windows to fixed glass.	Bready 2, [164] FCB4774 FCB4776
23 December 2012	Start of the delay period for SP6A (Building A (residential)) – 42 working days.	Programming Experts Joint Report 3, [5]
6 February 2013	Probuild submits Variation Claim #97 regarding its reduce scope of work to the commercial part of Building C. This claim is approved on 13 February 2013.	Bready 1, [479] and Appendix 2, page 215 FCB4820 FCB4845
13 February 2013	Mr Bready sends an email to Messrs Nave and Mackenzie setting out Probuild's extension of time claim for the glazing.	Bready 1, [582] PRE.004.002.2939 FCB4838
25 February 2013	Probuild submits Variation Request #16 regarding the changes to the glazing specification to comply with the current glazing matrix, including acoustic and town planning requirements. This variation is approved in the sum of $350,456 on 15 January 2014.	Bready 1, [585] Bready 2, [201] and [205] FCB4848 FCB4849

Date	Event	Evidence
27 February 2013	Mr Nave responds to Probuild's EOT claim regarding the glazing, and states that he does not agree that the claim is for a Qualifying Cause of Delay.	Bready 1, [586] FCB4851
6 March 2013	End of the delay period for SP1 (Building A (commercial)) – 41 working days.	Programming Experts Joint Report 3, [5]
20 March 2013	End of the delay period for SP6A (Building A (residential)) – 42 working days.	Programming Experts Joint Report 3, [5]
28 March 2013	Probuild issues a Notice of Dispute in relation to Mr Nave's assessment of Probuild's EOT claim regarding the glazing.	Bready 1, [593] FCB4887 FCB4889
20 January 2014	Mr Nave approves Probuild's variation claim #16 for the glazing specification changes.	Bready 2, [205] FCB4971
8 May 2013	Mr Nave approves Probuild's variation claim in relation to the deletion of 450 awning windows, to be replaced with fixed windows.	FCB4898 FCB4899

986 I am ultimately, and for the outlined reasons which follow, persuaded by Bready and Lyall's evidence in relation to the glazing delay that the above events caused critical delay to Probuild's work to the following Separable Portions and by the number of working days set out below.

987 I am also persuaded by and accept Bready's evidence, including in relation to the glazing facts, circumstances and consequences addressed in his evidence, including the specific references herein, which for the reasons I have separately outlined elsewhere, I consider to be uncontradicted by any evidence of equal weight.

988 I also accept and am persuaded by Lyall's expert evidence, which for reasons I have separately outlined, is in my view the only reliable and probative programming and delay analysis evidence available.

989 Further, in relation to Probuild's EOT7 claim and Probuild's establishment of the delaying effect of the glazing issues, including through Lyall's expert evidence, I also note that V601's programming and time extension expert Abbott did not undertake his own delay analysis, but rather just gave evidence critical of the approach and analysis by Lyall.

990 I reject V601's submission that Lyall's expert evidence in relation to the EOT7 delay should not be accepted because Lyall's analysis identified the wrong activity and the

wrong delay period. I am satisfied that Lyall's evidence establishes delay affecting activities critical to the progress of the glazing activities, and thereby critical delay to the relevant Separable Portions and the overall WUC, from 13 December 2012, when the relevant Municipal Authority (by endorsement) approved the Precinct Project glazing drawings and associated scope and details of those elements of the Project works.[748] I am also satisfied that the glazing delays continued until the required glazing was available to be installed on site.

991 I am satisfied that Bready's factual evidence and Lyall's expert evidence demonstrates the effect of the above events on Probuild's ability to fully specify, have fabricated and delivered to site, the frames and glazing it needed for the Precinct project.

992 I accept that Lyall's use of programming CN-19 Program dated 12 November 2012 substantially confirmed the results of Lyall's retrospective delay analysis,[749] and I also accept that Lyall's use of this Program was appropriate, including because it was the Program to which Melbourne Façades planned to work.

993 I am satisfied that as a result of the above established delaying events, it was not reasonably possible, nor contractually incumbent on Probuild, to order the required glazing in time for the frames and glazing to be delivered to site so as not to delay Probuild's planned works.

994 I also find that these glazing-related issues constitute a Qualifying Cause of Delay. This is because the glazing design evolution and associated scope and detail changes in my view constitute variations under the Contract, including because the Contract's Schedule of Clarifications provides that such changes to drawings included in the Preliminary Design are to constitute variations to the glazing requirements specified in that Preliminary Design under the Contract (Schedule of

748 Lyall First Report, [163]; Lyall's evidence at [111], [117], and [234]–[260] of his Reports extracted herein.

749 Lyall First Report, [243]–[252].

Clarifications Item 13.0 Windows).[750]

995 Further, I am also satisfied that the Glazing changes which V601 directed, and the delays that occurred until mid-December 2012 in obtaining endorsed Town Planning Drawings from the relevant Municipal Authority (which adequately specified the Project's glazing requirements), constituted Qualifying Causes of Delay because they were:

(a) acts or omissions within the meaning of cl 1, Qualifying Cause of Delay,[751] paragraph (a) of the Contract; and

(b) variations under cl 36 of the Contract; and

(c) gave rise to delays associated with Municipal approval and V601's glazing drawing, up to about 12 December 2012, and for that reason also constituted delay caused by a municipal authority (which was not caused by Probuild) within the definition of Qualifying Cause of Delay (cl 1(i) Qualifying Cause of Delay).

996 In relation to V601's allegations that Probuild failed to take all reasonable steps to preclude the occurrence of any resulting delay caused by the glazing issues by resequencing or reprogramming, I am not satisfied that V601 has identified what reasonable steps it alleges Probuild should have taken in that regard,[752] and I am also positively satisfied that Probuild's evidence establishes otherwise.

997 Throughout 2012, Probuild progressed the tender process with its glazing subcontractor, as Bready's evidence and the above chronology in my view establishes, so that the Glazing Subcontract Package would be ready when Municipal endorsement of the modified Glazing Package was received and the outstanding glazing issues were resolved.

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750 FCB0241.
751 FCB0072.
752 Abbott First Report, [42]–[46], [539]–[549]; Abbott Second Report, [38(g)].

998 I consider that Bready's evidence establishes that Probuild took extensive, and in my view all reasonable steps to preclude or minimise the glazing delay.[753] These measures included Probuild providing its subcontractor with additional factory space to increase the rate at which it could produce frames and windows ready for installation on-site. Bready's evidence also establishes that Probuild entered into an incentive agreement with its glazing subcontractor to increase the rate at which it delivered and installed window frames and glazing across the Project.

999 Bready's Amended First Witness Statement (at [510]–[617]), Amended Reply Witness Statement (at [120]–[206]), and Amended Supplementary Witness Statement (at [53]–[93]) deal in great detail with the facts, and effect of the glazing variation on Probuild's work and the proactive steps which Probuild took to avoid and minimise the delay caused by the above glazing design and approval issues.

1000 Bready's evidence in his Amended First Witness Statement (at [585]) refers to Probuild's 25 February 2013 Variation Request 16 to the Project Manager, which relates to glazing specification changes to comply with the changing Glazing Matrix, including the acoustic and town planning requirements for the Project.

1001 Further, I am satisfied that the circumstances which were the subject of Probuild's variation claim of 25 February 2013 constitute a Qualifying Cause of Delay for the same reasons as outlined above, in relation to the glazing changes which V601 directed and the delays that occurred until mid-December 2012 in relation to Municipal endorsement of glazing drawings. The 'directions' issued by V601 in relation to glazing changes, also constitute relevant Qualifying Causes of Delay, are:

(a) Variation 109 – change of awning windows to fixed;[754]

(b) Variation 74 – deletion of sunhoods;[755]

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753 Bready Amended First Statement [615]; Amended Supplementary Statement, [72]–[88]; Lyall First Report, [260], [295]–[296], [335]–[336], [375]–[376].

754 FCB4774.

755 FCB4334.

(c) Variation 97 – change of Building C from commercial to childcare.[756]

(d) Variation 55 – reintroduction of sliding louvres.[757]

1002 The contractual definition of 'Direction' includes, at cl 1 (Interpretation of the Construction Contract), an 'approval' or 'authorisation' and 'decision' and the contractual definition of Qualifying Cause of Delay; in the same definitions also includes an act, default or omission by the Project Manager as occurrences constituting a Qualifying Cause of Delay.

1003 I am satisfied, for the above reasons, that the glazing issues detailed above and the 'directions' I have specified all constitute Qualifying Causes of Delay,[758] detailed above, within the Contract definition:

> *Qualifying Cause of Delay* means:
> (a) any act, default or omission of the *Project Manager*, the *Principal* or their consultants, agents; …

1004 Further, I reject as unsubstantiated V601's contention that the Project Manager requested that Probuild proceed in accordance with VCAT's order, and do so before Council endorsed that order. There was no documentary evidence of such an instruction from the Project Manager and further, Nave stated under cross-examination that he could not recall giving any such instruction.[759] I accept Bready's evidence that there was in fact no such request or direction from the Project Manager.[760]

EOT7 – extent of delay

1005 In the Lyall First Report, I consider that Lyall accurately, and I consider, without embellishment, records key milestone events relevant to his analysis of Probuild's glazing-related (EOT7). Lyall's Report states:

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756 FCB4832.
757 FCB4868 and FCB4869.
758 Probuild Closing Submissions, 11 June 2019, [242]–[247].
759 T795.16–28.
760 Bready Amended Reply Statement [145]–[151].

111. This delay event relates to:
   (a) the delay in the receipt of the VCAT approval for the acoustics report;[761]
   (b) numerous revisions to the glazing design instructed by V601 and its agents between 9 March 2011 and 17 September 2013; and
   (c) the delay in the receipt of the endorsed drawings from the council until 12 December 2012.[762]

112. VCAT provided orders on 24 July 2012[763] which related to the acoustic requirements of the project, but council town planning endorsement was not obtained until 12 December 2012.[764]

113. During the project period, various revisions of the glazing/façade documentations were issued. Council endorsement was required on such documentation in order for Probuild to proceed with the relevant procurement, fabrication and installation works.

114. Probuild entered into a contract with Melbourne Facades for the manufacture of the windows and glazing on 13 December 2012[765] and included within the contract reference to the then current programme dated 12 November 2012. The Melbourne Facades contract contains a 12 November 2012 programme as reference for when window installation and glazing was required however, some of the dates included in the programme had passed.

115. Melbourne Facades commenced installation of the windows approximately 14 weeks after signing the subcontract on 21 March 2013[766] which included the 3 week non-working period over Christmas 2012. During this period it is typical for the contractor and subcontractor to produce shop drawings for approval, then manufacture the windows subject to the capacity of the manufacturer. In my experience, a 14 week period, which includes the Christmas non-working period, is not an excessive procurement period for the commencement of the window arrival on site and start of installation.

116. The works to install the windows in all buildings progressed between 21 March 2013[767] and 4 September 2013,[768] a period of approximately 24 weeks (167 calendar days) whereby Melbourne Facades completed the manufacturing and delivery of better than one floor per week, with 33 floors of windows and glazing manufactured and installed within the 24 week period.

117. This 24 weeks for the period of commencement for all floors in the five buildings is consistent with the planned staggered commencement of the window installation in the Approved Programme. The following excerpt from the Approved Programme shows the planned start for

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761 FCB3904–3907.
762 FCB4583–4584.
763 FCB3904–3907.
764 Reply to Defence and Counterclaim, 2 June 2016, [58].
765 FCB4607–4770.
766 Building A, Level 2 Daily Report: 'Sub seal works began BAL2 installed more frames to shop front also glazing'.
767 Building A, Level 2 Daily Report: 'Sub seal works began BAL2 installed more frames to shop front also glazing'.
768 Being the start of the last floor of glazing installation.

each of the floors for the five Buildings on the project. The earliest start date is 2 July 2012 for the ground floor of building D[769] and the last start date is 19 December 2012 for floor 10 of building B.[770] The duration between the start of the first floor installation (2 July 2012) and the start of the last floor installation (19 December 2012) is 170 calendar days. This is consistent with the planned intent of Probuild in the Approved Programme which was a period of 167 calendar days between the commencement of floor installations.

1006 Lyall also explains:

Extension of Time 7

243. Probuild was unable to place the order for glazing and window frames for the project until after endorsement of the VCAT approval by the Council was communicated to Probuild on 12 December 2012.

244. As a consequence of the VCAT order in July 2012, the revisions to the glazing matrix by V601 and the late endorsement by the council, Probuild was only able to finalise the price of the windows and glazing with its subcontractor, Melbourne Facades, on 13 December 2012 and then complete the shop drawing process.

245. I note from the minutes of meeting dated 21 March 2013 that the materials that were procured for Building D were transferred to Building B to accelerate the work in that area. The glazing and window installation sequence changed so that the glazing installation progressed from Building A sequentially through to Building E. This is reflected in the as-built records.

246. To ascertain if the late delivery caused any critical delay to the Date for Practical Completion I have performed the following analysis:

(a) I have first impacted the then current programme (12 November 2012 – CN19) with the actual commencement dates for the Building E. This provides a basis of comparison for what delay could reasonably have been expected by Probuild. This has then been compared with the forecast dates for completion in the 12 November 2012 programme to establish what entitlement to an extension of time Probuild would reasonably be entitled to, based on the programme current at the time of the delaying event. This has been done to demonstrate two things. The first is to ascertain if the forecast delivery of glazing and windows would cause critical delay to the works, and secondly to demonstrate if the controlling path through the fit out of the building was the late delivery of the windows.

(b) This analysis provide me with a prospective delay entitlement. I have compared this prospective assessment with the actual retrospective delay to the start of the window installation to demonstrate that the results of the actual critical path analysis are grounded in reality and consistent with what could reasonably have been expected at the time of the delaying

769 Daily Site Diary of Melbourne Façades dated 21 March 2013.
770 Daily Site Diary of Melbourne Façades dated 4 September 2013.

event.

Impact Analysis

247. The current construction programme at the date that endorsed drawing were provided to Probuild, and the Melbourne Facades subcontract was signed, was 'CN19' dated 12 November 2012.

248. The following is an excerpt from the 12 November 2012 programme which showed the forecast completion dates for the Separable Portions of the Works:

249. Separable Portion 4 was forecast to complete on 21 September 2013.

250. I have taken the actual dates for the installation of the windows and framing of the works in Building E and impacted these into the CN19 programme. (Note: Lyall's extract of excerpts from site diaries relied upon is not included)

251. I have relabelled this programme CN19–HKA. The following excerpt from the programme CN19–HKA sets out the shift in dates for the window installation for each of the floors in Building D from those in CN19. (Note: Lyall's description of the shift in dates on program CN19-HKA has not been included)

252. The conclusions that are drawn from the prospective analysis are that the delays to the window delivery were controlling the completion of the Building E works and that the effect of the delays leading to the council approval of the windows and glazing was that had Probuild not worked out of sequence to achieve Practical Completion on 17 December 2013, the works would not have completed until 27 February 2014, a critical delay of 103 working days (159 calendar days) beyond the then currently forecast completion of 21 September 2013. (Note: excerpts of programmes with impacted delays has not been included)

Actual Delay and Mitigation

…

254. As at 12 December 2012 when Council endorsement was received by Probuild, the actual delay to the critical path of SP4 to the completion of Building E was 127 calendar days. This is not consistent with the then current construction programme which had forecast a delay to completion of 46 calendar days as at 12 November 2012. The difference in the calculation of delay on the actual critical path and that reported by Probuild in CN19 is different largely because the works have been re-sequenced to attempt to mitigate delays occurring prior to 12 November 2012.

255. I have sought to address this disparity between the programmes in the actual delay analysis by only seeking to assess the actual delay caused by the delays to the start of the windows installation, that is to say the actual delay has been assessed as opposed to the theoretical forecast provided by the impact analysis.

256. The critical path sequence in the approved programme was through the level 8 glazing, with the planned commencement of the window installation planned to start on 21 February 2013.

257. The glazing actually commenced installation in building E at level 8 on 4 September 2013 which is 195 calendar days difference between

the planned start of window installation on 21 February 2013 and actual start of 4 September 2013.

258. The actual delay to the completion of the works at 3 September 2013, being the day prior to installation of the level 8 glazing, was 68 calendar days being the difference between the delay at the start of this delaying event (127 calendar days) and delay to the actual start of the glazing (195 calendar).

259. It is my assessment that the delay to the arrival of the glazing caused 68 calendar days of critical delay to the Date for Practical Completion from 28 June 2013 to 3 September 2013 inclusive. I have reached this conclusion because:

(a) Based on the prospective analysis, it is my opinion that Probuild would have been reasonably entitled to an extension of time at the date of council endorsement based on the then current construction programme, however I am of the opinion that the impact is exaggerated as it fails to take into account the mitigation performed by Probuild.

(b) The actual start of window installation is consistent with the planned duration for window and glazing delivery outlined in paragraphs 114 to 117 above;

(c) The prospective theoretical delay of 159 calendar days was actually limited to a critical delay of 68 calendar days demonstrating that there was some mitigation in the sequence of fit out construction performed by Probuild. This mitigation is explained further below:

260. I have continued my analysis of the actual critical path and have concluded that Probuild was able to mitigate 62 calendar days of delay by completing the fit out works in a sequence different from those planned. I have determined this by comparing the planned date for Practical Completion (6 August 2013) and the actual Date for Practical Completion (17 December 2013) with the difference being 134 calendar days. The delay to the actual start of the level 8 glazing was 196 calendar days, and therefore Probuild was able to mitigate 62 calendar days of delay to the project. But for this mitigation by Probuild, Separable Portion 4 would not have been able to achieve Practical Completion on 17 December 2013.

1007 Ultimately, Lyall's evidence was that, from his analysis, including his comparative prospective analysis to ascertain whether that analysis produced conclusions which supported the realities of actual progress and delay on site, the glazing delays which affected the critical path of the WUC and ran through the Level 8 glazing works, resulted in Probuild being delayed 68 calendar days.

1008 Lyall also concluded that, as a result of Probuild's mitigation measures, Probuild succeeded in preventing a further 62 calendar days of delay in relation to the

additional 62 calendar days.[771]

1009 Lyall's evidence was that the critical delay to glazing and related activities commenced on 13 December 2012; the date after the relevant Municipal Authority endorsed the relevant glazing drawings, and by so doing enabled Probuild's glazing procurement process to proceed.[772]

1010 Finally, I accept the Programming Experts' Joint Report 3 (at [5]) and Lyall's retrospective analysis of EOT7, which concludes that, in respect of all Separable Portions, there was no concurrent delay of relevance.

1011 I again note that in my view it is most significant that V601's Programming Expert, Abbott, appears not to have conducted any analysis to determine the delaying impact of the above glazing-related occurrences on the critical path of the Works using his preferred methodology, or otherwise. Abbott's reasons for not doing so were, I consider, not satisfactorily explained.

1012 Further, I accept that Abbott conceded that the glazing for buildings A, B, C and D needed to be ordered by early October 2012 to avoid delay.[773] Therefore, in my view, on this aspect of V601's own expert delay analysis evidence, given what actually transpired because of the delays associated with the above VCAT Order, which was not made until July 2012, the consequent revisions to the glazing matrix and the delay in Municipal endorsement of the glazing design and specification, the Glazing Subcontract with Melbourne Façades could not be finalised in mid-December 2012 and Shop Drawings for the frames and glazing could not be completed until after mid-December 2012. I am also satisfied that it follows that the glazing could not be ordered by early October 2012.

1013 On the basis of the evidence I have referred to, I am persuaded that the delays complained of and claimed by Probuild were critical delays retarding the completion

771 Lyall First Report, [260].
772 T1300–T1301; T1302–T1307; T1305.3–15; T1306.12–30; T1307.3–8.
773 T1485.29–T1488.10.

of the relevant Separable Portions of the WUC.

1014 Abbott also acknowledged that the glazing specification (GS), which was endorsed by the relevant Municipal Authority on 20 December 2012, contained many more changes to the glazing works than instructed by V601's lawyer to Abbott for the purpose of his opinion on the delaying effect of glazing-related design issues.

1015 Further, I also reject V601's contention that Probuild had all the information it needed in relation to its glazing works by August 2012. Bready's evidence establishes the contrary.[774] I am also not satisfied that any critical component of information or approval, relied on by Probuild, was part of any design obligation imposed by the Contract on Probuild.

1016 I reject, for reasons I have outlined above, based principally on Bready's evidence, that Probuild was directed by the Project Manager to proceed with the glazing works on the basis that the necessary VCAT Order would be made and I also reject that Probuild agreed to proceed on that basis.[775]

1017 Neither am I persuaded that, as V601 asserted, the real cause of delay to the Glazing Subcontract was Probuild attempting to renegotiate a lower subcontract price with its prospective subcontractor.

1018 Finally, I reject V601's contention that Bready and Probuild on an occasion, or occasions, made knowingly false claims to the Project Manager and V601. I am far from satisfied that there was evidence adduced which was sufficient to establish this grave allegation.

Clause 34 notice

1019 I note that the conclusions and findings below are of general application to all Probuild's claims for time extension.

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774 Bready Amended Supplementary Statement, [59]–[63].
775 Bready Amended Reply Statement, [145]–[151].

1020 Under the Contract, Probuild's entitlement to an extension of time is not conditional upon Probuild issuing notices pursuant to cl 34.2 of the Contract. Further, cl 34.3 of the Contract deals with notification to the Project Manager of a delaying occurrence, or a suspected delaying occurrence, and does not deal with a Contractor's EOT claim.

1021 It is cl 34.3(d) which requires a written EOT claim in respect of a cause of delay that arises from an occurrence which is a Qualifying Cause of Delay.

1022 However, I consider that sensibly and reasonably construed, and given that the occurrences of the type listed in the definition of Qualifying Cause of Delay do not necessarily, or in some cases self-evidently, give rise to delay to the works (and in the case of a Latent Condition may have occurred years before), under cl 34.3, the relevant occurrences are not required to be the subject of an EOT claim until the specified time after the Contractor can ascertain, or estimate, the relevant extent of delay with reasonable accuracy.

1023 Therefore, in my view, cl 34.3 should be broadly construed, so as not to require the submission of a Contractor's claim for extension of time, until after the contractor can identify, and with reasonable accuracy ascertain or estimate, the actual delay caused by the Qualifying Cause of Delay.

1024 I also accept Probuild's submission that the prerequisites for Probuild's entitlement to an extension of time are set out in cl 34.4(b) of the Contract, and are not conditional upon the Contractor issuing a notice under cls 34.2 or 34.3(b). Probuild's entitlement to an extension of time is, however, conditional upon it making an EOT claim in accordance with cl 34.3(d), within the period of time explained in the last preceding paragraph above.

1025 Accordingly, V601's assertion at [60A(c)] of its Amended Defence and Counterclaim that Probuild's EOT7 claim is not compliant with the claim requirement of the Contract is, I consider, unsustainable.

1026 Further, at all events, I am satisfied that Probuild issued compliant notices in relation to the subject of its EOT7 claim on 12 January 2012; these notices complied with the requirements of cl 34.2 of the Contract.[776] Probuild also issued a notice dated 14 December 2012, pursuant to cl 34.3(b),[777] and on 13 February 2013, Probuild issued a claim which I find complied with cl 34.3(d) of the Contract.[778]

Clause 41 notice

1027 I consider that Probuild's claim of 13 February 2013 also satisfied the requirements of cl 41 of the Contract.[779] Furthermore, on 28 March 2013, Probuild submitted a claim for determination by the Project Manager.[780] As earlier held, cl 41.1 does not impose additional and separate notice requirements to those stipulated in cl 34, in relation to the Contract's time extension regime. Clause 41.1(b) also reflects the intent of the parties that the application of cl 41.1 is excepted (that is, not subject to cl 41.1(b) of the Contract) where another clause stipulates another relevant time.

SP1 – Side Agreement

1028 Finally, I again record that I am not persuaded that there is any basis for a finding that the alleged 'SP1 Side Agreement' precludes relief sought by Probuild in EOT7.

Conclusion/Decision (EOT7)

1029 For the above reasons, I am satisfied that Probuild is entitled to an extension of time[781] in respect of the Glazing issue delays, and Probuild's EOT7 Glazing claim, as follows:

SP1 – 41 working days – 13 December 2012 to 6 March 2013

SP3 – 65 working days – 17 May 2013 to 27 August 2013

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776 Bready First Witness Statement, [521]; FCB2273.
777 Bready First Witness Statement, [578]; FCB4771.
778 Bready First Witness Statement, [582]; Bready Second Witness Statement, [205].
779 Bready First Witness Statement, [582]; Bready Second Witness Statement, [205].
780 Bready First Witness Statement, [586] and [593]; V601 concedes that all the Project Manager's determinations are the subject of a Notice of Dispute: V601 Submissions, 12 June 2019, [2].
781 Programming Experts' Joint Report 3, [12]; see also [5].

SP4 – 44 working days – 28 June 2013 to 3 September 2013

SP5 – 44 working days – 1 May 2013 to 9 July 2013

SP6 – 25 working days – 13 June 2013 to 22 July 2013

SP6A – 42 working days – 23 December 2012 to 20 March 2013

SP7 – 44 working days – 28 June 2013 to 3 September 2013.

1030 I return to the way in which V601 defined the scope of the EO7 issues in its Closing Submissions. V601 submits[782] that the dispute between it and Probuild, in relation to Probuild's EOT7 claim, comes down to V601's defences that:

(i) any delay in procuring the glazing was not caused by a Qualifying Cause of Delay, as Probuild had everything it needed to proceed and had been directed to do so;
(ii) the evidence shows that V601 took the risk of proceeding without secondary consent and Probuild was aware of this; and
(iii) Mr Lyall's delay analysis has identified the wrong activity and the wrong delay period and, accordingly, cannot be accepted.

1031 For the above outlined reasons I reject each of the above 'defences' which V601 submitted answered Probuild's glazing delay claim; in short:

(a) Probuild's evidence, in particular Bready's evidence, I consider convincingly establishes that V601's contention in (i) above is unfounded.[783]

(b) Probuild's evidence, in particular Bready's evidence, I consider convincingly establishes that V601's contention in (ii) above is unfounded.[784]

(c) Probuild's evidence, including in particular Lyall's expert evidence, persuades me that V601 is wrong in its assertion that Lyall identified the wrong delay period in respect of Probuild's EOT7 delay.[785]

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782 V601 Closing Submissions, 12 June 2019, [9(e)].
783 Bready Amended Statement, [5.10]–[5.14], [515]–[615], [578]; Amended Reply Statement, [125]–[144], [145]–[151]; Amended Supplementary Statement, [53]–[92], [59]–[63].
784 Not established.
785 Lyall First Report, [111]–[120].

Dates of Practical Completion

Probuild's submissions

1032 Probuild disputes the bases of V601's entitlement to liquidated damages by questioning the manner in which the certificate underlying the claim was calculated and by impugning the independence of the Project Manager.

1033 Probuild submits that 'the certificate relied upon the practical completion dates the Project Manager applied when assessing the liquidated damages claim, and they were informed by his assessment, his prior assessment, of Probuild's extension-of-time claims'.[786]

1034 The disputes in relation to the dates on which Probuild achieved Practical Completion relate both to the establishment of the fact of Practical Completion, determined in the applicable contract setting, and also to Probuild's case that the Project Manager failed to determine the Probuild EOT claims 'either the granting of them or the assessment of them, independently'.[787] I note that the issue of the independence of the Project Manager has been addressed elsewhere in these reasons for judgment, and I have earlier held that the Project Manager lacked the required independence in its role as assessor and certifier.

1035 There appears to be no dispute between the parties in relation to the dates of Practical Completion certified by the Project Manager in respect of Separable Portions 1, 2, 3, 4 and 7. There is dispute in relation to the proper dates of Practical Completion for Separable Portions 5, 6 and 6A.

1036 Probuild submits that the Project Manager's rejection of the achievement of Practical Completion of SP5, SP6 and SP6A on the basis of incomplete landscape works and access to the swimming pool and gymnasium, as a result of Probuild's work on proximate deck, should be rejected. Probuild submits that based on a proper construction of the Contract, the landscaping and external areas fall within SP7, and

786 T1655.
787 T1655.

not SP5, SP6, and SP6A.[788] Probuild characterises SP7 as 'the final separable portion for the ragbag of items to be completed right at the end'.[789] In support of this point, Probuild refers to the Staging Plan in the Contract, and submits that: 'The contract sets out an arrangement where the annexure Part A describes the separable portions.' That in turn refers to part of the Principal Project Requirements, in turn calling up the Staging Plans.[790]

1037 In relation to the Staging Plan, Probuild notes that the buildings make up the Separable Portions and are presented using different colours for each building. For example, SP1, which is Building A (retail) is coloured red and SP2, which is Building C (commercial), is coloured blue.[791]

1038 Probuild submits that, based on a proper construction of the Contract, the 'defects and unfinished issues' which V601 asserts impeded the determination of Practical Completion were 'really just rats and mice', and even more obviously so when considered in the context of the large number of apartments involved.[792] Probuild refers to V601's submissions which list items such as 'screens and terrace works to five apartments in SP5 and seven apartments in SP6'.[793] Other items identified in relation to this issue by V601 include 'the fit off and commissioning of an air conditioning unit in one apartment in SP5', and the need to '[rectify] water damage in one part of level 10 of SP6'.[794] Probuild submits that, for a development with 'more than 400 apartments … in the whole scheme of a development of this nature these are minor defects'.[795]

1039 Probuild emphasises that the Practical Completion clauses in the Contract contain a 'minor defects and incomplete works exception', and points out in its submissions

788 T1790.
789 T1790.
790 T1790.
791 T1790.
792 T1791.
793 T1791.
794 T1791.
795 T1791.

that Practical Completion 'contemplate[s] defects being attended to after the date of Practical Completion'.[796] Probuild notes that paragraph A of the definition for Practical Completion also 'allow[s] minor defects'.[797]

1040 Probuild highlighted that the Contract of Sale in relation to the Project attached to the Contract 'prevents any purchaser from delaying settlement on account of defects'. Probuild submitted that there was 'no suggestion that settlement [had] been delayed by reason of any of these defects',[798] and that what had delayed Settlement was the delay by V601 in registering the Plan of Subdivision, which occurred in 'mid-November 2013'.[799]

1041 Probuild observed in this regard that the Contract provides that the registration of the relevant Plan of Subdivision 'that started the 14-day period under the contract for settlement to take place, which takes us through to late-November, which, low and behold, is when [Practical Completion] for two of these separable portions is granted'.[800] The thrust of Probuild's submission in this regard is that it was V601's strategy to delay recognition of Practical Completion so as to financially advantage itself and that the Project Manager was complicit in this strategy.

1042 Probuild seeks declarations that the date of Practical Completion for SP5 (Building C, Residential) and SP6 (Building B) and SP6A (Building A, Residential) were all achieved on 8 November 2013; the day on which the successful inspection occurred resulting in the issuing of Occupancy Certificates in respect of each of those Separable Portions on 12 November 2013. Alternatively, Probuild seeks the same declarations as at 12 November 2013.

1043 The Project Manager purported to certify SP5, SP6 and SP6A on 22 November 2013, 28 November 2013, and 13 November 2013 respectively.

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796 T1791.
797 T1792. See cl 1.
798 T1792. See cl 28.7.
799 T1792.
800 T1792.

V601's submissions

1044 V601 submits that Probuild advances no pleaded basis for the dates of Practical Completion it now seeks, although V601 concedes that Probuild issued a Notice of Dispute on 9 December 2013 in relation to the certification of Practical Completion of SP5, SP6 and SP6A, referred to above.

1045 V601 submits that it is a question of fact, bearing in mind the Contract definition of Practical Completion, when Practical Completion was achieved, and adds that Probuild has ignored many of the requirements of Practical Completion, including mandatory requirements; for example, in relation to the Project Manager's need to obtain Certificates of Occupancy. In this regard V601 observes that because Certificates of Occupancy for Stage 1 were not provided to the Project Manager until 12 November 2013, Practical Completion cannot be granted at 8 November 2013, as claimed by Probuild.

1046 V601 also contends that Practical Completion of SP5 and SP6 were properly rejected because of defects which could not be rectified after Practical Completion and adds that on 30 November 2013 there were 10 apartments which were not yet available to be inspected by the Project Manager.

1047 V601 also claims that in relation to SP5 and SP6 incomplete landscaping works were part of the scope of SP5 and SP6 apartments and justified Practical Completion not being certified.

Considerations/conclusions (dates of practical completion)

1048 The Contract provides in the relevant part of cl 1 (Interpretation and construction of Contract):

> **1 Interpretation and construction of Contract**
>
> In the *Contract*, except where the context otherwise requires:
>
> ***Practical Completion*** is that stage in the carrying out and completion of *WUC* when:
> (a) the *Works* are complete except for minor *Defects*:
> (i) which have been listed by the *Contractor*

and approved by the *Project Manager* as not required to be rectified at *Practical Completion*;

(ii) which, in the *Project Manager's* opinion, do not prevent the *Works* from being reasonably capable of being used for their intended purpose;

(iii) which the *Project Manager* determines the *Contractor* has reasonable grounds for not promptly rectifying; and

(iv) the rectification of which will not prejudice the convenient use and/or lawful occupation of the *Works*;

(b) those *Tests* which are required by the *Contract* to be carried out and passed before *the Works* reach *Practical Completion*, have been carried out and passed;

(c) all documents and other information required under the *Contract* which, in the *Project Manager's* opinion, are reasonably required for the use, operation and maintenance of *the Works* have been supplied in draft (which documents shall be finalised within 28 days after the *Date of Practical Completion*);

(d) certificates have been provided from each *Key Consultant* engaged in respect of the *WUC* confirming that the part of *the Works* the subject of that *Key Consultant's* design has been carried out in accordance with the *Contract* and the *Endorsed Design Documents*;

(e) all relevant approvals, including but not limited to those required under the *Building Act*, which are to enable use of the whole of *the Works* (including the original certificate of occupancy (or occupancy permit) issued by a licensed building surveyor and any other certificate, approval or authorisation which must be issued or given by an *Authority* to lawfully occupy or use *the Works*), have been obtained by the *Contractor* and given to the *Project Manager*;

(f) the *Contractor* has supplied the *Project Manager* the following:

(i) a certificate by a licensed surveyor identifying *the Works* and confirming that there are no encroachments by *the Works* upon adjoining lands;

(ii) a certificate from an independent consultant confirming that the fire services function under normal and simulated emergency operating conditions and in accordance with the *Contract*;

(iii) a copy of all fire rating certificates required under the *Contract* in respect of materials forming part of *the Works*;

(iv) a compliance certificate as required under section 221ZH of the *Building Act*;

(g) all plant and equipment forming part of *the Works* has been installed, commissioned and tested and function under normal and simulated emergency operating conditions and in accordance with the *Contract*;

(h) all rubbish, surplus material, *Temporary Works*, plant, equipment and hoarding has been removed from the *Site* so as to leave the *Site* in a clean and tidy condition, except for those items which the *Project Manager* agrees in writing are required during the *Defects Liability Period*;

(i) without limiting paragraph (a) above, the following items forming part of *the Works* have been completed:

(i) all appliances and fittings have been installed and are fully operational;

(ii) all work on areas of common property;

(iii) all landscaping which the *Project Manager* reasonably determines should be finished;

(iv) any parts of *the Works* which the *Contractor* has used in the course of construction, including lifts and light globes, have been restored or replaced, as applicable; and

(v) the whole of the Works has been professionally cleaned;

1049 In my view, SP5 (Building C, Residential), SP6 (Building B) and SP6A (Building A, Residential) achieved Practical Completion on 12 November 2013, the date on which the required Certificates of Occupancy were provided to the Project Manager.

1050 I reject Probuild's assertion that Practical Completion should be recognised on 8 November 2013, the date of the successful inspection which resulted in the issue of the relevant certificates. This is because cl 1(e) of the Contract definition of 'Practical Completion' provides that the original Certificate of Occupancy must be obtained by the Contractor and given to the Project Manager as part of the requirements to achieve Practical Completion under the Contract. That did not occur until 12 November 2013.

1051 I accept that on the evidence the issues identified and relied on by the Project Manager to refuse recognition of Practical Completion of the Separable Portions in issue were minor defects within the language and intent of the cl 1 definition of Practical Completion.[801] I accept Bready's evidence as to the state of the works at the relevant times and in relation to the Practical Completion issues.[802]

1052 My conclusions in relation to Probuild's achievement of Practical Completion are also informed by the following evidence:

Lyall reports and submissions:

Probuild's case[803]	Lyall reports (1, 2, 3)[804]	Probuild's submissions[805]	V601's submissions[806]
SP1 – 3 July 2013	Lyall First Report, 6 [13]. Lyall First Report, 32 [128] Lyall Second Report, 8 [15] Lyall Third Report, 9 [13] Lyall Third Report, 9 [14] Lyall Third Report, 10 [16] Lyall Third Report, 22 [84] Lyall Third Report, 22 [85] Lyall Third Report, 63 [276]		
SP2 – 31 July 2013	Lyall First Report, 6 [13] Lyall First Report, 42 [170] Lyall Second Report, 8 [15] Lyall Third Report, 9 [13] Lyall Third Report, 9 [14] Lyall Third Report, 10 [16] Lyall Third Report, 22 [84] Lyall Third Report, 22 [85] Lyall Third Report, 63 [276]		
SP3 – 17 December 2013	Lyall First Report, 6 [13] Lyall First Report, 48 [194]		

801 Nave Amended Statement, [586]–[587].

802 Bready Amended First Statement, [637]–[664].

803 Probuild's Amended Defence and Counterclaim, 25 February 2019, 50 [A].

804 Lyall First Report, 12 April 2018; Lyall Second Report, 4 May 2018; Lyall Third Report, 20 December 2018.

805 **Written:** Probuild's Closing Submissions, 11 June 2019; Probuild's Reply Closing Submissions, 12 June 2019; Probuild's Further Reply Closing Submissions, 18 June 2019. **Oral:** Day 16, 13 June 2019, T1653–T1762; Day 17, 14 June 2019, T1773–T1798, T1926–T1929.

806 **Written:** V601's Closing Submissions, 12 June 2019; V601's Further Closing Submissions, 17 June 2019. **Oral:** Day 17, 14 June 2019, T1798–T1925.

Probuild's case[803]	Lyall reports (1, 2, 3)[804]	Probuild's submissions[805]	V601's submissions[806]
	Lyall Second Report, 8 [15] Lyall Third Report, 9 [13] Lyall Third Report, 9 [14] Lyall Third Report, 10 [16] Lyall Third Report, 22 [84] Lyall Third Report, 22 [85] Lyall Third Report, 63 [276]		
SP4 – 17 December 2013	Lyall First Report, 6 [13] Lyall First Report, 58 [232] Lyall Second Report, 8 [15] Lyall Third Report, 9 [13] Lyall Third Report, 9 [14] Lyall Third Report, 10 [16] Lyall Third Report, 22 [84] Lyall Third Report, 22 [85] Lyall Third Report, 63 [276]		
SP5 – 8 November 2013	Lyall First Report, 6 [13] Lyall First Report, 68 [268] Lyall Second Report, 8 [15] Lyall Third Report, 9 [13] Lyall Third Report, 9 [14] Lyall Third Report, 10 [16] Lyall Third Report, 22 [84] Lyall Third Report, 22 [85] Lyall Third Report, 63 [276]	Probuild's Closing Submissions, [326]	V601's Closing Submissions, 73 [351]
SP6 – 8 November 2013	Lyall First Report, 6 [13] Lyall First Report, 76 [304] Lyall First Report, 82 [329] n 327 Lyall Second Report, 8 [15] Lyall Third Report, 9 [13] Lyall Third Report, 9 [14] Lyall Third Report, 10 [16] Lyall Third Report, 22 [84] Lyall Third Report, 22 [85] Lyall Third Report, 63 [276]	Probuild's Closing Submissions, [326]	V601's Closing Submissions, 73 [351]
SP6A – 8 November 2013	Lyall First Report, 6 [13] Lyall First Report, 87 [344] Lyall First Report, 93 [376] n 371 Lyall Second Report, 8 [15] Lyall Third Report, 9 [13] Lyall Third Report, 9 [14] Lyall Third Report, 10 [16] Lyall Third Report, 22 [84] Lyall Third Report, 22 [85]	Probuild's Closing Submissions, [326]	V601's Closing Submissions, 73 [351]

Probuild's case[803]	Lyall reports (1, 2, 3)[804]	Probuild's submissions[805]	V601's submissions[806]
	Lyall Third Report, 63 [276]		
SP7 – 17 December 2013	Lyall First Report, 6 [13] (records date as 18 Dec 2013) Lyall Second Report, 8 [15] (records date as 18 Dec 2013) Lyall Third Report, 9 [13] (records date as 18 Dec 2013) Lyall Third Report, 9 [14] (records date as 18 Dec 2013) Lyall Third Report, 10 [16] (records date as 18 Dec 2013) Lyall Third Report, 22 [84] (records date as 18 Dec 2013) Lyall Third Report, 22 [85] (records date as 18 Dec 2013) Lyall Third Report, 63 [276] (records date as 18 Dec 2013)		

1053 I reject Nave's evidence in relation to the facts in issue in respect of the dates on which Practical Completion of Separable Portions in issue was achieved, including Nave's evidence about defects and access for the reasons I have outlined elsewhere in relation to Nave's evidence on matters in dispute.[807]

1054 I reject V601's claims that incomplete landscaping work and work being undertaken to the deck justified rejecting the recognition of Practical Completion of SP5, SP6 and SP6A, including because V601 claimed that landscaping works were within the Contractor's scope of work for the apartments in the relevant Separable Portions. I do not accept V601's case and Nave's evidence to the effect that those works were hampering access to the swimming pool and gymnasium.

1055 I find that the landscaping work in SP5, SP6 and SP6A was not within the Contractor's required scope for achievement of the Practical Completion of the

807 See also Probuild's Submissions, 11 June 2019, [324]–[326].

relevant apartments because those works were not included in the Contract provisions which precisely defined the works falling within the Contractor's scope in relation to the Separable Portions, as ultimately clarified by the Staging Plan.[808] I am also unpersuaded by V601's assertion that DWG BSK - #3 (Rev 4) depicts landscaping within the Contractor's scope of works in SP5.

1056 Further, I also find that V601 was at material times able to access ground floor apartments in Buildings B and C.[809] Additionally, I find that the items of purportedly defective work relied upon by the Project Manager to refuse Probuild's achievement of Practical Completion,[810] in relation to SP5, SP6 and SP6A, pursuant to the intent of the definition of 'Practical Completion' in cl 1 of the Contract, were in the nature of minor defects only.[811] I also accept Probuild's submission that there is no proper basis to conclude that the Project Manager's asserted defects prevented the works from being reasonably capable of being used for their intended purpose and I am satisfied that the Project Manager failed to have had regard to that definition of Practical Completion.

1057 For the above reasons I find that the following Separable Portions reached the stage of Practical Completion on the following dates:

(a) Separable Portion 1 – 3 July 2013;[812]

(b) Separable Portion 2 – 31 July 2013;[813]

(c) Separable Portion 3 – 17 December 2013;[814]

(d) Separable Portion 4 – 17 December 2013;[815]

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808 FCB0053 at 247–252; see also Contract Annexure Part A; Principal's Project Requirements Section 5.2.
809 Bready Amended First Statement, [655]; T1127–T1128.
810 Nave Amended Statement, [586]–[587].
811 Bready Amended First Statement, [637]–[664].
812 Nave Amended Statement, [563], [599], [600]; no dispute as to date of Practical Completion.
813 Bready Amended First Statement, [640], [641]; Nave Amended Statement, [564]; no dispute as to date of Practical Completion.
814 Bready Amended First Statement, [622]; Nave Amended Statement, [568]; no dispute as to date of Practical Completion.

(e) Separable Portion 5 – 12 November 2013;[816]

(f) Separable Portion 6 – 12 November 2013;[817]

(g) Separable Portion 6A – 12 November 2013;[818] and

(h) Separable Portion 7 – 17 December 2013.[819]

Delay Damages

Considerations/conclusions (delay damages) – and acceleration costs, façade variation costs, and delay damages

1058 Probuild claims delay damages, pursuant to cl 34.9 of the Contract, in respect of each of its EOT claims 2A, 3, 6 and 7, and in the alternative claims as common law damages for delay resulting from V601's breaches both direct and perpetrated by its agent the Project Manager.

1059 Probuild's delay damages are predicated on the extensions of time to which Probuild is entitled and supported by its Quantum Expert Cox and also put, in the alternative, on an apportioned basis in case it is adjudged appropriate and necessary to apportion Probuild's delay costs to prevent windfall recovery as a result of concurrent grants of time arising from delay to more than one Separable Portion in the same timeframe.

Relevant contractual provisions

1060 Clause 34.9 of the Contract provides as follows:

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815 Bready Amended First Statement, [622]; Nave Amended Statement, [568]; no dispute as to date of Practical Completion.

816 I find that Probuild is entitled to a Declaration that it achieved Practical Completion of SP5 (Building C residential), SP6 (Building B), and SP6A (Building A residential) on 12 November 2013, being the date the original Occupancy Permit dated 12 November 2013 was given to the Project Manager.

817 I find that Probuild is entitled to a Declaration that it achieved Practical Completion of SP5 (Building C residential), SP6 (Building B), and SP6A (Building A residential) on 12 November 2013, being the date the original Occupancy Permit dated 12 November 2013 was given to the Project Manager.

818 I find that Probuild is entitled to a Declaration that it achieved Practical Completion of SP5 (Building C residential), SP6 (Building B), and SP6A (Building A residential) on 12 November 2013, being the date the original Occupancy Permit dated 12 November 2013 was given to the Project Manager.

819 Bready Amended First Statement, [663]; Nave Amended Statement, [568(c)]; no dispute as to date of Practical Completion; Probuild's Amended Defence and Counterclaim, 25 February 2019, [7]; Prayer for Relief A, Probuild Closing Submissions, 11 June 2019, [318]–[325].

34.9 Delay damages

(a) For every *Working Day* the subject of an *EOT* for a cause described in paragraph (a), (b), (f), (g), (h), (i) or (j) of the definition of *Qualifying Cause of Delay* and for which the *Contractor* gives the *Project Manager* a claim for delay damages pursuant to clause 41.1, damages certified by the *Project Manager* under clause 41.3 shall be due and payable to the *Contractor* in the amount which the *Project Manager* certifies is the *Contractor's* and any of its subcontractor's, employees' or agents' reasonable and necessarily incurred direct on-site time-related costs including on-site preliminaries costs (but excluding all other overhead costs, any allowance for profit or loss of profit and all consequential losses), up to the maximum amount per *Working Day* stated in *Item* 31A which damages are capped in aggregate at the maximum amount recoverable by the Contractor for delay damages stated in Item 31B.

(b) The *Contractor* shall, at the request of the *Project Manager*, make access available to its primary records and books at any pre-arranged time for the audit and checking by the *Project Manager* of the *Contractor's costs* in support of any claim by the *Contractor* for delay damages under this clause 34.9.

(c) The *Contractor* acknowledges and agrees that any entitlement of the *Contractor* under the *Contract* to delay damages in accordance with this clause 34.9 is the sole entitlement of the *Contractor* for any delay or disruption to the *WUC* and the *Contractor* shall have no entitlement to any other damages, costs or other compensation whatsoever from the *Principal* whether under the *Contract*, in tort (including negligence), equity, under statute or otherwise.

1061 Clause 34.9 provides an entitlement to the Contractor to be paid its reasonable and necessarily incurred direct on-site time-related costs, including on-site preliminary costs, for each day of extension of time awarded pursuant to the Contract.

1062 Annexure Part A of the Contract provides at Item 31A (Delay damages) for a 'Maximum amount' per day for delay damages, varying according to the presence of cranes and hoists on site as follows:

Annexure Part A

Item 31A Delay Damages	Period of Project	Maximum Amount
	1. Period without cranes and hoists	$31,985 per day
	2. Period with cranes but without hoists	$41,909 per day
	3. Period with cranes and hoists	$49,220 per day

1063 The Contract stipulates a cap on contractual delay damages. Item 31B (Cap on delay

damages) provides for a 'Maximum amount' (in the aggregate) of delay damages recoverable by the Contractor. The 'Maximum amounts' are specified as follows:

> Annexure Part A
>
> Item 31B Cap on delay damages
>
> Maximum amount (in the aggregate) of delay damages recoverable by the Contractor is 17 weeks at the amount stated in item 31A

The Contract also provides in cl 34.9(b) for a process pursuant to which the Project Manager may audit and check the makeup of the Contractor's delay damages claim.

1064 Further, cl 34.9(a) stipulates that the Contractor's entitlement is, amongst other things, in respect of the certified '… reasonable and necessary incurred' costs, as defined by cl 34.9.

Probuild's claim

1065 Probuild claims delay damages as particularised in its Closing Submissions 11 June 2019, Annexure 1. Probuild particularises and claims delay damages based on Lyall's conclusions, founded on his retrospective analysis of relevant delay, page 12 of the Programming Experts' Joint Report of 3 February 2019 and Cox's delay damage calculations.

1066 Probuild's primary case in relation to delay damages is that it is entitled to unapportioned delay damages calculated in relation to each Separable Portion in respect of each time extension claim. Probuild submits that the Contract and in particular cl 34.9 provide for compensation for delay on this basis, and that there is no justification for construing the Contract as reflecting an intent that there must be an apportionment of delay damages including to remove possible duplication of recoverable delay damages.

1067 V601 submits however that the Contract requires the apportionment of delay damages to avoid Probuild otherwise recovering a windfall in relation to such damages when in respect *of the same period(s) of delay damages are recoverable in respect*

of a number of Separable Portions.

1068 V601 argues that cl 34.9(a) and Part A of the Contract properly construed, provides for a pro rata recovery of the delay damages fixed in Items 31A and 31B across each Separable Portion.

Probuild's arguments against apportionment

1069 Probuild submits that V601's pleadings raise no issue or allegation that delay damages for a given delay are limited to those 'attributable solely to the separable portion in delay'.[820]

1070 Probuild submits that nothing in cl 34.9 limits its delay damages entitlement to the separable portion in delay. Probuild also submits that the opening words of cl 34.9(a) contain broad language which reflects an intention that delay damages are payable for 'every *Working Day* the subject of an *EOT*'. Probuild adds that constraining the language, in order to advance a narrower interpretation, would introduce a qualifier in relation to cl 34.9 as to the Contractor's entitlement to delay damages which is not reflected in the parties' language.[821] Probuild submits that if apportionment of this type was required, it would be likely that the Contract would prescribe how this should occur.[822] Without such guidance, Probuild submits that there is 'a strong contextual indicator that delay damages are not to be apportioned in the manner for which V601 contends'.[823]

1071 Probuild also submits that the Contract as a whole 'points against any apportionment being necessary'.[824] Whilst separate daily and aggregate caps for delay damages are outlined in Part A (see items 31A and 31B), they are not prescribed for the various Separable Portions, which contrasts with the daily rates

820 Probuild Closing Submissions, 11 June 2019, [301], [302].
821 Probuild Closing Submissions, 11 June 2019, [303].
822 Probuild Closing Submissions, 11 June 2019, [304]. Examples suggested include 'the value of work for each separable portion' or 'the relative amount of liquidated damages per separable portion': at [304].
823 Probuild Closing Submissions, 11 June 2019, [304].
824 Probuild Closing Submissions, 11 June 2019, [305].

which do apply to Separable Portions for liquidated damages and bonus payments.[825] Probuild argues that for V601's argument to be tenable, items 31A and 31B would need to contain separate amounts for each of the Separable Portions.[826]

1072 In the event that apportionment is required, Probuild submits that the methodology adopted by Cox in his Second Report should be preferred.[827] In the absence of guidance in the Contract on how apportionment should be conducted, Cox has outlined various approaches in respect of the different cost components. Probuild points out that Cox's approach to apportionment is directed at identifying costs arising from the delay, rather than utilising a more arbitrary method.[828]

V601's argument for apportionment of any delay damages

1073 V601 rejects Probuild's interpretation of cl 34.9 of the Contract which, V601 contends, 'ignores clause 4(b)'. Clause 4 relates to 'separable portions', and provides:

> (b) The interpretations of:
>
> (i) *Date for Practical Completion*;
>
> (ii) *Date of Practical Completion; and*
>
> (iii) *Practical Completion*,
>
> and clauses 2, 14, 24, 27, 32, 34, 35, 36 and 46 shall apply to each *Separable Portion* and references within those clauses to *the Works* and to *WUC* shall mean so much of *the Works* and *WUC* as is comprised in the relevant *Separable Portion*.

1074 V601 submits that cl 4(b) of the Contract provides that cl 34 in its entirety shall apply in relation to each Separable Portion. The impact of cl 4(b) upon cl 34.9(a), according to V601's submission, is that a claim for delay damages must be made separately for each Separable Portion in respect of each EOT awarded by the Project Manager,

825 Probuild Closing Submissions, 11 June 2019, [305].
826 Probuild Closing Submissions, 11 June 2019, [305].
827 Probuild Closing Submissions, 11 June 2019, [306]; Cox Second Report. At this point in its submissions, Probuild also noted Cox's confirmation that the assessment of Probuild's delay costs remained as outlined in the Cox First Report, prior to any apportionment: at n 458. See also, T1595.7–T1596.12.
828 Probuild Closing Submissions, 11 June 2019, [306].

which it observes is consistent with the approach taken by Probuild in claiming extensions of time on a Separable Portion basis.[829]

1075 V601 submits that Probuild's entitlement to delay damages in relation to a Separable Portion is therefore limited to 'reasonable and necessarily incurred direct on-site time-related costs including on-site preliminaries costs (but excluding all other overhead costs, any allowance for profit or loss of profit and all consequential losses)' in respect of the relevant Separable Portion.[830]

1076 V601 submitted that costs claimed in relation to a Separable Portion, as costs related to a specific extension of time, must have been incurred. V601 observes that delay damages are intended as compensation for costs incurred, not to provide 'some sort of bonus'. V601 argues that cl 34.9(b),[831] by enabling V601 to inspect Probuild's primary records and books, the Contract 'emphasise[d] the need for costs to have been separately incurred and accounted for'.[832]

1077 V601 submitted that the Cox First Report assessment of delay damages in the sum of $10,420,373 would have amounted to compensation for all resources being delayed over a period of 232 Working Days (see Birchall First Report, [5.12]–[5.17]) and would, if awarded, have resulted in a significant windfall to Probuild.

1078 I accept that absent the apportionment of delay costs in relation to delays to Separable Portions by application of Cox's methodology to align the portion of the delay costs defined by cl 34.9, in relation to the WUC, to delay costs calculated as reasonably referable to a Separable Portion, Probuild would probably be significantly over compensated. For reasons earlier outlined, in my view, V601 and Probuild would have been unlikely to have intended that delay damages recoverable

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829 V601 Closing submissions, 12 June 2019, [319].

830 Contract, cl 34.9(a) (V601's emphasis).

831 Clause 34.9(b) states that: 'The *Contractor* shall, at the request of the *Project Manager*, make access available to its primary records and books at any pre-arranged time for the audit and checking by the *Project Manager* of the *Contractor's costs* in support of any claim by the *Contractor* for delay damages under this clause 34.9.'

832 V601 Closing Submissions, 12 June 2019, [320]–[321].

by the Contractor pursuant to cl 34.9(a) would give rise to recovery by the Contractor in excess of delay costs of the type referred to in cl 34.9(a) actually incurred.

1079 V601 argues that Cox's apportionment methodology for assessing delay damages results in the inclusion of amounts that have already been allowed in the original Contract Sum, and which cannot be said to have been incurred as a result of a delay for which an extension of time should be granted. V601 argues that supervision costs are a clear example, because supervisors like Bready would always have to be on site for the duration of the WUC works and, even if Bready had to spend more time attending to delayed portions of the works, no additional costs would be incurred by Probuild.

1080 Birchall's thesis is that Probuild can only recover additional costs, in the nature of supervisory costs and the costs of labour, if it can prove that it was delayed beyond SP7.[833]

1081 V601 also argues that Probuild can only recover additional costs of labour if it is able to demonstrate that specific labourers were assigned to Separable Portions which were delayed.

1082 Probuild contends that if an extension of time caused delay to SP7 and Bready was required to be on site for longer, then this would give rise to Probuild incurring additional costs and those costs should be compensable because they have not already been allowed for in the Contract Sum.[834]

Assessment

1083 V601 disputes Cox's statement that the Contract does not provide guidance on how delay costs are to be calculated.[835] V601 also disputes the methodology which Cox

833 V601 Closing Submissions, 12 June 2019, [334].
834 V601 Closing Submissions, 12 June 2019, [325]–[332].
835 Cox Second Report, [4.1(b)].

employs to calculate delay costs relevant to Separable Portions;[836] namely, by applying delay damages in the percentage of the contract value attributable to the Separable Portion in delay.

1084 V601's substantive reasons for rejecting Cox's methodology are that Cox's methodology is not permitted by the Contract and that Cox's assessment overstates Probuild's entitlement to delay damages,[837] leading to a windfall payment for onsite costs already covered in the Contract price.[838]

1085 V601 also challenges the lack of detail provided by Probuild to support the additional costs claimed which, V601 submits, require proof that they were incurred in relation to each Separable Portion impacted by a particular EOT. V601 illustrated this point by stating that if, for example, resources had been retained on site for an additional seven days as the result of a delay giving rise to an extension of time, Probuild is required to identify which Separable Portion was being worked on and the number of days associated with this work.[839] In this respect, V601 submits that claiming a percentage of the relevant total cost of the site for a day is not a sufficient adjustment and could result in claims for costs unrelated to the extension of time and/or costs covered by the Contract sum.[840]

Allowable costs

1086 V601 also submits that Cox's apportionment methodology has resulted in costs being claimed as delay damages that are already covered under the Contract sum, and the inclusion of Probuild's costs which have not been 'incurred' in relation to an extension of time. V601 submitted that a more appropriate test for such delay damages is the 'but for' approach applied by Birchall. That is, Probuild must 'demonstrate that those costs would not have been incurred if it were not for the

836 Cox Second Report, [5.9]–[5.12].
837 Birchall First Report, [5.21]–[5.24].
838 V601 Closing Submissions, 12 June 2019, [322].
839 V601 Closing Submissions, 12 June 2019, [323].
840 V601 Closing Submissions, 12 June 2019, [324].

EOT'.[841]

1087 **Supervision costs:** An example provided by V601 of disputed costs concerned supervision costs attributed to Bready, Probuild's Construction Manager. V601 submits that Bready was required to be on site for the duration of the WUC, and thus had 'already been paid for'. In response to Probuild's assertion that Bready had to spend additional time supervising the separable portions in delay, V601 submitted that unless Probuild can show that the relevant delay 'caused it to bring on an additional supervisor for a period of time', then it cannot claim that costs were incurred.[842] However, where an extension of time caused delay to SP7 and Bready was required to spend additional time on site, V601 accepts that such costs would not be covered by the Contract sum and would be compensable.[843]

1088 **Labour costs:** V601 put forward a similar argument in relation to labour costs. It responded to Probuild's assertion that Birchall identified no evidence or instruction to support his assumption that Probuild had always intended to have a general pool of labour on site to allocate where required[844] by highlighting that Cox had not provided evidence to support his contrary assumption; that is, there was no general pool of labour.[845]

1089 Based on Birchall's analysis, V601 submitted that Probuild could only recover additional labour costs if it could show that specific labourers were allocated to Separable Portions in delay. On V601's thesis, if Probuild was able to show that the labourers were required on site beyond the duration of the WUC (eg, delay to SP7), and in excess of the labour costs which were covered by the Contract sum, then Probuild could claim '100% of those costs'.[846] V601 submitted that Cox's analysis resulted in claims for the cost of 'any labourers' allocated to Separable Portions in

841 V601 Closing Submissions, 12 June 2019, [325]–[326].
842 V601 Closing Submissions, 12 June 2019, [327].
843 V601 Closing Submissions, 12 June 2019, [328].
844 See Probuild Closing Submissions, 11 June 2019, [306(a)].
845 V601 Closing Submissions, 12 June 2019, [332].
846 V601 Closing Submissions, 12 June 2019, [329]–[330].

delay.[847]

1090 V601 submitted that Probuild bears the onus of proving that it incurred additional labour and supervision costs in relation to specific Separable Portions associated with extensions of time; if not, V601 argues, such costs cannot be claimed.[848] Further, V601 submitted that Probuild must prove 'that the amounts claimed are over and above the labour and supervision costs' already accounted for in the Contract sum.[849] V601 points to Birchall's analysis which, it says, shows that these additional costs are only recoverable for a delay beyond SP7, because the 'contract sum incorporates the cost of labour and supervision to the planned completion of SP7'.[850] V601 also criticises Cox's position in relation to this issue as unsupported by evidence and lacking any concessions by Cox during the Joint Experts Conclave.[851] V601 rejects as inappropriate, Probuild's suggestion that the Court should proceed to make an appropriate estimate of damages if it were unpersuaded by Cox's methodology.[852]

Miscellaneous quantum issues: Crane costs

1091 Additionally, V601 rejects Cox's delay damages allowance for one working day per month of non-productive time (ie, tool-box meetings and wet weather) in respect of the cranes.[853] V601 submitted that Cox's analysis assumes that Probuild has taken on the risk of such events occurring and is thereby required to pay a higher rate for the cranes to accommodate those events. V601 also submitted that Probuild has taken this risk under the Contract and that, if there is downtime of the type identified, then 'it is Probuild's responsibility to deal with this issue'.[854] V601 points out that Birchall's calculation of the daily cost does not reflect a higher figure for non-productive time, and therefore does not incorporate this cost.

847 V601 Closing Submissions, 12 June 2019, [331].
848 V601 Closing Submissions, 12 June 2019, [332].
849 V601 Closing Submissions, 12 June 2019, [333].
850 V601 Closing Submissions, 12 June 2019, [334].
851 V601 Closing Submissions, 12 June 2019, [334].
852 Probuild Closing Submissions, 11 June 2019, [307].
853 V601 Closing Submissions, 12 June 2019, [336].
854 V601 Closing Submissions, 12 June 2019, [337].

1092 V601 also notes by its submissions that Birchall's calculations for daily rates relating to crane crews, although not in evidence, are available on request; however, V601 observes that no such request has been made by Probuild.[855]

Probuild's reply closing submissions

Apportionment

1093 Probuild submits that V601's apportionment argument is based solely on cl 4(b) of the Contract and fails to engage with the textual and contextual features[856] that Probuild argues, 'point against any apportionment requirement'. Probuild observes that V601 continues to require apportionment of delay costs against separable portions and yet at the same time V601 asserts that Cox's proposed method is 'not permitted' by the Contract.[857]

1094 Further, Probuild also points out that V601 does not provide an alternative methodology or alternative calculations by which apportionment could be appropriately applied if the Court considered that to be necessary.[858]

1095 In relation to V601's reliance upon cl 4(b), Probuild submits that:

> Although it attaches a particular meaning to the terms '*Date for Practical Completion*', '*Date of Practical Completion*' or '*Practical Completion*', none of these terms are used in clause 34.9 with reference to Probuild's delay costs entitlement. Further, the mere statement that clause 34 'shall apply to each *Separable Portion*' does not compel the apportionment of delay damages. It merely confirms, for clarity, that each separable portion may be the subject of an extension of time claim, and thereby produce an entitlement to delay damages.[859]

1096 Probuild also submits that V601's claim that Cox's methodology has resulted in delay damages which include costs already covered by the Contract sum, and costs

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855 Probuild Closing Submissions, 11 June 2019, [316]. Probuild referred to these calculations as not having been 'disclosed'. See, eg, T1589.29–T1590.1; T1599.17–18; T1604.29–T1605.4; T1606.28–T1607.6. V601 Closing Submissions, 12 June 2019, [339].

856 See Probuild Closing Submissions, 11 June 2019, [303]–[305].

857 V601 Closing Submissions, 12 June 2019, [322].

858 Probuild Reply Closing Submissions, 12 June 2019, [156].

859 Probuild Reply Closing Submissions, 12 June 2019, [157].

not incurred by an extension of time,[860] is unsubstantiated and unsupported by any relevant analysis of the Contract sum.[861]

1097 In relation to supervision costs, Probuild rejects V601's contention that only in the period of time by which the performance of SP7 was extended can Probuild recover delay-related costs.[862] Probuild submits, for example that, based on Lyall's analysis, 'SP7 was delayed by much earlier events, such as those giving rise to Probuild's EOT 2A and 7 claims'. Probuild argues that its recoverable delay-related costs include the costs it incurred during this period of delay.[863]

Probuild's quantum evidence

1098 Probuild's quantum claim is supported by the expert evidence of Mr Mike Cox, a Chartered Quantity Surveyor (Currie & Brown), with more than 35 years' experience in the construction industry and extensive experience in the preparation of estimates, cost planning, managing works, and finalising accounts and various types of projects, including residential and mix-use developments of the type constituting the Precinct Project.

1099 As an integer, Cox's calculation utilises the periods of critical delay for each of the Separable Portions which were delayed as identified by Lyall in his programming analysis and evidence. Cox summarises his calculations in relation to delay damages in Appendixes B and C of his June 2018 report for each period of delay in 2012 and 2013.

1100 In the Cox First Report, Cox proffers the following overall conclusions in relation to delay costs:[864]

> 4.1. Based upon the information available:
> a) My assessment of the proper valuation of the reasonable and necessarily incurred direct onsite time related costs is $3,156,664 in

860 V601 Closing Submissions, 12 June 2019, [325].
861 Probuild Reply Closing Submissions, 12 June 2019, [158].
862 V601 Closing Submissions, 12 June 2019, [327]–[328].
863 Probuild Reply Closing Submissions, 12 June 2019, [159].
864 Cox First Report, [4.1(a)]–[4.1(c)].

relation to calendar year 2012 and $6,316,403 in relation to calendar year 2013 providing for an overall cost of $9,473,067 excluding GST (based upon a calculation of 232 working days) and without any further consideration to any adjustment for concurrent working or due to the cap on delay damages as noted under Item 31B of the Contract Annexure;

b) In my opinion the costs referred to in paragraph 4.1 a) above would also be the additional costs that Probuild reasonably incurred by reason of the events giving rise to the EOT claims preventing Probuild from achieving Practical Completion by the certified Dates for Practical Completion;

c) In terms of any further adjustment to the costs identified in paragraph 4.1a) due to the cap on delay damages and the details provided under Item 31B of the Contract Annexure, I can confirm that I have not considered this matter further as I believe any adjustment or calculation to fall under Contract interpretation. On the basis this is a question of law, I believe any adjustment falls outside my area of expertise[.]

1101 In extract 4.1(a) above Cox addresses the overall delay cost in respect of the total period of 232 days of delay.[865] It is to be noted that at 4.1(b) above Cox opines in substance that the gross costs referred to in 4.1(a) above also inform the cost of the delays which are the subject of Probuild's EOT claims in this proceeding.

1102 It is to be noted that Cox's First Report does not adjust for concurrent work on Separable Portions of the WUC, nor does he apply the Contract Item 3.1B 'Cap'.

1103 Neither does Cox's First Report appear to calculate how delay damages overlap or can be separated from Acceleration costs claimed by Probuild which appear to be applicable to a number of periods over which the WUC was performed.

1104 However, in Cox's subsequent Second Report he opines as to the adjustment to delay costs necessary to take into account that Probuild's reasonable and necessarily incurred direct on-site time-related costs arose in respect of seven Separable Portions of the WUC which on a number of occasions experienced overlapping (concurrent) delays and which each probably utilised a percentage of the same direct on-site time-related costs.

865 T1581.10–18.

Expert evidence on delay damages

Expert reports of Mike Cox

Delay periods

1105 As earlier pointed out, the Cox First Report identifies the periods of delay adopted from Lyall's reports and conclusions.[866] For the purpose of calculating delay damages, Cox has broken up the period over which construction on the Precinct Project was undertaken into a series of 20 Delay Periods.[867]

1106 In the appendices to his First Report, Cox sets out the costs that he identified across the 20 discrete Delay Periods.[868] He also identifies the materials which he used to calculate the proper valuation to be attributed to the on-site preliminaries.[869]

1107 Cox's First Report includes the following detail in relation to his assessment of delay damages:[870]

> Assessment of delay damages costs
> 5.13. From a review of the information provided an assessment of a valuation of the reasonably incurred direct on-site time related costs has taken place and is included within Appendices B and C of this report;
> 5.14. The costs had been identified across the 20 Delay Periods and for ease of review are noted as events 2012.1 to 2012.9 (for Delay Periods 1–9) and 2013.1 to 2013.11 (for Delay Periods 10–20) With each event cross-referencing to the assumed working days as noted within paragraph 5.2 of this report;
> 5.15. The assessment of costs generally falls under four categories and further details are now provided in terms of the assessment process and overall calculation. These categories are:
> a) Site based supervision staff;
> b) Site labourers;
> c) Cranage and hoists; and
> d) Balance of site costs.

1108 The Cox First Report also in my view persuasively explains the assumptions underlying his calculations, including those relating to crane and hoist costs, certain

866 Cox First Report, [5].
867 Cox First Report, [5.2].
868 Cox First Report, [5.4] and Appendices.
869 Cox First Report, [5.5]–[5.12].
870 Cox First Report, [5.13]–[5.15].

other specific preliminaries, site-based supervisory staff and their attendance on site, and his treatment and calculation of adjustments and allowances.[871]

1109 The Cox First Report, and similar disclosures in the Second and Third Reports, each provide a detailed account of the instructions and materials provided to Cox as part of his brief.[872]

Cox Second Report – evidence in relation to apportionment

1110 In Cox's Second Report of 26 October 2018, he addresses apportionment in accordance with the instructions provided by Probuild's lawyers. Cox provides his expert opinion in relation to:

(a) a reasonable methodology for apportioning Probuild's reasonable and necessarily incurred direct on-site time-related costs, including on-site preliminary costs, in relation to Separable Portions that are subject to an extension of time claim and an entitlement to delay damages pursuant to cl 34.9 of the Contract; and

(b) applies this methodology to each extension of time entitlement identified by Lyall in his First and Second Reports so as to apportion Probuild's reasonable and necessarily incurred direct on-site time-related costs, including on-site preliminary costs, to each Separable Portion.

1111 At [5.4] of his Second Report, Cox notes that based on the program information with which he was provided, a number of extension of time events, and their associated impacts on Separable Portions, are concurrent across the earlier identified 20 Delay Damage Periods.

1112 Section 5 of the Cox Second Report outlines Cox's methodology for apportioning Probuild's reasonable and necessarily direct delay costs for each Separable Portion

871 Cox First Report, [5.16]–[5.18].

872 Cox First Report, [Appendix M and N]; Cox Second Report [Appendix H], and Cox Third Report [Appendix E].

subject to an extension of time claim. Cox explains that in assessing the delay damages claim he has segregated the costs per day (which had earlier been identified in the Cox First Report) into a number of heads of claim including Supervision, General Labour, Cranes/Hoists, and additional Preliminary Costs.

1113 In my view, the Cox Second Report chronologically and carefully and logically explains the underlying rationale for his methodology, which includes the identification of key considerations, and an explanation of the approach adopted to calculate the General Labour component of the delay damages claim by reference to the contract values of the Separable Portions.

1114 In his Second Report, Cox has explained that he used an approach similar to the one adopted for General Labour costs and his assessment of Supervision costs, together with a further adjustment identified at paragraphs [5.23] and [5.24] of Cox's Second Report.

1115 In his Second Report, Cox also explained that the crane and hoist costs involved different methods of calculation to those applied to the balance of items, with the crane and hoist costs being allocated to specific buildings, and the balance of costs assessed for each day of the claim, but calculated by reference to the overall delay to Practical Completion of the Project.

1116 Cox's apportionment of delay costs as between Separable Portions has been calculated as follows:[873]

(a) **General Labour Costs:** These costs were determined to show the extent to which work in a delayed separable portion was part of the outstanding work in the overall project.[874]

I note in relation to this item Probuild submitted that Birchall's views on this

873 Probuild Closing Submissions, 11 June 2019, [306(a)]–[306(d)] (footnote references to evidence included).

874 Cox Second Report, [5.17]–[5.20].

approach should be rejected, as no evidence was provided to support his assumption[875] that the intention was always to have a general pool of labour;

(b) **Supervision Costs:** In accordance with Cox's formula, the Experts agreed that a disproportionate amount of supervision had been allocated to separable portions in delay.[876] Probuild however submitted that Birchall's methodology only accounted for supervision costs if delay affected SP7, and did not factor in costs relating to delays for other separable portions.[877]

Probuild also pointed out that Birchall had not considered where Probuild's supervision staff were located.[878] In this respect, Probuild contended that Birchall's approach would result in it not being compensated for supervision costs in many portions of the WUC.

(c) **Cranes and hoists:** Cox allocated the costs for these items to Buildings B and E, the two largest buildings. Cox explained that one of the principal reasons for doing so was that cranes and hoists could not be demobilised until work had progressed to a satisfactory stage.

Although other separable portions might have used the equipment during delay periods, Probuild pointed out that any over-entitlement for these buildings as a result would be compensated for by under-entitlements for the other separable portions.[879]

(d) **Balance of preliminaries:** Costs were allowed by Cox for each day of delay to SP7, including overhead costs such as bank guarantee fees, insurance, site

875 Birchall's assumption is evident on p. 7 of the Quantum Experts' Joint Report 1 (see 2.2. *General Labour costs*).

876 See Cox Second Report, [5.21]–[5.27]; T1601.8–T1602.6, in which Birchall conceded that, if the project manager (Bready) had to attend to an extension of time event and thus take time away from other issues, then it might be necessary to engage others to assist.

877 T1601.8–13 and T1602.20–25.

878 T1589.3–27.

879 Relying upon Cox Second Report, [5.28]–[5.30]. See esp, [5.30(e)] on this latter point.

sheds and miscellaneous costs.[880] Probuild pointed out that such costs were consistent with Birchall's analysis.

1117 Probuild submits that if the Court considers that apportionment is required, the Court should accept Cox's apportionments of delay damages between Separable Portions, especially given the absence of calculations underpinning Birchall's assertions and conclusions in the Quantum Experts' Joint Report 2. Probuild also submits that if the Court finds that Cox's methodology is flawed in some way, then the Court should nevertheless do its best to arrive at an appropriate estimate of Probuild's delay damages entitlement.[881]

1118 In conclusion, Cox opines in relation to the proper quantification of delay damages, on an apportioned basis, that Probuild's reasonable and necessarily incurred direct on-site time-related costs, including on-site preliminary costs referable to Separable Portions are as follows:[882]

i. EOT 2/2A, Separable Portion 3 – $25,812;
ii. EOT 2/2A Separable Portion 4 – $855,519;
iii. EOT 3 Separable Portion 1 – $30,022;
iv. EOT 3 Separable Portion 6 – $435,904;
v. EOT 3 Separable Portion 6A – $33,917;
vi. EOT 6 Separable Portion 2 – $170,223;
vii. EOT 6 Separable Portion 5 – $96,033;
viii. EOT 7 Separable Portion 1 – $99,176;
ix. EOT 7 Separable Portion 3 – $303,981;
x. EOT 7 Separable Portion 4 – $910,458;
xi. EOT 7 Separable Portion 5 – $224,153;
xii. EOT 7 Separable Portion 6 – $451,779;
xiii. EOT 7 Separable Portion 6A – $117,324; and
xiv. A total of $3,754,302.

Cox's apportionment methodology

1119 Cox explains at [5.5]-[5.38] of his Second Report that in order to appropriately apportion delay damages to take into account certain concurrent extensions of time

880 Cox Second Report, [5.31]–[5.36].

881 Probuild Closing Submissions, 11 June 2019, [307]. On this point, Probuild cited the following authorities as examples: *Chaplin v Hicks* [1911] 2 KB 786, 792 (Vaughan Williams LJ); *Commonwealth v Amann Aviation Pty Ltd* (1992) 174 CLR 64, 120 (Deane J).

882 Cox Second Report, [4.1(g)]; see also Cox Quantum Experts Joint Report 2 (13 February 2019) Annexure A (A1), Cox Assessments based on Lyall 1A.

applicable to a number of Separable Portions, he has reviewed the Contract Sum and identified the value of individual Separable Portions comprising the Contract Sum, thereby arriving at a figure and the approximate percentage of the total contract sum constituted by each Separable Portion, excluding variations or additional approved works.[883]

1120 As part of this analysis and calculation, Cox outlines and considers various possible forms of apportionment, and I consider does so in a cogent and persuasively detailed way. Cox explains how other possible forms of apportionment are not as appropriate as the methodology that he has ultimately adopted and applied.[884] Cox also explains exactly how he arrived at and applied the methodology that he ultimately adopted.[885]

1121 For the above reasons, in my view, Cox's methodology and calculation of the appropriate apportionment of direct on-site time-related costs, including on-site preliminary costs in respect of each Separable Portion is a fair and reasonable and appropriate adjustment of recoverable delay costs in accordance with, and within the limitations imposed by cl 34.9(a) taking into account the claimed extensions of time concurrently applicable across a number of Delay Damage periods and Separable Portions.

1122 I am satisfied that Cox's apportionment methodology and calculations are consistent with the contractual requirement in cl 34.9(a), including in particular that recoverable delay damages are reasonable and actually incurred by Probuild. I also consider that such apportionment is necessary to prevent impermissible double recovery of delay damages under cl 34.9 of the Contract. In my view, it is beyond any argument that cl 34.9 and associated delay damages provisions of the Contract reflect no intent by the parties to compensate for delays beyond the reasonable cost of relevant delay actually incurred, and subject to the Contract's prescriptions as to

883 Cox Second Report, [5.6].
884 Cox Second Report, [5.23]–[5.24].
885 Cox Second Report, [5.28]–[5.38].

what delay costs are within the Contract's entitlement.

1123 Further, for the above reasons I reject V601's contention that Cox's methodology would significantly overstate Probuild's entitlement to delay damages and would result in a windfall payment of on-site costs already included in the Contract price.

1124 I am satisfied that Cox's delay cost calculations reflect the reasonable direct delay costs incurred by Probuild in supporting an extended period of performance on site and note that cl 34.9(a) provides for the Contractors' recovery of on-site time-related costs, including on-site preliminary costs. I also note that Birchall advances no persuasive alternative apportionment methodology.

Cox Third Report – Responses to the SJA Reports

1125 Cox's Third Report deals with Cox's response to Birchall's evidence on Probuild's Acceleration Costs and responds to the SJA Report on these issues, delay damages, and the attacks upon Cox's Façade Return Wall Variation evidence. Cox's Third Report also establishes the extent of Probuild's delay cost, and support Probuild's Aceleration claim costs and Probuild's Façade Variation valuation.

1126 Finally, in the Quantum Experts' Joint Report 2, Cox refers to many of his underlying opinions and sets out his ultimate assessments of Probuild's delay cost entitlements.[886]

1127 Cox's evidence also opines as to the costs incurred by Probuild in accelerating the works under the Contract and Cox addresses the proper valuation of Probuild's Façade Variation claim.

1128 In Cox's First Report [6] and Cox's Reply Report [4.1]–[4.3], [5.3]–[5.8], Cox reviews Probuild's Acceleration claim items and explains the basis of his opinion that the costs verified in Bready's witness statement of 23 February 2018, as components of Probuild's acceleration cost claim of $1,706,536.81, reflect the typical costs incurred

886 Quantum Experts' Joint Report 2, Annexure A, A.1 'Cox Assessments'.

by a contractor in accelerating the works.

1129 Additionally, at [7] of his First Report and at [4.4]–[4.8] and [5.9]–[5.18] of his Reply Report, Cox deals with Probuild's façade variation claim of $520,436,[887] including by reference to Bready's proof of items in Appendix 6 to Probuild's closing submissions of 11 June 2019.

1130 I also note in this regard that in his first witness statement, Bready 1 at [618]–[636], Bready verifies and seeks to establish Probuild's acceleration claim in the sum of $1,706,536.81.

1131 V601 did not seek to put on detailed evidence to refute Probuild's itemised acceleration costs.

Conclusions in relation to Cox's evidence

1132 I am satisfied that Cox's reports have been carefully compiled and that Cox's methodology and analysis is logical and appropriate.

1133 Furthermore, I consider that, in a cogent and reasonable way, Cox separately assesses delay damages for each Separable Portion, by calculating the overall direct delay related costs referred to in cl 34.9(a), and by rational and reasonable adjustment makes allowance for each Separable Portion if, for a period of delay, Probuild's direct delay-related costs were applicable to more than one Separable Portion. That adjustment is explained above.

1134 Further, I am persuaded that Cox's analysis and conclusions on apportionment in the Cox Second Report are logical and persuasive and calculate an appropriate adjustment of costs as between separable portions.

Expert reports of Neil Birchall

Delay damages — Birchall Reports

1135 V601's quantum expert, Birchall (Area Manager Construction Consulting for SJA

887 Cox First Report, [7]; Cox Reply Report, [4.21], [5.9]–[5.18].

Construction Services Pty Ltd) has produced the Birchall First Report, the Birchall Second Report, and the Third Birchall Report (Addendum dated 17 October 2018), which Probuild's expert, Cox, responds to in the Cox Second and Third Reports.

Birchall First Report

1136 The Birchall First Report sets out a summary of Birchall's experience and qualifications as a lawyer, an arbitrator, and a person holding a Higher National Diploma of Building. Birchall refers to having been taught and examined in the practice and procedures of Quantity Surveying. Birchall also refers to his 30 and more years of employment in the construction industry, during which he has worked for contractors, subcontractors, consultants, suppliers, and owners/principals, and occupied positions including as a Quantity Surveyor, Estimator and Surveyor, Managing Quantity Surveyor, and Commercial Manager. Birchall also refers to having undertaken numerous forensic Quantity Surveying commissions, including the ascertainment of cost to complete, in relation to the valuation of construction works.

1137 Birchall refers to having conducted his own investigation and analysis of the Probuild Claim in respect of delay damages.

1138 Birchall's First Report puts forward his analysis and opinions in relation to the interpretation and operation of a number of clauses of the Contract.[888] Notwithstanding having undertaken the aforementioned exercise, Birchall states that proper application of the contractual provisions is a matter for legal submissions and that he has not considered the effect of the provisions upon his assessment.[889]

1139 Birchall opines that his investigation and analysis identified fundamental errors in the Cox First Report which render Cox's assessment incorrect and his opinions unreliable, specifically because Cox fails to take into account a number of matters.

888 Birchall First Report, [5.6], [5.9], and [5.11].
889 Birchall First Report, [5.7].

Those matters are, in Birchall's view:[890]

(a) Cox fails to separately assess delay damages for each Separable Portion (ie, 20 overlapping delay periods, totalling 232 days of delay identified by expert programming evidence which affects differing combinations of Separable Portions concurrently). Birchall states that Cox failed to assess the delay damages by reference to specific Separable Portions;

(b) Birchall opines that by adopting the above course, Cox fails to consider only those reasonable and necessarily incurred direct on-site time-related costs, including on-site preliminary costs, that are properly referable to the relevant Separable Portion, and so much of the Works and WUC as is comprised in the Separable Portion;

(c) Cox's counted days which are specifically excluded under cl 34.9, by including three days of state-wide industrial action in the Overlapping Delay Periods. Birchall notes that days are not compensable under cl 39.4 of the Contract;

(d) Cox fails to account for the period during which resources were planned to be on-site, in particular the delay damages for each delay included costs for the Construction Manager, the Project Manager, and numerous other members of Probuild's staff who, for the most part, were usually required on the construction project for the duration of the Project. Accordingly, in Birchall's opinion, their costs are referable only to SP7, except for the Design Manager/Services whose tasks would probably have been completed before completion of instructed work. Birchall opines that Cox has failed to recognise that these costs would have been incurred up to the original Date for Practical Completion regardless of delay, and Birchall asserts that Cox has therefore overstated Probuild's entitlement to delay damages;

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890 Birchall First Report, [5.17]–[5.29].

(e) In Birchall's judgement, Cox's calculation of actual costs for salaried employees is 30% above what it should be; and

(f) Cox's weekly charge in relation to crane and crane crews is based on 17 working days per calendar month, whereas it should be 18.33 calendar days per month.

Acceleration costs

1140 Birchall observes that his investigation into Probuild's claim for acceleration costs addresses only the sums claimed, and not whether Probuild actually increased its rate of progress and accelerated the WUC works thereby incurring additional costs.

1141 Birchall opines that Cox's evidence takes only a cursory view of Probuild's claimed costs and does not proffer a reliable opinion as to the amount of those costs.

Façade return wall variation

1142 The Birchall First Report addresses the evaluation of Probuild's variation claim in relation to the façade wall. Birchall initially asserts that his investigation addresses the valuation of the façade return wall variation claim but not whether the variation is valid.[891] However, Birchall then proceeds to consider whether or not the facts and circumstances give rise to a variation under the Contract in relation to the façade return walls.[892]

1143 In relation to the pricing of the precast wall work, Birchall opines typical costs to support what he asserts to be a proper valuation of the façade variation (if such a variation is established), in a range of $22,000 to $113,000 (approximately), depending on the system used to complete that work.[893]

1144 Birchall's First Report, I note, provides no detailed costing calculations or workings.

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891 Birchall First Report, [5.39].
892 Birchall First Report, [5.46]–[5.52].
893 Birchall First Report, [5.69].

Birchall Second Report

1145 As with his First Report, in his Second Report Birchall opines on questions of contract interpretation and application,[894] although at [5.9] he again refers to the application of contractual provisions being a matter for legal submissions and states that he did not consider the effect of the relevant provisions on his assessment.

1146 Birchall states at [5.13] that, 'in my view … delay damages equally apply to each Separable Portion and accordingly, are limited to those reasonable and necessarily incurred direct on-site time-related costs including on-site preliminary costs that are properly referable to the Separable Portion and to so much of the Works and WUC as is comprised in the Separable Portion'.

1147 At [5.16], Birchall states that he has analysed the document relied upon for Cox's First Report to identify and verify the underlying substantiation (if any) of the amounts claimed.

1148 However, as with his First Report, Birchall provides very little in the nature of calculations or detailed workings in support of his Second Report, in my view rendering it very difficult and probably impossible for either Probuild, or the Court, to adequately understand and analyse that Report, or to enable Probuild to interrogate relevant calculations and workings which may have supported Birchall's First and Second Reports. As earlier observed, the same deficit exists in respect of a large number of specific items of Cox's costing which Birchall put in issue in Birchall's first report.

1149 Birchall's Second Report does however provide limited but basic calculations in relation to a number of items relevant to Probuild's delay costs claim. However, for the most part, in my view, what detail there is refers to a number of line item comments on Cox's earlier significantly more comprehensive and detailed primary calculation of relevant costs found in Cox's First Report. Birchall's Appendix C

894 Birchall Second Report, [5.7]–[5.15].

simply notes Birchall's differences in relation to a number of assessments and also notes where, in Birchall's opinion, certain costs in his view require adjustment.

1150 In Appendix D of the Second Report, Birchall records his calculation of relevant EOT periods for Separable Portions and, in Appendix E, Birchall allocates delay damages to Separable Portions.

1151 Birchall addresses crane costs at [5.19]–[5.21] of his Second Report and notes, in Birchall's Appendix C, how his assessment differs from Cox's. Birchall also summarises the adjustments he would make to Cox's calculation of costs.

1152 Birchall opines that, although he cannot identify specific working days for each of the relevant extensions of time with accuracy, he has nevertheless been able to identify the broad time-frame within which events occurred, and from that has been able to establish the typical daily cost based on an average of the available records. These calculations are contained in Appendix D to Birchall's Second Report.[895]

1153 Birchall explains his calculation of total cost per working day, which reflects his assessment of the amount of delay damages in relation to each Separable Portion in respect of a particular extension of time, as set out in Appendix E to Birchall's First Report.

1154 Birchall also calculates his delay damages on alternative bases: using a multiplier based on the Project Manager's assessment of Probuild's extension of time entitlements; and alternatively, on the basis of Probuild's assessment of extension of time entitlements, as analysed in the Lyall Second Report.[896] Birchall's conclusions are as follows:[897]

> EOT2/2A
> 6.2 I assess the delay damages due to Probuild on account of EOT2/2A:
> (a) in the sum of $227,182.38 based on the Nave assessment of the EOT periods; alternatively

895 Birchall Second Report, [5.30] and [5.34]–[5.35].
896 Birchall Second Report, [6.1].
897 Birchall Second Report, [6.2]–[6.11].

(b) in the sum of $519,221.19 based on the Second Lyall assessment of the EOT periods.

6.3 This EOT did impact the Date for Practical Completion of the Project and/or SP7, therefore, this EOT did prolong the period that the Whole of Project Duration costs would be on site.

6.4 This EOT did impact the Date for Practical Completion of SP's 3 and 4.

EOT3

6.5 I assess the delay damages due to Probuild on account of EOT3:

(a) in the sum of $59,668.18 based on the Nave assessment of the EOT periods; alternatively

(b) in the sum of $83,535.45 based on the Second Lyall assessment of the EOT periods.

6.6 This EOT did not impact the Date for Practical Completion of the Project and/or SP7, therefore, this EOT did not prolong the period that the Whole of Project Duration costs would be on site.

6.7 This EOT did impact the Date for Practical Completion of SP's 1, 6 and 6A.

EOT6

6.8 I assess the delay damages due to Probuild on account of EOT6:

(a) in the sum of $28,155.47 based on the Nave assessment of the EOT periods; alternatively

(b) in the sum of $151,179.82 based on the Second Lyall assessment of the EOT periods.

6.9 This EOT did not impact the Date for Practical Completion of the Project and/or SP7, therefore, this EOT did not prolong the period that the Whole of Project Duration costs would be on site.

6.10 This EOT did impact the Date for Practical Completion of SP's 2 and 5.

Overall assessment

6.11 I assess the total of the delay damages due to Probuild by reason of the EOT's I am instructed to consider to be:

(a) $315,182.02 based on the Nave assessment of the EOT periods; alternatively

(b) $753,936.45 based on the Second Lyall assessment of the EOT periods.

1155 In Birchall's Second Report, other than a number of line items which comment on some of Cox's calculations and note the variance in the unit, quantity or rate used in Cox's calculations, Birchall, unlike Cox, does not appear to undertake, or commence with, costings based on the primary Probuild Project Costing Records.

1156 Furthermore, as separately observed in relation to his estimates in respect of Probuild's Façade Variation claim, in Birchall's costing of Probuild's delay damages and Façade Variation, Birchall notes variances with cost on certain line items

(Birchall's Appendix C to his Second Report); however, in respect of a very large number of variances noted by Birchall, he does not provide any explanation or rationale of his asserted calculation. Birchall also, on many occasions, asserts that a cost is irrelevant to a section of costing and has therefore been excluded, however, he does not explain the basis of the irrelevance which he asserts.

1157 I also note that Birchall does not consider EOT7 which relates to town planning approval of the acoustic windows on the Precinct Project.

Birchall Third Report (Addendum dated 17 October 2018 to Birchall Second Report)

1158 By an addendum of 17 October 2018, Birchall responds to Cox's Second Report in relation to Birchall's assessment of Probuild's delay damage entitlement for EOT2/2A, EOT3, EOT6, and EOT7. Birchall applied his calculation of delay damages to the time-extension periods which Abbott considered appropriate for EOT2/2A, EOT3, and EOT6.

1159 Birchall assesses the total of delay damages due to Probuild in the sum of $241,507.01. Birchall also excludes specific days of delay from his assessment of delay damages to correspond with the identification in Abbott Second Report of overlapping non-qualifying and qualifying causes of delay. Birchall excludes specific days, in respect of fully overlapping current delays and partially overlapping concurrent delay. Birchall also excludes a number of days equivalent to the sum total of partially overlapping days.[898]

1160 Birchall's conclusion in relation to the delays identified by V601's expert, Abbott, is set out at [6.2]–[6.5] of the Birchall Third Addendum Report, which summarises Birchall's conclusions as follows:

> EOT2/2A
>
> 6.2 I assess the delay damages due to Probuild on account of EOT2/2A in the sum of $127,890.30.
>
> EOT3

[898] Birchall Third Report, [5.6]–[5.8].

6.3 I assess the delay damages due to Probuild on account of EOT3 in the sum of $81,225.41.

EOT6

6.4 I assess the delay damages due to Probuild on account of EOT6 in the sum of $32,391.30.

Overall assessment

6.5 I assess the total of the delay damages due to Probuild by reason of the EOT's I am instructed to consider to be $241,507.01.

1161 In the Quantum Experts' Joint Reports, particularly the more conclusive Quantum Experts' Joint Report 2, Birchall provides his final quantum conclusions, including as to the apportionment of delay damages to each Separable Portion the subject of an EOT claim.[899]

Considerations/conclusions – Apportionment of delay damages

1162 The Contract does not expressly provide for apportionment of delay damages in respect of working days that are the subject of extensions of time, including overlapping extensions of time and extensions of time, for more than one applicable Separable Portion.

1163 Clause 34.9 refers to the Contractor's entitlement in terms of an entitlement to costs arising 'for every Working Day the subject of an EOT …'

1164 The clear intent of cl 34.9 (Delay damages) of the Contract is to entitle the Contractor to payment of reasonable and necessary direct on-site time-related costs incurred, including on-site preliminary costs (excluding other overhead costs, any allowance for profit or loss of profit, and all consequential losses) subject to the caps prescribed in Items 31A and 31B of Annexure Part A.

1165 In my view it is most improbable that V601 and Probuild intended by cl 34.9 and Annexure Part A (Item 31A and 31B) that the Contractor would recover delay damages to the Contract-specified rate for delay to multiple Separable Portions, in

899 In Quantum Experts' Joint Report 2, [10], and Quantum Experts' Joint Report 1, Issue 1, Birchall's calculations of delay damages are predicated on Abbott's conclusions in relation to critical delay and Probuild's time extension entitlements.

circumstances where a delay concurrently effected more than one Separable Portion, and where as a result Probuild would recover up to the Contract-specified rate of damages for delay multiple times, and in circumstances where the applicable direct on-site, time-related costs including on-site preliminary costs incurred by Probuild were the same costs incurred in respect of many, if not all, Separable Portions of the WUC.

1166 In relation to the above issue, Probuild argues that an apportionment of delay damages is not contractually required or permitted because the Contract does not expressly provide for apportionment and fails to provide any method of apportionment. Further, Probuild points out that the Contract expressly provides for a specified sum of delay damages for each day of time extension granted.

1167 Probuild's argument has some force, including because Annexure Part A proscribes separate daily and aggregate caps for delay damages, but does not, in relation to delay damages refer to different Separable Portions of the Works. This contrasts with the daily rates for liquidated damages and bonus payments which are tied to the relevant Separable Portions of the Works. Probuild's argument that Items 31A and 31B of Annexure Part A of the Contract would, if apportionment was contemplated, specify separate amounts, or a mechanism, dealing with a method of apportionment applicable to Separable Portions, is also of some force particularly if, as V601 argues, claims for delay damages must be awarded separately for each Separable Portion, and in respect of each extension of time awarded to the Contractor.[900]

1168 However, I consider that cl 4(b) of the Contract is of no real relevance in relation to the contractual basis for the Contractor's entitlement to delay damages. Clause 4(b) of the Contract is, in my view, solely directed to the interpretation of contractual terms (Date for Practical Completion, Date of Practical Completion, and Practical Completion) so as to clarify that the operation of certain clauses, including cl 34,

900 V601 Closing Submissions, 12 June 2019, [319]–[321].

applies to each Separable Portion, with the references in those clauses, including cl 34, being references to the Works and to WUC insofar as they comprise relevant Separable Portions.

1169 In this way, the Contract is clear in its intent to ensure that extensions of time granted pursuant to cl 34 of the Contract apply, in appropriate contractual circumstances, to each Separable Portion of the Project.

1170 However, none of the terms upon which cl 4(b) focuses (Date for Practical Completion, Date of Practical Completion, and Practical Completion) are referred to in cl 34.9 of the Contract which deals with the Contractor's delay damages entitlement.

1171 I accept V601's argument that Probuild's entitlement to delay damages pursuant to cl 34.9(a) of the Contract is limited to those reasonable and necessary direct on-site time-related delay costs which have in fact been incurred by Probuild. Clause 34.9(a) expressly so provides.

1172 Further, in any event, Probuild cannot recover multiple payments of delay damages in respect of a number of Separable Portions, if this results in double recovery of direct on-site delay-related costs incurred by Probuild.

1173 Probuild's delay damages entitlement is limited to recovering only those delay damages specified in cl 34.9 which Probuild actually incurs and only to the 'Maximum Amount' specified in Annexure Part A, Item 31A. In this regard, I am satisfied that by means of Cox's method of apportionment and related calculation of Probuild's delay costs for relevant Separable Portions, Cox has established Probuild's cl 34.9 delay damages entitlement.

1174 I add that the Court will also ordinarily be astute to ensure that reasonable and necessarily incurred direct costs, as circumscribed by the carefully worded limitations in cl 34.9 of the Contract are applied, and that the parties' agreed

compensation to the Contractor for delay damages arising in respect of extensions of time to multiple Separable Portions do not result in 'double-dipping' or 'double compensation' to the Contractor. Doing so in this particular case is also in accord with the terms of the Contract, and in particular cl 34.9 which reflect the parties' intent that the Contractor recover delay cost, circumscribed in certain respects and limited to reasonable and necessarily incurred direct on-site time-related costs.

Birchall's evidence – less persuasive

1175 As I have elsewhere concluded, neither the Birchall First Report or the Birchall Second Report, nor the Birchall Third Report, disclose detailed backup calculations in support the SJA costing conclusions which are as transparent and comprehensive as the costing calculations relied on by Cox. I consider that this gives rise to a substantial lack of substantiation in relation to Birchall's conclusions and opinions in many instances, as outlined in key examples. Furthermore, I consider that this deficiency with Birchall's evidence renders Birchall's Reports significantly less persuasive compared to Cox's evidence.

1176 I also consider the Birchall First and Second Reports to be less persuasive because Birchall focuses on assessing delay damages in relation to the extended time for contractual performance on-site. In this regard, for example, Birchall recognises as recoverable delay damages only Probuild's supervision cost, if incurred in respect of the last completed Separable Portion, namely SP7. I consider the Cox approach, which principally focuses upon the actual periods of delay and the delay damages incurred during such delays, to be more logical, appropriate, and likely to capture the direct on-site time-related costs including on-site preliminaries as intended by the Contract.

Delay costs do not need to be confined to costs incurred after date for Practical Completion

1177 I reject as neither logical or reasonable that delay costs can only be compensable at, and after, the point in time when delayed works are undertaken after the Date for

Practical Completion. This is so either in relation to the overall works or a Separable Portion of the works.

1178 I recognise that there may well be a compensable delay to a critical activity during the course of the Contract period which extends the completion of the Project. When the event which caused such a delay occurred, the direct on site time-related costs to the Contractor, including on-site preliminary costs, may have been very considerable.

1179 However, during the period of overrun after the Date for Practical Completion, it is likely that the only activities being undertaken are minor (for example, painting and landscape gardening activities) giving rise to the Contractor incurring minimal costs during that period of time.

1180 Put another way, when the critical two-week delay actually occurred, it may have stopped the overall works, or a critical part of the works, at a time when the Project was heavily resourced and overheads, including on-site cranes and other typical preliminaries, were at a high daily cost. By contrast it is quite likely that during the ultimate period by which a delay extended the date of practical completion, minimal overheads were being incurred.

1181 Relevantly and corroborative of the above, I note that Lyall's analysis of SP7 demonstrates, for example, that Separable Portions, including SP7, the last Separable Portion to be completed on the Project, were delayed by the events very early in the works; namely, Probuild's progress of the EOT2A and Probuild's EOT7 time extension claims.[901]

1182 I consider that on its natural language and clear intent, cl 34.9(a) is intended to compensate the Contractor for its costs flowing from delay in respect of each delayed Separable Portion, and not only the Separable Portion still being constructed after the latest date for practical completion, here SP7, as asserted by V601. In my view

901 Programming Experts' Joint Report 3; Lyall's retrospective analysis, 12.

such costs are not in the nature of costs already included in the Contract Price, as argued by V601, but are additional costs incurred during a period of delay which were not priced because the additional costs generated by delay and prolongation of performance were not identifiable at the time of tender or Contract. For these reasons I reject V601's argument that notwithstanding contractual delays all labour costs should be regarded as priced, as should all supervision-related overheads.

Cox and Birchall's experience

1183 Further, as separately addressed, I consider that Cox's relevant experience in relation to claims and assessments of the type in issue, in particular as a Chartered Quantity Surveyor with 35 plus years of experience in the construction industry, as well as his experience in preparing estimates, cost planning, and managing construction works on projects, including projects of the type in issue (namely residential and mixed-use developments) to be more extensive and relevant, when compared to Birchall's experience; and I consider that for this reason, Cox's expert evidence is more persuasive than Birchall's evidence on points of conflict concerning costing issues in dispute.

1184 Specifically, Birchall's background and experience was more academic; Birchall's evidence was that he 'taught and examined in, amongst other things, the practice and procedures of quantity surveying'. Birchall's evidence was that he had previously held various positions, including those of Estimator/Surveyor, Quantity Surveyor, Managing Quantity Surveyor and Commercial Manager. Birchall also held the position of Associate Director of an international surveying practice. Birchall's summary of his own experience and qualifications establishes that his practical and industry experience-based work as a Quantity Surveyor is only a part of his employment in many roles in the construction industry, including Estimator/Surveyor, Quantity Surveyor and Managing Quantity Surveyor.

1185 Cox, by comparison, is a Chartered Quantity Surveyor of 35 years' experience, which experience appears to have been centrally focused upon quantity surveying in, and

in relation to, the construction industry. Cox is also experienced in the area of estimating in relation to residential and mixed-use development. The Precinct Project is a mixed-use development.

1186 In my view, for these reasons, Cox's stronger and more relevant experience and qualifications give rise to another factor resulting in his evidence on the costing issues in this proceeding being more persuasive.

1187 Cox also gave evidence and was cross-examined at trial. I am satisfied that Cox's evidence, principally as advanced in his Expert Reports, adequately explains his costing methodology, and the assumptions that he has applied, and provides sufficient detail of his instructions and the materials upon which he relied to reach the conclusions and express the opinions he has in this matter.

1188 I am also of the view that Cox impartially and persuasively addressed the questions put to him in cross-examination at trial. I consider Cox to be a convincing and probative witness in the areas in relation to which he gave evidence.

1189 Further, I observe that much of V601's cross-examination of Cox sought to impugn his evidence by suggesting that he did not take account of concurrent delays and related matters in his Reports. However, it was in my view clear by the time of the trial of this proceeding that Cox had satisfactorily addressed this attack on his evidence by clarifying that the Cox First Report made it clear in [4.1(a)] that Cox had based his relevant calculations on 232 working days, and done so '*without any further consideration to any adjustment for concurrent working or due to the cap on delay damages as noted under Item 31B of the Contract Annexure*'.

1190 Finally, I consider Cox's experience as a Quantity Surveyor, and in particular the extent of his experience estimating residential and mixed-use developments, renders his estimation and quantification evidence in this proceeding more persuasive than that of Birchall's, whose quantity surveying and estimating experience is I consider less extensive, in particular in relation to residential and mixed-use projects of the

type in issue.

1191 Each of the above outlined matters are further significant factors which I consider add substantial weight to Cox's evidence in areas where there is a disparity of approach or estimate between Cox and Birchall in their expert evidence.

1192 I am also less persuaded by the Birchall First and Second Reports, because it was clear from parts of Birchall's evidence during cross-examination that significant assumptions made by him were not substantiated or founded by his instructions, or established by the evidence in this proceeding. In this regard, I am satisfied that each of the specific examples of unjustified assumption by Birchall and unsubstantiated or unfounded instruction highlighted by Probuild in its submissions in relation to Birchall are made out.

1193 The establishment of the above also in my view substantially reduced the confidence that I am able to place in Birchall's evidence.[902] Those examples include Birchall incorrectly assuming that Probuild planned to have a pool of general labour available on the project, and Birchall's costing of Probuild's crane crews failing to take into account Probuild's cost actually incurred in relation to this item.

General labour costs

1194 The Quantum Experts' Joint Report 1 records that Birchall assumed that Probuild 'always intended that there was a general pool of labour', as reflected in the *General Labour Costs*, as part of the calculation in relation to ascertaining the contract work value by reference to Separable Portions. Cox's evidence was that he was able to undertake a calculation to assess the percentage costs of labour for individual Separable Portions as a comparison of the Contract Sum.[903] On this issue I consider that Birchall's position on the apportionment of labour costs was critically

902 Birchall's treatment of General Labour costs assumed that a pool of general labour was always intended (Quantum Experts' Joint Report 1, [7] – not substantiated), T1603.4–17; and his weekly cost of Probuild's crane crews did not consider the cost actually incurred by Probuild, T1605.25–31; Probuild Closing Submissions, 11 June 2019, [299].

903 Cox Second Report, [5.17]–[5.20].

undermined by the absence of evidence adduced at trial to support his assumption that a general pool of labour had always been intended and costed by Probuild in the Contract price.

Supervision costs

1195 Similarly, at [5.23] of the Cox Second Report, Cox opines that the use of an apportioned labour/trade percentage would not be appropriate for Supervision in relation to smaller Separable Portions because, for example, on a construction site with a number of Separable Portions, more emphasis and resourcing would be committed to areas of the site in delay or facing programming issues.

1196 Although Birchall accepted the above proposition as reasonable,[904] his approach only provided for Supervision Costs as part of Probuild's delay damages if the delay had affected SP7, and did not capture the Supervision Costs for delays to other Separable Portions.[905] Further, Birchall's approach failed to capture the costs associated with all Probuild's supervisory staff.[906]

1197 For the above reasons, I consider that Birchall's methodology in at least the above respects was flawed and his approach was also insufficiently thorough, resulting in a likely underestimate of Probuild's supervisory entitlements in respect of delay.

1198 I also reject V601's case in relation to the appropriate quantum of delay damages because:

(a) Birchall's calculation of delay damages is primarily based on the periods of extension of time assessed and 'determined' by the Project Manager.

I have separately found that the Project Manager's assessments and determinations of extensions of time to Probuild were not arrived at or made, independently, or fairly or reasonably or in accord with the Contract, and

904 T1601–T1602.
905 T1601–T1602.
906 T1589.

were tainted by the Project Manager having regard for the financial interests of V601.

(b) Insofar as Birchall bases his delay damages calculations on periods of delay assessed as appropriate by Abbott, I have earlier rejected Abbott's programming and time extension opinions and conclusion for reasons separately outlined.

(c) For the other reasons which I have outlined above, I consider Birchall's evidence and opinions to be considerably less probative than the evidence and opinions on the same quantum issues given by Cox for Probuild.

1199 By contrast, as earlier outlined, I am satisfied that Cox's evaluation methodology is reasonable and preferable to Birchall's in relation to supervision costs and in relation to the allocation of costs for cranes and hoists, as explained in the Cox Second Report.[907] I note also that Birchall does not contradict Cox's allocation of costs for cranes and hoists in his own report in relation to daily delay damages, but rather deals with only a minor aspect of the Cox Second Report calculation; specifically, Birchall's assessment of the average number of working days per calendar month that should be included as an integer in the crane cost calculation – namely, a 1.33 day higher multiplier than Cox's 17 working days per calendar month.[908]

Supervision on-costs

1200 The quantum experts disagreed on the appropriate rate for salary on-costs for Probuild's supervision staff. Cox's supports a rate of 30%, and Birchall a rate of 23.74%.[909] Probuild submitted that Cox's rate should be preferred, because it more closely approximated the costs incurred,[910] and reflected the reasonable and necessarily incurred costs criteria in cl 34.9 of the Contract.[911]

907 Cox Second Report, [5.28]–[5.30].
908 Birchall First Report, [5.28].
909 Quantum Experts' Joint Report 1, [9].
910 See Cox First Report, [5.24(i)].
911 Specifically, sub-cl (a). Probuild Closing Submissions, 11 June 2019, [314].

1201 I am persuaded that the rate applied by Cox to salary on-costs in relation to Probuild's supervisory staff, namely 30%, is preferable to Birchall's rate of 23.74%, because I accept that Cox's rate more closely reflects the costs that Probuild actually incurred on the Project in relation to those on-costs.

1202 In relation to this issue, and more generally, I also prefer Cox's opinion because it is clear from his report that he has undertaken, by reference to Probuild's costing records, a much more meticulous and detailed analysis of this and similar costs, and cost issues, compared to Birchall.[912] On this costing item, I also note that V601 appears not to have pursued or pressed its case in contradiction of Cox's supervision on-costs of 30% in its Closing Submissions of 12 June 2019 or its Further Closing Submissions of 17 June 2019.

Costs of crane crews and alimaks

1203 The experts agreed on the weekly rate for crane hire ($4,700) but disagreed on the number of working days per month across which to apportion the rate.[913] Cox's analysis allows for one working day per month of unproductive time (eg, tool-box meetings and wet weather),[914] which Probuild submitted is 'reasonable and conservative in the circumstances'.[915]

1204 Probuild submitted that Birchall's opinion regarding the daily rate for crane crews and Alimak hire should not be accepted[916] because it is recorded in an appendix to the Quantum Experts' Joint Report 2 that has not been disclosed.[917] Probuild submitted that the Court should accept Cox's rates, as outlined in the Cox First Report.[918]

1205 In cross-examination, Birchall admitted that he had not seen the record outlining the

912 Cox First Report, Site-based supervision staff, [5.16]–[5.24], including [5.24(i)].
913 Probuild Closing Submissions, 11 June 2019, [315].
914 Cox First Report, [5.39].
915 Probuild Closing Submissions, 11 June 2019, [315].
916 Probuild Closing Submissions, 11 June 2019, [316].
917 T1604.15–T1605.4.
918 Cox First Report, [5.38]–[5.41].

weekly cost of crane crews to Probuild, which was approximately $20,000;[919] a rate that Probuild submitted should be used, because it reflects the contractual criteria on 'reasonable and necessarily incurred' costs.[920]

1206 I accept Cox's rates for these items which were uncontradicted by V601. Furthermore, I am satisfied that paragraphs [5.38]–[5.41] of the Cox First Report provide a very detailed justification for Cox's applicable allowances, which I accept.

1207 In relation to the parties' crane costs, I consider it to be a neutral matter that, as V601 asserts, although both experts (Birchall and Cox) included calculations relating to daily rates for the crane costs at Appendix 1 to the Quantum Experts' Joint Report 2, those calculations, which could have been requested by either party, are not in evidence. Neither party has however sought a copy of those calculations, and in my view, neither parties' evidence on this issue is impugned for that reason alone, including because the calculations are not in evidence and therefore what those calculations establish is a matter of conjecture.[921]

1208 Finally, in relation to the Quantum Experts' different integer for the number of working days per month to be applied to the crane hire rate of $4,700 per week, Cox, in my view, provided the more persuasive explanation for his slightly lower number of 17 working days per month; namely, that an allowance of 1 working day per month is justified and appropriate for non-productive time.[922]

SP1 and SP2 Side Agreements

1209 V601 submitted that Probuild was precluded from making delay cost claims in relation to SP1 and SP2, due to side agreements made in respect of each of those Separable Portions.[923]

1210 Probuild rejects the above argument on the bases that there is no evidence of such an

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919 T1605.25–31.
920 Probuild Closing Submissions, 11 June 2019, [3.17].
921 V601 Closing Submissions, 12 June 3019, [339].
922 Cox First Report, [5.39] and, in particular, [5.39(c)], including [5.39(c)(vi)].
923 See Amended Reply and Defence to Counterclaim, [78A(a)]–[78A(b)].

agreement in relation to SP1 and, even if Maitland's evidence on this point established an agreement that Probuild would not make 'any other claim' in respect of SP1 (including delay costs), at that point in time, Probuild had already submitted the relevant delay claims.[924]

1211 As to V601's assertion that a side agreement between it and Probuild prevents delay cost recovery in relation to delays to SP2, Probuild submits that this issue has 'fallen away', because the Probuild EOT6 claim is not being pursued in relation to SP2 and it says the SP2 Agreement is not asserted to be relevant to any other Probuild claims.[925]

Clause 34.9 and clause 41.1 notices

1212 I am also satisfied that Probuild notified its delay damages claim to the Project Manager and V601, together with its extension of time claims in relation to EOT2A, and EOT3.[926] Probuild, in addition to lodging extension of time claims for EOT2A, EOT3, and EOT7, also provided notification of its delay damages claim.[927]

1213 I also accept Probuild's submission in relation to EOT6 that Probuild's delay costs were notified to the Project Manager and V601 on 12 February 2013, well before approval of the variation relating to EOT6.[928] The Project Manager made no determination in relation to this claim and therefore Probuild was not required to submit any further notice pursuant to cl 41 to preserve its claim entitlement, including in respect of its delay damages claim.

1214 Further, Probuild's Reply Closing Submissions of 12 June 2019 highlighted that

924 Probuild Closing Submissions, 11 June 2019, [208]–[209], [312].

925 Probuild Closing Submissions, 11 June 2019, [313]. See Probuild Opening Submissions, 7 February 2019, [59] (in which Probuild conceded that an agreement existed between the parties that it would not seek an extension of time in relation to SP2 or 'receive delay costs') and T911.20–22. However, Probuild confirmed that it was still pursuing its EOT6 claim 'to the extent it relates to SP5': at n 474.

926 Bready First Witness Statement, [296], [300], [301], [314], [582], [586], and [593]; Bready Second Witness Statement, [205]; FCB4363.

927 **EOT2A:** Bready 1, [297] (9 March 2012), [300] (5 April 2012), [313]–[314] (17 October 2012). **EOT3:** Bready 1, [301] (5 April 2012), [313]–[314] (17 October 2012). **EOT7:** Bready 1, [521] (12 January 2012), [578] (14 December 2012), [582] (13 February 2013), [593] (28 March 2013).

928 Bready First Witness Statement, [474] (31 January 2013), [477] (12 February 2013); V601 Amended Reply and Defence to Counterclaim [54], acknowledges Probuild's EOT6 claim dated 31 January 2013.

V601's closing submissions do not address V601's allegation that Probuild had failed to provide contractual notification of its delay damages claim in relation to EOT6 and EOT7.

1215 I also observe that neither V601's Further Closing Submissions of 17 June 2019 nor its closing oral submissions sought to traverse this issue.

1216 Further, even if V601 had pressed issues of non-compliance by Probuild with notice requirements asserted by V601, Probuild, as I have earlier found, promptly notified its delay damages claims in relation to EOT2, 2A, 3 and 7.

1217 Finally, I am also satisfied that Probuild's claims for delay damages satisfy the requirements of cls 34.9 and 41.1 of the Contract (if and to the extent cl 41.4 is applicable) as particularised in Probuild's written closing submissions, Annexure 2, under 'Notices'.

Balance of preliminaries

1218 I am satisfied that the preliminary costs explained and justified in the Cox Second Report[929] are an appropriate and reasonable component of Probuild's delay damages pursuant to cl 34.9 of the Contract.

1219 I am also satisfied that the Second Report of 26 October 2018, dealing principally with apportionment of delay costs between separable portions, for the reasons earlier outlined, adequately explains Cox's methodology and apportionment calculations, and adequately addresses the Birchall criticisms in Birchall's Second Report of 21 September 2018, including at [5.17] of that Report.

Conclusion/Decision (delay damages)

Delay damage amounts

1220 For the above reasons, including principally my acceptance of Cox's quantum evidence, including Cox's apportionment of delay damages between Separable

929 Cox Second Report, [5.31]–[5.36].

Portions, and my acceptance of the underlying factual situation on site at the Precinct Project as verified by Bready in his evidence and also based on my acceptance of the periods of relevant delay identified by Lyall, I find that Probuild is entitled to the following delay damages in respect of its extension of time claims referred to below. I further consider it just and appropriate that Probuild be awarded delay damages apportioned by reference to Separable Portions to take into account overlapping delays in respect of Separable Portions as follows:[930]

EOT Assessment – Lyall 1A								
	SP1	SP2	SP3	SP4	SP5	SP6	SP6A	SP7
EOT 2/2A			$25,851	$715,514				
EOT3	$30,062					$440,081	$33,970	
EOT6					$96,621			
EOT7	$99,780		$365,483	$909,981	$248,855	$488,515	$118,092	

1221 For the above reasons I find that Probuild's delay cost entitlement is as set out below:

	SP1	SP2	SP3	SP4	SP5	SP6	SP6A	SP7
EOT 2/2A			$25,851	$715,514				
EOT3	$30,062					$440,081	$33,970	
EOT6					$96,621			
EOT7	$99,780		$365,483	$909,981	$248,855	$488,515	$118,092	

1222 Finally, I again note that although Probuild pleaded a financial claim in relation to its cl 9A Early Works delay claim, it did not appear to adduce evidence in relation to that financial claim, nor pursue financial compensation in relation to it in its ultimate submissions.

Acceleration claim

Written submissions on acceleration costs

Probuild's acceleration claim

1223 Probuild seeks to recover the costs, namely $1,834,853, that it alleges that it incurred in accelerating the WUC to avoid or reduce the delays the subject of this proceeding.

1224 Probuild submits that there are three ways by which it is entitled to recover its

930 Quantum Experts' Joint Report 2, 7 (Annexure A: Allocation of EOT costs between Separable Portions for each EOT scenario); Quantum Experts Joint Report 2 (13 February 2019), page 7, Annexure A, Cox's A.1 Assessments (based on Lyall's time extension analysis).

acceleration costs:

(a) by recovery of the acceleration costs that constitute part of the loss and damage to Probuild as a result of the Project Manager's failure to certify, in full, the extensions of time to which Probuild was entitled. Probuild contends that in that regard the acceleration costs it expended were a mitigation measure and are therefore recoverable, even if the total loss resulting from the breach is thereby increased. In support of this claim, Probuild cites *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd*;[931]

(b) pursuant to an implied obligation on V601 to require that the Project Manager act in the manner contemplated by the Contract in cl 20,[932] and an implied term of the Contract that the parties cooperate so as to permit each party to fulfil their obligations and obtain their entitlements under the Contract,[933] Probuild submits that its acceleration costs represent part of its loss and damage flowing from V601's breaches of the Contract. In support of this claim, Probuild cites *Perini Corporation v Commonwealth of Australia*;[934]

(c) as a result of V601's failure, through the Project Manager, to award Probuild its extension of time claims, either in full or at all, which Probuild argues constitutes a 'direction' to accelerate for the purposes of cl 32.4 of the Contract. Probuild contends that the non-exhaustive, but broad, definition of 'direction' at cl 1 of the Contract includes a 'rejection', which therefore entitles Probuild to recover its 'reasonable and necessary additional direct costs'

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931 Probuild Closing Submissions, 11 June 2019, [289]–[290], citing *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603, [134] (Hayne J); *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452, 506 (Lord Macmillan).

932 Probuild Closing Submissions, 11 June 2019, [291], citing *Perini* [1969] 2 NSWR 530 (MacFarlan J).

933 Probuild Closing Submissions, 11 June 2019, [291], citing *Park v Brothers* (2005) 80 ALJR 317, [38] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126, [36] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215, 219 (Dawson and Toohey JJ).

934 [1969] 2 NSWR 530.

pursuant to cl 32.5.[935]

1225 On this latter point, Probuild submits that a comparable situation arose in *Multiplex Constructions Pty Ltd v Abigroup Contractors Pty Ltd*,[936] in which the Queensland Court of Appeal held that a direction to accelerate arose from the head contractor's failure to give justified extensions of time, together with the pressure placed on the subcontractor to complete the development in time for 'an important football game on 1 June 2003'.[937]

V601's submissions

1226 V601 submits that Probuild has not established that it accelerated the WUC or the PCG Programs,[938] because:

(a) despite having conducted a critical path analysis and given evidence in relation to steps taken by Probuild to mitigate delay, Lyall did not consider the impact of any alleged acceleration on the Approved Contractor's Program;

(b) Probuild has not put on evidence identifying and quantifying the increase in productivity that is alleged to have been achieved by increasing resources and/or resequencing the WUC; and

(c) although Cox reviewed a number of acceleration claim items, he did not identify the number of or which materials had been reviewed. Accordingly, V601 argues that there is no evidentiary basis for a reliable opinion quantifying Probuild's acceleration costs.[939]

1227 V601 submits that the key issue with Probuild's claim for acceleration costs is that it is inconsistent with the contractual provisions relating to acceleration, particularly cl 32.5 of the Contract which states:

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935 Probuild Closing Submissions, 11 June 2019, [292].
936 [2005] QCA 61.
937 Probuild Closing Submissions, 11 June 2019, [293].
938 Pleaded as the Approved Contractor's Program for the purposes of Probuild's claim.
939 V601 Closing Submissions, 12 June 2019, [303]–[306], citing Birchall First Report, [5.30]–[5.38].

If the *Project Manager* gives a *Direction* to the *Contractor* under clause 32.4:

> (a) the *Contractor* shall accelerate *WUC* to overcome or minimise the extent and effect of some or all of the delay as directed, including, if required, in order to achieve *Practical Completion* by the *Date for Practical Completion*;
>
> (b) if the *Contractor* would, but for the *Direction*, have been entitled to an *EOT*, the *Contractor* shall be entitled to claim its reasonable and necessary additional direct costs and expenses directly arising directly as a result of accelerating *WUC*, valued by the *Project Manager* in accordance with clause 36.4; and
>
> (c) the *Contractor* is not entitled to any other compensation or to make any claim for loss in respect of or arising out of the cause of the delay and the *Direction* to accelerate except as provided in clause 32.5(b).

1228 V601 submits that if the Project Manager had directed Probuild to accelerate as alleged, then all of its other claims must fall away because a direction to accelerate disentitles Probuild to any extension of time claim arising from the relevant delay. This means that the extension of time claims must fail, as there is no relevant breach of Contract resulting from the Project Manager's failure to grant an extension of time.[940]

1229 V601 also submits that Probuild's acceleration claim is inconsistent with cl 34.9(c) which states that:

> The *Contractor* acknowledges and agrees that any entitlement … to delay damages in accordance with this clause 34.9 is the sole entitlement … for any delay or disruption to the *WUC* and [it] shall have no entitlement to any other damages, costs or other compensation whatsoever from the *Principal* whether under the *Contract*, in tort (including negligence), equity, under statute or otherwise.[941]

V601 submits that, pursuant to clause 34.9(c) of the Contract, Probuild has agreed that it will not be entitled to claim for the costs of mitigation as a result of the extensions of time.[942]

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940 V601 Closing Submissions, 12 June 2019, [309].
941 V601 Closing Submissions, 12 June 2019, [310]–[311].
942 V601 Closing Submissions, 12 June 2019, [310]–[311].

Probuild's reply submissions

1230 Probuild responds to V601's above submissions as follows:[943]

(a) Probuild has identified and quantified the increase in productivity resulting from its acceleration of works. Lyall's analysis identifies the delays mitigated by Probuild and Bready's evidence substantiates Probuild's efforts to accelerate. Probuild also notes that the documents upon which its quantum expert, Cox, based his identification and quantification of Probuild's acceleration costs are clearly referenced in his reports.

(b) Probuild points out that V601 did not challenge Bready's evidence in relation to acceleration efforts or Probuild's acceleration costs.

(c) Probuild's acceleration claim is not inconsistent with the Contract's requirements because:

(xxvii) Probuild's acceleration claim is primarily for:

(a) loss and damage flowing from the Project Manager's failure to certify, in full, its extension of time entitlements; and

(b) alternatively, the cost of mitigation measures reasonably employed by Probuild to reduce its losses flowing from V601's relevant breaches. Probuild submits that its expenditure on acceleration measures constitutes loss and damage arising from unrecognised time extension entitlements.

(xxviii) V601's unpleaded reliance on cl 32.5 of the Contract only applies to the third limb of Probuild's acceleration costs claim; namely, the Project Manager's direction to accelerate under cl 32.4.[944]

1231 By way of further reply submissions, Probuild relies upon two further authorities to

943 Probuild Reply Closing Submissions, 12 June 2019, [151]–[153].
944 Probuild Reply Closing Submissions, 12 June 2019, [151]–[153].

support its submission that acceleration measures may be regarded as loss and damage arising from a certifier's failure to award proper entitlements to a contractor (*Perini* case and the *Amec* case, in addition to the *Multiplex* case),[945] and two further authorities to illustrate that acceleration measures can be recognised as a form of mitigation (*GEH v Laing* and *BG Checo*, in addition to *Unity Insurance*).[946]

Probuild's closing oral submissions

1232 Probuild emphasised that its acceleration claim was based alternatively on 'loss and damage flowing from the Project Manager's failure to award Probuild its proper delay entitlements'.[947]

1233 Probuild also submitted that its acceleration claim was also a claim for 'mitigation measure[s] which Probuild reasonably employed to reduce its losses flowing from V601's breaches', primarily because V601, through its Project Manager, failed to properly administer and grant time extensions under the contract,[948] and submitted that such '[c]osts may even be increased because of the mitigation measures as long as it's a reasonable measure'.[949]

1234 Probuild clarified that its claim for acceleration costs on a more traditional variation direction basis was based on V601 effectively issuing 'a direction to accelerate under clause 32.4'.[950] In support of this limb of its claim, Probuild relied upon the 'the broad definition of a direction' contained in cl 1 of the Contract.[951] Clause 1 of the Contract defines 'direction' as including 'agreement, approval, assessment, authorisation, certificate, decision, demand, determination, explanation, instruction,

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945 Probuild Closing Submissions Further Reply, 18 June 2019, [44], citing *Perini* [1969] 2 NSWR 530; *Amec Process and Energy Ltd v Stork Engineers & Contractors BV* (1999) 68 Con LR 17, 48 [110].

946 *Great Eastern Hotel Company v John Laing Construction Ltd* [2005] EWHC 181 (TCC); [2005] 99 ConLR 45; *BG Checo International Ltd v British Columbia Hydro and Power Authority* [1993] 1 SCR 12 (Sup Crt Canada).

947 T1786. Probuild's Reply Closing Submissions, 18 June 2019, [44], citing *Perini* [1969] 2 NSWR 530; *Amec Process and Energy Ltd v Stork Engineers & Contractors BV* [1999] 68 Con LR 17, 48 [110].

948 T1786.

949 T1786; Probuild cited the following authorities in its Further Reply Closing Submissions, 18 June 2019, [44]: *Great Ensfeni Hotel Company Ltd v John Laing Company Ltd* [2005] EWHC 181 (TCC) [321]; *BG Checo International Ltd v British Columbia Hydro & Power Authority* [1993] 1 SCR 12.

950 T1786–T1787.

951 T1787.

notice, order, permission, rejection, request or requirement'.[952] Probuild argues that 'by refusing Probuild's extension of time claims and therefore requiring Probuild to complete by the dates for practical completion that the Project Manager specified, such conduct amount[ed] to a direction to accelerate the work'.[953]

1235 Probuild addresses V601's reliance on cls 32.5(b) and (c), as provisions precluding the Contractor from entitlements to extensions of time and the recovery of delay damages if it succeeds in recovering acceleration costs via cl 32.5, and asserts that V601's position is based on 'an unduly narrow reading of the contract which could give rise to very uncommercial results which points against it being correct'.[954] Probuild illustrates this point with the following example:

> [L]et's just say there's a period of delay of 30 days. The contractor is directed to accelerate in a de minimis way which saves one day. It gets its acceleration costs for that one day, but on an overly broad interpretation of these clauses, it would lose its EOT for the other 29 days and would lose delay damages for those other 29 days.[955]

1236 Probuild relies upon the language of the Contract, particularly cl 32.5(a),[956] which states that: '[T]he *Contractor* shall accelerate *WUC* to overcome or minimise the extent and effect of some or all of the delay as directed, including, if required, in order to achieve *Practical Completion* by the *Date for Practical Completion*'.[957] Probuild submits that cl 32.5(a) of the Contract 'contemplates a direction to accelerate, to minimise some of the delay, not necessarily all of it'.[958] Probuild observes that, if it were otherwise, the Contractor's entitlement to 'the unaffected part of the delay [would] simply evaporate only because part of it has been mitigated by way of acceleration'.

1237 Probuild submits that cl 32.5(a) does not operate as V601 asserts, because Probuild

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952 Agreement between V601 and Probuild, 23 May 2011.
953 T1787.
954 T1787.
955 T1788.
956 T1788.
957 Quoted at T1788 by Probuild's counsel.
958 T1788.

has 'still been delayed to the extent set out in its programming experts' analysis'. Probuild also submits that cl 32.5(a) is no impediment to it recovering on its 'acceleration' claim, because Probuild's acceleration measures would be unlikely to overcome all the delay sought to be mitigated, the parties to the Contract would be unlikely to have intended that Probuild would be deprived of compensation for relevant delay.[959]

Considerations/conclusions

Probuild's claim that its acceleration entitlements arose from a direction of the Project Manager

1238 Although Probuild put its acceleration costs claim in three ways, I observe that V601 really only focused on one of them; namely, an acceleration claim based on Probuild's assertion that the Project Manager issued an acceleration direction under cl 32.4 of the Contract.

1239 I am not satisfied on the evidence as to Probuild's allegation that it is entitled to recover acceleration costs on the basis that the Project Manager's conduct constituted a direction under cl 20.3, or alternatively, cl 32.4 of the Contract; similarly, nor am I satisfied that there is any sound basis to imply such a direction.

1240 I am also unpersuaded that the Project Manager's failure or refusal to grant extensions of time to which the Contractor was entitled constituted a direction under cl 20.3 or cl 32.4, or otherwise. Similarly, given the express contractual context referred to above, in relation to the Contract's acceleration regime and its requirements, and also given the absence of supporting evidence, there is also no basis upon which to imply a relevant direction.

Whether acceleration measures may be regarded as loss and damage arising from a Certifier failing to award a Contractor its proper time-extension entitlements

1241 In an argument that is complimentary to its claim to an entitlement to 'reasonable and necessary additional direct costs' (as outlined above), Probuild is also claiming,

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959 T1788–1789.

pursuant to cl 32.5 of the Contract, that acceleration measures may also be regarded as loss and damage arising from the Project Manager's failure to award Probuild its proper entitlements. In support of this claim, Probuild relies upon judicial statements and conclusions in *Perini Corporation v Commonwealth of Australia*,[960] *Multiplex Constructions Pty Ltd v Abigroup Contractors Pty Ltd*,[961] and *Amec Process and Energy Ltd v Stork Engineers & Contractors BV*.[962]

***Perini Corporation v Commonwealth of Australia* (*Perini*)**[963]

1242 *Perini* considered whether certain terms could be implied into a contract and, on this basis, found that a principal (in that case, the Department of Works) may be held liable for its supervisor's breach of the contract (in that case, the Director of Works).

1243 In the New South Wales Supreme Court decision of *Perini*, the Court determined certain points of law relating to the construction of the relevant agreement between Perini Corporation (Perini) and the Commonwealth.[964] In this decision, Macfarlan J considered whether implied terms existed to the effect that the principal to the construction and engineering contract in issue agreed, (i) not to interfere with the Project Manager's duties as certifier, and (ii) whether the principal must ensure that the Project Manager does its duty as certifier.

1244 In *Perini*, the plaintiff contractor sought to make its case principally on the basis that the Commonwealth, the defendant, had breached certain terms to be implied into the agreement between the parties.[965] Specifically, that the Director of Works (the Director), a 'servant' of the Commonwealth, whose role involved overseeing the building works, as well as certifying the contractor's extension of time applications under cl 35 of the contract, had 'acted in a manner that was outside his mandate',

960 [1969] 2 NSWR 530.
961 [2005] QCA 61.
962 [1999] 68 Con LR 17. Probuild's Closing Submissions, 11 June 2019, [289]–[293], Annexure 6; Probuild's Closing Submissions in Reply, 12 June 2019, [151]–[153]; Probuild's Reply Closing Submissions, 18 June 2019, [44].
963 [1969] 2 NSWR 530 (Macfarlan J).
964 *Perini* [1969] 2 NSWR 530, 531.
965 *Perini* [1969] 2 NSWR 530, 535.

and that he had done so 'with the encouragement and support' of the Commonwealth.[966] Perini argued that the Commonwealth was liable for damage suffered to it as a result of the Director's errors.[967]

1245 Justice Macfarlan noted the dual role occupied by the Director and that, although he was an 'officer of the Commonwealth' and 'may well have been the servant of the Commonwealth', the duties imposed by cl 35 also required the Director to undertake the role of certifier and consider applications made by the contractor for extensions of time.[968] In this regard, in relation to cases containing similar clauses, his Honour observed that:

> In my opinion the cases make plain that throughout the period of performance of all these duties, the senior officer remains an employee of the government or semi-government body, but that in addition and while he continues as such an employee he becomes vested with duties which oblige him to act fairly and justly and with skill to both parties to the contract. The essence of such a relationship in my opinion is that the parties by the contract have agreed that this officer shall hold these dual functions and they have agreed to accept his opinion or certificate on the matters which he is required to decide.[969]

1246 The terms alleged by Perini were of both a negative and a positive character. In the negative, Perini contended that the Commonwealth was 'contractually bound not to "interfere" with the proper performance of the Director's duties' as certifier. In the positive, Perini contended that the Commonwealth was 'contractually bound to insure that the Director did his duty'.[970]

1247 In his analysis of whether the negative term referred to above could be implied, Macfarlan J considered authorities on the implication of terms. His Honour stated that 'any consideration of this point must begin with' Bowen LJ's judgment in the UK Court of Appeal case, *The Moorcock*,[971] in which his Lordship said:

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966 *Perini* [1969] 2 NSWR 530, 535.
967 *Perini* [1969] 2 NSWR 530, 535.
968 *Perini* [1969] 2 NSWR 530, 536.
969 *Perini* [1969] 2 NSWR 530, 536.
970 *Perini* [1969] 2 NSWR 530, 540.
971 (1889) 14 PD 64.

> [A]nd I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have.[972]

1248 Bowen LJ further stated that:

> The question is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit, and where they say nothing about the burden of this kind of unseen peril, leaving the law to raise such inferences as are reasonable from the very nature of the transaction.[973]

1249 Macfarlan J also referred to *Heimann v Commonwealth of Australia*, a decision from the Supreme Court of New South Wales, in which Jordan CJ stated that:

> In order to justify the importation into a contract of an implied term which is not to be found in the express language of the contract when properly construed, and is not annexed by some recognised usage, or by statute or otherwise, it is essential that the express terms of the contract should be such that it is clearly necessary to imply the term in order to make the contract operative according to the intention of the parties as indicated by the express terms. It is not sufficient that it would be reasonable to imply the term [citation omitted]. It must be clearly necessary. And the test of whether it is clearly necessary is whether the express terms of the contract are such that both parties, treating them as reasonable men—and they cannot be heard to say that they are not—must clearly have intended the term, or, if they have not adverted to it, would certainly have included it, if the contingency involving the term had suggested itself to their minds [citations omitted].[974]

1250 Following his consideration of the authorities, Macfarlan J stated that:

> It must in my opinion be assumed that the parties entered into this agreement and it must be assumed that when they did so they intended to achieve something. The definition of what they intended to achieve is to be found in the agreement itself. … One purpose in my opinion must be that if cause arose for the application of cl 35 … that condition would receive effect according to its terms. I have already held that the duty of the Director when acting as Certifier was to act independently and in the exercise of his own volition according to the exigencies of a particular application. In my opinion it is not possible to assume that the parties to this agreement could have contemplated that he would act in manners other than those upon which they have agreed and expressed in cl 35 and that it is a consequence of this assumption that they shall have impliedly bound themselves one to the other

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972 *The Moorcock* (1889) 14 PD 64, 68, quoted in *Perini* [1969] 2 NSWR 530, 542.

973 *The Moorcock* (1889) 14 PD 64, 70, quoted in *Perini* [1969] 2 NSWR 530, 542.

974 *Heimann v Commonwealth of Australia* (1938) 38 SR (NSW) 691, 695, which Macfarlan J paraphrased in part, quoting the remainder, at *Perini* [1969] 2 NSWR 530, 542.

> that they would not do anything that would prevent him from a proper discharge of the mandate which contractually they had granted to him.[975]

1251 Macfarlan J thereby concluded that 'there must be implied in this contract in order to give it business efficacy an implied term of the negative character [non-interference] to which I have already referred'.[976]

1252 At this point, Macfarlan J addressed an argument put by the Commonwealth against the implication of a term in the agreement, in which it was contended that if

> there had been a wrongful, in the sense of unauthorized, exercise of powers by a certifier with the knowledge of the employer of the certifier, the employer being the other party to the contract pursuant to which the certifier was appointed, the only right of the contractor was that he was entitled to disregard the provisions of the agreement with respect to time and either to sue for the price or resist a claim for liquidated damages by way of penalty [citation omitted].[977]

1253 His Honour did not agree, stating:

> While it is, in my opinion, the law that a contractor is entitled to disregard the provisions of the agreement with respect to time in the manner that learned counsel for the defendant submitted it does not follow, nor in my opinion has it been decided that if the contractor has otherwise suffered damage he is not entitled to sue upon an implied term.[978]

1254 Regarding the term to be implied of a positive character (ensuring performance), Macfarlan J relied upon the test stated in *The Moorcock*, referred to above, and stated that in his opinion, 'the plaintiff and the defendant, being the parties bound by this agreement, are bound to do all co-operative acts necessary to bring about the contractual result'.[979] In this respect, his Honour referred to the UK House of Lords case, *Mackay v Dick*,[980] in which Lord Blackburn said:

> I think I may safely say as a general rule that where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his

975 *Perini* [1969] 2 NSWR 530, 542.
976 *Perini* [1969] 2 NSWR 530, 543.
977 *Perini* [1969] 2 NSWR 530, 543.
978 *Perini* [1969] 2 NSWR 530, 543.
979 *Perini* [1969] 2 NSWR 530, 545.
980 [1881] 6 App Cas 251.

> part for the carrying out of that thing, though there may be no express words to that effect.[981]

1255 Macfarlan J concluded that a term binding the Commonwealth to ensure that the Director, its servant, performed the duties contained in cl 35 must be implied into the agreement.[982]

1256 Subsequent to *Perini*, in *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales*,[983] the High Court of Australia, citing *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*,[984] concisely summarised the five elements necessary for identification of an implied term; namely:[985]

> The conditions necessary to ground the implication of a term were summarized by the majority in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* [footnote omitted]: '(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.'

***Amec Process & Energy Ltd v Stork Engineers & Contractors BV* (*Amec*)**[986]

1257 *Amec* considered the damages (including the costs associated with 'accelerative measures') that might be awarded for breach of a term of the nature found in *Perini*.

1258 In *Amec*, Judge John Hicks QC, Queen's Bench Division (Technology and Construction Court), considered certain preliminary issues relating to a dispute between a sub-contractor (Amec) and the defendant (Stork). Stork had been engaged to 'design, fabricate, construct, install and precommission the topside facilities' for a floating production facility. Stork carried out the design aspect and supplied certain materials, but sub-contracted the remainder of the contract works to

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981 *Mackay v Dick* [1881] 6 App Cas 251, 263, quoted in *Perini* [1969] 2 NSWR 530, 545; *Park v Brothers* (2005) 80 ALJR [38].
982 *Perini* [1969] 2 NSWR 530, 545.
983 (1982) 149 CLR 337 (*Codelfa*).
984 (1977) 180 CLR 266, 282–3 (PC) (Lord Simon of Glaisdale, Viscount Dilhorne and Lord Keith of Kinkel).
985 *Codelfa* (1982) 149 CLR 337, 347 (Mason J).
986 [1999] 68 Con LR 17 (Judge John Hicks QC) (*Amec*).

Amec.[987]

1259 Relevantly, the issue in *Amec* concerned the following question:

> Is Amec entitled to sums claimed to have been incurred by it in respect of accelerative measures: (a) Pursuant to article 13; and/or (b) Otherwise than pursuant to article 13; (c) In either case was an express instruction (whether oral or in writing) a pre-requisite to recovery of such sums?[988]

1260 Judge John Hicks QC focused his analysis upon the true construction of the contract documents.[989] His Honour observed that article 13.1(a)(iv) of the contract contained a clear exposition of the meaning associated with 'accelerate', which involved 'taking steps "in order to recover … delay in respect of which [Amec] would otherwise have been entitled to a revision of the PROTECH PLAN"'.[990] His Honour noted that the examples canvassed in argument, and the sums that Amec was claiming 'in respect of accelerative measures', appeared to 'cover a much wider field'.[991] He described these measures as including

> the increase of resources generally in order to cope with increases in the quantity of work, measures taken in consequence of breaches of contract by Stork, or in order to mitigate those consequences and, most generally, any use of 'additional resources' in consequence of Stork's instructions, acts or omissions.[992]

1261 Whilst his Honour thought it best to avoid use of the word 'acceleration' and its derivatives 'in any undefined sense', he stated that 'the principles which should be applied to the issues canvassed and examples advanced under this head' were not 'particularly obscure or much open to debate'.[993] Following analysis of the contractual provisions relevant to his decision on this issue, Judge John Hicks QC

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987 *Amec* [1999] 68 Con LR 17, 22 [1].

988 *Amec* [1999] 68 Con LR 17, 46 [98]. Judge John Hicks QC commenced his analysis with a re-construction of the question, stating: 'It is immediately as a matter of both grammar and logic that the first sentence should end with (b) and that what is now (c) should be a fresh, unlettered, paragraph, so that it is not a third, free-standing, question but a rider to each of the first two': at 46 [99].

989 *Amec* [1999] 68 Con LR 17, 46 [100].

990 *Amec* [1999] 68 Con LR 17, 46 [101].

991 *Amec* [1999] 68 Con LR 17, 47 [102].

992 *Amec* [1999] 68 Con LR 17, 47 [102].

993 *Amec* [1999] 68 Con LR 17, 47 [103].

stated that Amec was 'entitled to … damages for any breach of contract by Stork'[994] subject to, inter alia, the question of whether Amec 'has elected against or waived its claim for damages for the same breach' by pursuing a claim under article 13.6 of the contract.[995] Further, his Honour stated that:

> Such breaches may arise out of failure by Stork to carry out its obligations in dealing with Amec's rights to or requests for variations, and the damages recoverable may include the cost of what Amec may classify as 'accelerative measures', but whether any such breach is established and whether the damages recoverable include any such element are questions to be decided in each instance by applying the relevant contractual terms and the law, in particular the law of damages, to the facts as found.[996]

***Multiplex Constructions Pty Ltd v Abigroup Contractors Pty Ltd* (*Multiplex*)**[997]

1262 In *Multiplex*, the Queensland Court of Appeal held that the subcontractor for the Lang Park redevelopment in Brisbane had an arguable case that a direction to accelerate arose from the head contractor's failure to give justified extensions of time, coupled with the pressure placed on the subcontractor to complete the development by a certain deadline. The term 'direction' in that subcontract was similar, by comparison, with the defined meaning of that term in the Contract which is the subject of the current proceeding.

1263 In *Multiplex*, however, the subcontractor's claim failed because the subcontractor had not notified the head contractor of the additional direct costs that it would incur in complying with the direction. That issue does not arise in the subject proceeding.[998]

1264 In his reasons in *Multiplex*, Jerrard JA referred to the principles identified in *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (*Peter Turnbull*),[999] which had been relied upon by the subcontractor.[1000] His Honour described Dixon CJ's expression of these principles as follows:

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994 *Amec* [1999] 68 Con LR 17, 48 [110].
995 *Amec* [1999] 68 Con LR 17, 42 [84]. See also, 43–4 [90].
996 *Amec* [1999] 68 Con LR 17, 48 [110].
997 [2005] 1 Qd R 610 (*Multiplex*).
998 *Multiplex* [2005] 1 Qd R 610, 630–1 [42] (Jerrard JA, with whom McMurdo P and Mullins J agreed).
999 (1954) 90 CLR 235, 246–8 (Dixon CJ); 250–2 (Kitto J) (*Peter Turnbull*).
1000 *Multiplex* [2005] 1 Qd R 610, 630 [40].

> [T]hat it was always the law that, if a contracting party prevented the fulfilment by the opposite party to the contract of a condition precedent therein expressed or implied, it was equal to performance thereof; and that a plaintiff might be dispensed from performing a condition by the defendant expressly or impliedly intimating that it was useless for the plaintiff to perform it and requesting the plaintiff not to do so. If the plaintiff then acted upon that intimation it was just as effectual as actual prevention.[1001]

1265 Jerrard JA accepted that:

> [O]n the assumption Abigroup has an arguable case that a constructive notice to accelerate was given — and the contract did not require it to be given in writing — then, in the circumstances then prevailing, the joint venturers' conduct also arguably relieved Abigroup of its obligation to provide a written notification of the additional direct costs it would incur on that acceleration.[1002]

1266 However, his Honour did not accept that this necessarily meant

> the application of those principles can result in the joint venturers being treated as if they had thereafter acted as required by the contract on receipt of Abigroup's written notification and either withdrawn the direction … or affirmed the direction in writing accompanied by the described statements.[1003]

1267 In essence, his Honour found that the principle enunciated by the Chief Justice in *Peter Turnbull* 'entitles Abigroup to be treated as if it had performed its contracted obligations, but does not entitle Abigroup to be treated as if the joint venturers had responded in a particular way in the performance of their contracted obligations'.[1004] In this respect, his Honour agreed with Multiplex's characterisation of Abigroup's argument as proposing 'that the *Turnbull* principle elevates the absolving of a condition precedent into performance of the opposite contractual obligation', and stated that this proposition went too far.[1005]

1268 Addressing the facts in *Multiplex*, Jerrard JA stated:

> In the instant matter, treating Abigroup as if it had performed its contractual obligation to give the relevant notice in writing of additional direct costs does not entitle it to any payment. Had Abigroup given that notice, that would

1001 *Multiplex* [2005] 1 Qd R 610, 630 [40].
1002 *Multiplex* [2005] 1 Qd R 610, 630 [42].
1003 *Multiplex* [2005] 1 Qd R 610, 630–1 [42].
1004 *Multiplex* [2005] 1 Qd R 610, 631 [42].
1005 *Multiplex* [2005] 1 Qd R 610, 631 [42].

> have entitled the joint venturers to either withdraw the direction, or affirm it in writing. An affirmation in writing accompanied by the relevant statements would have then entitled Abigroup to be paid the cost of acceleration, limited to those it actually incurred and to the extent of the additional costs notified.[1006]

1269 Referring to Muir J's decision in *Qline Interiors Pty Ltd v Jezer Construction Group Pty Ltd* (*Qline*),[1007] which concerned progress claims submitted by a plaintiff and the contractual requirement that the defendant assess them, Jerrard JA stated:[1008]

> The learned judge expressed the view that where such a claim had been delivered prior to the termination of the contract, but not assessed by the defendant in breach of its obligation to do so, then the court might proceed to decide, as a question of fact, the amount of the payment to which the plaintiff was entitled. The learned judge cited the principle which prevents a person from taking an advantage of the non-fulfilment of a condition the performance of which has been hindered by himself, and the related principle which 'exonerates one of two contracting parties from the performance of the contract when the performance of it is prevented and rendered impossible by the wrongful act of the other contracting party'.[1009]

1270 Jerrard JA distinguished the position in *Qline* from the facts in *Multiplex*, stating that 'the rights which had accrued to Abigroup under the contract (on the assumption in its favour that a constructive direction had been given) did require the further performance of obligations by the joint venturers'.[1010] In this respect, and agreeing with the trial judge, his Honour held that the principle referred to in the *Peter Turnbull* case did not apply to assist Abigroup.[1011]

1271 His Honour also agreed with the trial judge that:

> [T]he difficulties Abigroup faces on its claim for acceleration costs under the contract are insuperable. Its claim that a direction could be inferred in the circumstances raised the problems that that direction was not in writing, when, as the trial judge observed, occasions will be rare when a direction by a head-contractor to a subcontractor to accelerate work in a multimillion dollar project are not express; and an implication or inference that it had happened would require the clearest evidence. Drawing that implication in this case

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1006 *Multiplex* [2005] 1 Qd R 610, 631 [43].
1007 [2002] QSC 88.
1008 *Multiplex* [2005] 1 Qd R 610, 631 [44] (footnote included).
1009 Citing from *Panamena Europea Navigacion (Compania Limitada) v Frederick Leyland & Co Ltd* [1947] AC 428, 436 (Lord Thankerson); and referring also to *Hickman & Co v Roberts* [1913] AC 229.
1010 *Multiplex* [2005] 1 Qd R 610, 632 [46].
1011 *Multiplex* [2005] 1 Qd R 610, 632 [46].

> would occur in the face of the express and repeated communications from the joint venturers that they were not directing that acceleration. Further, there is the point which also appealed to the learned trial judge, that if a direction was to be inferred, then there were a number of subsequent written communications explicitly withdrawing any implied direction.[1012]

1272 Jerrard JA also stated that:

> Independent of those matters is the point that the joint venturers' conduct did not do anything to prevent Abigroup from notifying the joint venturers in writing of the additional direct costs Abigroup would incur from accelerating the performance of its work. Abigroup submitted various estimates and calculations in various items of correspondence, but not the contractually agreed upon one. Assuming a breach by the joint venturers which arguably constituted an effective direction, that breach did not prevent Abigroup from making the required calculations, and it was clearly not dissuaded from presenting calculations to the joint venturers. It simply did not take a step that is critical to a claim for acceleration under cl. 33.5, which step was necessary for quantifying the claim for acceleration costs. Even if every other argument advanced for Abigroup was fairly arguable, its entitlement under cl. 33.5 was specifically limited to the additional direct costs notified by it under that subclause. Mr Bond did not suggest there was any figure it could be deemed or taken to have notified. I consider that Abigroup's appeal must fail.[1013]

Whether acceleration measures may be recognised as a form of mitigation

1273 Probuild's acceleration costs claim is also advanced as a claim for cost incurred to implement mitigation measures to reduce, or avoid, the loss resulting from V601's alleged breach of the Contract in not awarding contractual extensions of time for delay to which Probuild was entitled. In this regard, Probuild relies upon *Great Eastern Hotel Company v John Laing Construction Ltd* and *BG Checo International Ltd v British Columbia Hydro and Power Authority*.[1014]

***Great Eastern Hotel Co Ltd v John Laing Construction Ltd* (*GEH v Laing*)**[1015]

1274 In *GEH v Laing*, a decision of the UK Queen's Bench Division (Technology and Construction Court), Great Eastern Hotel Co Ltd (GEH) had engaged John Laing Construction Ltd (Laing) as the construction manager for a hotel refurbishment, with

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1012 *Multiplex* [2005] 1 Qd R 610, 632 [47].

1013 *Multiplex* [2005] 1 Qd R 610, 632 [48].

1014 Probuild's Further Reply Closing Submissions, 18 June 2019, [44]. See also Probuild's Closing Submissions, 11 June 2019, [289]–[293], Annexure 6; Probuild's Closing Submissions in Reply, 12 June 2019, [151]–[153].

1015 [2005] EWHC 181 (TCC); [2005] 99 ConLR 45 (Judge David Wilcox) (*GEH v Laing*).

the work to be carried out by specialist trade contractors. GEH claimed that Laing breached the construction management agreement by misconducting itself as construction manager, which resulted in the project being delayed by about 44 weeks, and required GEH to make acceleration payments to trade contractors. GEH sought recovery of these costs as damages.[1016]

1275 Laing argued that the costs expended to bring about the acceleration measures were not wasted, and therefore the claim for acceleration costs should fail. Judge David Wilcox rejected this argument for the reason that it had no factual basis.[1017] His Honour stated that:

> [E]ven if some acceleration could be demonstrated, it follows that delays to completion would have been greater, and thus Laing's liability for costs consequent on such delays correspondingly larger in the absence of acceleration. Any acceleration measures, even if partially successful, were clearly measures adopted in order to mitigate GEH's losses and as such the cost of such measures are recoverable from the contract-breaker [citation omitted].[1018]

1276 His Honour noted that payments to the contractors for delay and disruption claims 'directly flow[ed] from the fact that that project was delayed from the start', with the result that almost all of the contractors spent longer on the site than envisaged by the original programme.[1019] Further, his Honour stated:

> I am satisfied that the trade contractor accounts are global claims, and if such a claim is to succeed, GEH must eliminate from the causes of the loss and expense element all matters which are not the responsibility of Laing. That requirement is mitigated in this case, because it is possible to identify a causal link between particular events for which Laing was responsible, and the individual items of loss.[1020]

1016 *GEH v Laing* [2005] EWHC 181 (TCC); [2005] 99 ConLR 45, 47 [1].
1017 *GEH v Laing* [2005] EWHC 181 (TCC); [2005] 99 ConLR 45, 110 [321].
1018 *GEH v Laing* [2005] EWHC 181 (TCC); [2005] 99 ConLR 45, 110 [321], citing *Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd* [1966] 1 QB 764, 782.
1019 *GEH v Laing* [2005] EWHC 181 (TCC); [2005] 99 ConLR 45, 111 [323].
1020 *GEH v Laing* [2005] EWHC 181 (TCC); [2005] 99 ConLR 45, 112 [328]. At [329], his Honour stated that this analysis was approved in the Court of Session, Inner House, in *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* 2004 SCLR 872.

BG Checo International Limited v British Columbia Hydro and Power Authority (BG Checo)[1021]

1277 In *BG Checo*, a decision of the Canadian Supreme Court, BG Checo International Limited (Checo) had submitted a tender to British Columbia Hydro and Power Authority (Hydro) for the construction of transmission towers and the installation of insulators, hardware, and conductors across 42 kilometres of right-of-way.[1022] Prior to submitting the tender, Checo conducted an aerial inspection of the relevant site and noted that the right-of-way had been partially cleared. There was ongoing activity in the area, so Checo assumed that further clearing of the right-of-way would occur prior to commencement of the works.[1023] However, no further clearing took place, which caused various difficulties for Checo in respect of the completion of works.[1024]

1278 At trial, evidence was given that Hydro had contracted the clearing works to another company, which had not performed the works adequately, and that Hydro was aware that they had not been performed adequately. There was no direct discussion with Checo on this matter.[1025] Under cl 6.01.03 of the contract, it was stated that: 'Clearing of the right-of-way and foundation installation has been carried out by others and will not form part of this Contract.'[1026] In light of Hydro's failure to properly clear the right-of-way, Checo argued that, inter alia, Hydro had breached the contract.[1027]

1279 Iacobucci J[1028] found that cl 6.01.03 was an express term of the contract that the right-of-way would be cleared, and also noted the trial judge's finding that the right-of-way was not cleared. Accordingly, Iacobucci J found that Hydro had breached the

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1021 [1993] SCR 12 (*BG Checo*).
1022 *BG Checo* [1993] SCR 12, 43–4.
1023 *BG Checo* [1993] SCR 12, 43–4.
1024 *BG Checo* [1993] SCR 12, 44.
1025 *BG Checo* [1993] SCR 12, 44.
1026 *BG Checo* [1993] SCR 12, 46.
1027 *BG Checo* [1993] SCR 12, 22.
1028 The judgment of Sopkina and Iacobucci JJ was delivered by Iacobucci J.

contract,[1029] and referred the matter back to trial on the question of damages.[1030]

1280 On the subject of damages for breach of contract, La Forest and McLachlin JJ[1031] stated that:

> The plaintiff suing for breach of contract is to be put in the position it would have been in had the contract been performed as agreed. The measure of damages is what is required to put Checo in the position it would have been in had the contract been performed as agreed. If the contract had been performed as agreed, Hydro would have removed the logs and debris from the right-of-way. Checo would not have been required to do the additional work that was necessitated by reason of the work site being improperly cleared. It might also have avoided certain overhead.[1032]

1281 In assessing the damages for breach of contract, La Forest and McLachlin JJ stated that Checo was

> to be put in the position it would be in had the work site been cleared properly, and is therefore to be reimbursed for all expenses incurred as a result of the breach of contract, whether expected or not, except, of course, to the extent that those expenses may have been so unexpected that they are too remote to be compensable for breach of contract.[1033]

1282 La Forest and McLachlin JJ then stated that 'the damages in contract would include not only the costs flowing directly from the improperly cleared work site, but also consequent indirect costs such as acceleration costs due to delays in construction'.[1034]

***Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (*Unity Insurance*)**

1283 In *Unity Insurance,*[1035] the insured (Rocco Pezzano) engaged the broker (Unity Insurance Brokers Pty Ltd) to obtain an industrial special risks insurance policy from the insurer (NZI Insurance Australia Ltd), in respect of the insured's business premises.[1036] The policy included cover for damage by fire. Subsequently, a fire at the premises caused extensive damage, and the insurer 'refused to indemnify the

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1029 *BG Checo* [1993] SCR 12, 85.
1030 *BG Checo* [1993] SCR 12, 86.
1031 The judgment of La Forest, L'Heureux-Dubé, Gonthier and McLachlin was delivered by La Forest and McLachlin JJ.
1032 *BG Checo* [1993] SCR 12, 25–6.
1033 *BG Checo* [1993] SCR 12, 42.
1034 *BG Checo* [1993] SCR 12, 42–3.
1035 (1998) 192 CLR 603 (HCA) (*Unity Insurance*).
1036 *Unity Insurance* (1998) 192 CLR 603, 610 [12].

insured for the damage because "of material non-disclosure of prior claims"'.[1037] In his judgment in the matter, McHugh J notes that: 'The non-disclosure was caused by the broker who disclosed to the insurer only one of twelve claims that the insured had made against insurers during the previous thirteen years.'[1038]

1284 In response to the insurer's failure to indemnify its loss, the insured 'sued the insurer for breach of its promise of indemnity and the broker for breach of its duty to exercise reasonable care and skill in obtaining the policy'.[1039] The insurer defended its position by relying upon s 28 of the *Insurance Contracts Act 1984* which, it said, enabled the insurer to reduce its liability under the policy to nil, due to the insured's non-disclosure.[1040] On the basis of legal advice, the insured settled the action resulting in a substantial shortfall between the full indemnity and the settlement amount.[1041]

1285 The insured then sued the broker, contending that 'because the broker [had] placed it in the position where it had to settle for this sum, the broker [was] liable to it for the difference between the amount of the full indemnity and the sum of $900,000 received in the compromise settlement'.[1042] Evidence was provided in the proceeding of an earlier offer to the insured of $740,000, which was later increased to $900,000.[1043] The trial judge found that the broker had breached its duty to the insured, that it was reasonable for the insured to compromise the claim, and that the settlement was reasonable.[1044] On the basis of expert evidence, the judge also found that the insured would have obtained insurance of the kind obtained from the insurer even if it had disclosed the history of prior claims.[1045] The insured was awarded the difference between the full indemnity, as assessed by the trial judge,

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1037 *Unity Insurance* (1998) 192 CLR 603, 610 [12].
1038 *Unity Insurance* (1998) 192 CLR 603, 610 [12].
1039 *Unity Insurance* (1998) 192 CLR 603, 610 [13].
1040 *Unity Insurance* (1998) 192 CLR 603, 610 [13].
1041 *Unity Insurance* (1998) 192 CLR 603, 610 [13].
1042 *Unity Insurance* (1998) 192 CLR 603, 610 [13].
1043 *Unity Insurance* (1998) 192 CLR 603, 610 [14].
1044 *Unity Insurance* (1998) 192 CLR 603, 610 [15].
1045 *Unity Insurance* (1998) 192 CLR 603, 611 [16].

and the settlement sum.[1046]

1286 On appeal, McHugh J articulated the question for consideration as:

> [W]hether a plaintiff claiming damages for breach of contract is entitled to damages for loss arising from the plaintiff compromising legal proceedings with a third party where the proceedings arose out of the breach of contract.[1047]

1287 His Honour identified the primary issue in the appeal as 'whether the difference between the amount that the insured would have received under the policy and the amount which it received in the settlement was a loss caused by the broker's breach of contract'.[1048]

1288 Referring to s 28 of the Act, McHugh J stated that:

> The plain meaning of this section is that the insurer was not entitled to avoid the policy even though the insured failed to comply with the duty of disclosure. However, the insurer was entitled to reduce its liability to the amount that would place it in the position in which it would have been if the failure to disclose had not occurred (s 28(3)).[1049]

1289 His Honour outlined the broker's argument as follows:

> The broker contends that, although it breached its contract with the insured by failing to exercise reasonable care and skill in obtaining an insurance policy, the insured failed to prove that it had suffered a loss from that breach. That contention is based on the ground that the insured sought to prove its loss simply by proving the difference between the sum that it would have received from the insurer, if due care had been exercised, and the sum that it did receive in settlement of the claim with the insurer. The broker contends that to calculate its loss the insured was required to prove the sum that it would have received if it had litigated the matter against the insurer and that the insured cannot rely on the settlement sum in calculating the difference.[1050]

1290 The broker contended that 'the insured could recover the difference between the two

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1046 *Unity Insurance* (1998) 192 CLR 603, 610–11 [15].

1047 *Unity Insurance* (1998) 192 CLR 603, 609 [10].

1048 *Unity Insurance* (1998) 192 CLR 603, 611 [18].

1049 *Unity Insurance* (1998) 192 CLR 603, 612 [21]. Section 28(3) provided that: 'If the insurer is not entitled to avoid the contract or, being entitled to avoid the contract (whether under subsection (2) or otherwise) has not done so, the liability of the insurer in respect of a claim is reduced to the amount that would place him in a position in which he would have been if the failure had not occurred or the misrepresentation had not been made.'

1050 *Unity Insurance* (1998) 192 CLR 603, 609–10 [11].

sums only if it showed that it could not have recovered any more than the sum for which it settled' and asserted that, notwithstanding its breach, s 28(3) of the Act enabled the insured to claim the full indemnity under the policy less some small amount for the increase in premium;[1051] the latter of which, it argued, was the extent of the broker's liability, being the only loss suffered by the insured in respect of the broker's breach.[1052] The broker pointed to the lack of any evidence from the insurer regarding what the position of the insurer would have been if the true claims history of the insured had been disclosed and that, accordingly, the insured had failed to show that it had suffered any loss as a result of the broker's breach of duty.[1053] In this respect, the broker argued that the loss suffered by the insured in accepting the settlement was due to a voluntary act of the insured, rather than being causally connected to the broker's breach of duty.[1054]

1291 A key issue in this case was what would constitute reasonableness, in the context of the settlement reached between the insured and the insurer, and the subsequent claim for the full indemnity shortfall made by the insured against the broker. On loss that is recoverable, McHugh J stated that:

> [T]o succeed in its action against the broker, the insured must show more than that its loss was causally connected with the broker's breach of duty. Damages in contract are recoverable only for a loss which is the kind of loss which was within the contemplation of the contract breaker or would have been within the contemplation of a reasonable person in his or her position.[1055]

1292 In applying this principle to the facts of the case, McHugh J stated that:

> Accordingly, upon the finding in this case that the settlement was reasonable, the insured proved a causal connection between the settlement and the breach of the broker's duty of care and that the settlement was within the reasonable contemplation of the broker or a reasonable person in its position. If the case is governed by ordinary principles of contract law concerning

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1051 *Unity Insurance* (1998) 192 CLR 603, 611 [19].
1052 *Unity Insurance* (1998) 192 CLR 603, 612 [21].
1053 *Unity Insurance* (1998) 192 CLR 603, 648 [116].
1054 *Unity Insurance* (1998) 192 CLR 603, 612 [21].
1055 *Unity Insurance* (1998) 192 CLR 603, 613 [24], citing *Koufos v C Czarnikow Ltd* [1969] 1 AC 350, 395; *Wenham v Ella* (1972) 127 CLR 454, 471–2; *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653, 657–8, 672–3.

causation and remoteness, the insured is entitled to recover the loss claimed.[1056]

1293 On reasonable contemplation by a party, McHugh J stated that:

> Whether a settlement was within the contemplation of a defendant or a reasonable person in its position must depend upon the nature of the contract between the plaintiff and the defendant, their actual or imputed knowledge of the consequences of a breach, and the nature of the third party's claim against the plaintiff. As a general rule, a contract breaker must be taken to have reasonably contemplated that its breach may force the innocent party into litigation with third parties and that the innocent party may conclude that it is in its best interest to compromise the third party's claim. But it does not follow that the fact that it was reasonable for the plaintiff to compromise the claim against the third party necessarily means that the settlement was within the reasonable contemplation of the defendant. That is so even in those cases where the defendant's breach was proved to be causally connected with the settlement. Each case must depend upon its own facts.[1057]

1294 In his consideration of the trial judge's finding that the settlement was reasonable, McHugh J noted the judge's reference to comments made by Lord Macmillan in *Banco de Portugal v Waterlow*,[1058] in which his Lordship stated:

> Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.[1059]

1295 On the reasonableness of the settlement in *Unity Insurance*, Brennan CJ stated:

> If an amount be accepted by a plaintiff in settlement with a third party and subsequently discovered events demonstrate that the settlement was more favourable than it would have been had those events been known at the time, the defendant is not disadvantaged by the settlement. On the other hand, if events subsequently discovered by a plaintiff show that a more favourable

1056 *Unity Insurance* (1998) 192 CLR 603, 613 [27].
1057 *Unity Insurance* (1998) 192 CLR 603, 615–16 [33].
1058 [1932] AC 452.
1059 *Banco de Portugal v Waterlow* [1932] AC 452, 506, quoted in *Unity Insurance* (1998) 192 CLR 603, 617 [36].

> settlement could have been obtained, the damages assessed against the wrongdoer are not necessarily diminished. The reasonableness of a settlement depends on the circumstances existing at the time, provided the plaintiff has acted reasonably in discovering the circumstances material to the settlement at that time.[1060]

1296 The Chief Justice had earlier noted that '[t]he plaintiff must show that the sum accepted in settlement was reasonable',[1061] and had agreed with Hayne J's finding that the test of reasonableness is an objective one.[1062]

1297 In this respect, Hayne J stated that, '[w]hether the compromise of a claim was reasonable must be judged objectively, not subjectively …',[1063] following which his Honour stated:[1064]

> Next, the question whether the settlement was reasonable must be judged by reference to the material the parties had available to them at the time the compromise was reached. It is not to be judged according to whether material which was obtained later shows that the opposite party could or could not have prosecuted or defended the claim successfully but according to the assessment which could properly be made at the time of settlement of the chances of success or failure.
>
> Often that will require consideration of whether the party that later seeks to say that the settlement was reasonable had made sufficient inquiries and had sufficient information available to it to warrant reaching a compromise. …

1298 In response to the broker's argument that liability should be fixed by reference to a judgment sum, Hayne J disagreed, stating inter alia:[1065]

> [T]o subject the broker to liability based upon a settlement that is found to be reasonable is not unjust. And it is not unjust even though there may well have been a range of figures within which settlement could reasonably occur and even though the decisions whether to settle and at what figure to settle are decisions over which the broker has no control. It is always necessary to recall that the broker was in breach of duty. There is no injustice in leaving the wrongdoer to bear the consequences of the decisions made in response to that wrongdoing by the party harmed — so long as those decisions are reasonable. Reasonableness informs much of the law of contract and, in

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1060 *Unity Insurance* (1998) 192 CLR 603, 609 [7].
1061 *Unity Insurance* (1998) 192 CLR 603, 608 [6], citing *Biggin & Co Ltd v Permanite Ltd* [1951] 2 KB 314, 321 (Somervell LJ); 326 (Singleton LJ).
1062 *Unity Insurance* (1998) 192 CLR 603, 608 [6].
1063 *Unity Insurance* (1998) 192 CLR 603, 653 [129].
1064 *Unity Insurance* (1998) 192 CLR 603, 653 [130]–[131].
1065 *Unity Insurance* (1998) 192 CLR 603, 654 [134] (footnotes included).

particular, the assessment of damages for breach.[1066] This means, for example, that if the party wronged has acted reasonably, the wrongdoer may be liable for all the loss that the plaintiff has suffered, even if the plaintiff's conduct has increased the loss.[1067] Conversely, the party wronged is not bound to take all possible steps to mitigate its loss, only those steps which are reasonable.[1068]

1299 This case examined the reasonableness of a settlement, in light of the broker's breach of contract and the insured's claim for damages. In the current proceeding, the reasonableness to be assessed relates to the measures deployed by Probuild to mitigate its loss, in response to the alleged breach of contract by V601. Further, the question also concerns whether acceleration damages can include the reasonable costs of mitigation. This aspect was considered earlier, in the authorities outlined above (*GEH v Laing* and *BG Checo*).

Conclusions

1300 I consider that Probuild is entitled to recover the additional costs it has expended in its efforts to overcome and minimise delay to the works, in order that the works achieved Practical Completion by the dates required by the Contract, as damages flowing from V601's breach, by its Project Manager, in not awarding and compensating Probuild in relation to the extensions of time to which it was entitled during the course of the performance of the WUC.[1069]

1301 I am also of the view that Probuild's acceleration costs were necessary and reasonable costs incurred in mitigation in respect of delays, or likely delays, which, through breach of the Contract by V601, by its Project Manager, were not

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1066 *Bellgrove v Eldridge* (1954) 90 CLR 613, 618–19; see also *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673; *Ruxley Electronics and Construction Ltd v Forsyth* [1996] 1 AC 344; *Jacob & Youngs v Kent* (1921) 129 NE 889, 891–2 (Judge Cardozo).

1067 See, eg, *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452, 506 (Lord Macmillan); *Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd* [1976] 1 NSWLR 5, 9 (Yeldham J); *Segenhoe Ltd v Atkins* (1990) 29 NSWLR 569, 582 (Giles J).

1068 Eg, a party is not bound to embark upon a 'complicated and difficult piece of litigation against a third party': see *Pilkington v Wood* [1953] Ch 770, 777 (Harman J).

1069 *Perini* [1969] 2 NSWR 530; *Multiplex Constructions Pty Ltd v Abigroup Contractors Pty Ltd* [2005] QCA 61; *Amec Process and Energy Ltd v Stork Engineers & Contractors BV* [1999] 68 Con LR 17.

compensated for in time or cost as required by cl 34 of the Contract.[1070]

1302 Further, for the above reasons, I also consider that the subject acceleration costs, loss and damage was caused by V601's breaches, by its Project Manager, in denying Probuild the time extension process agreed and intended to be underwritten by the Contract, and by ultimately denying Probuild its time extension entitlements as determined herein.

1303 Further, I consider that Probuild's cost, loss and damage was within the contemplation of both V601 and Probuild, and I also find would have been within the contemplation of a reasonable person in V601 and Probuild's position.

1304 I am satisfied, principally by the evidence of Bready, that Probuild took necessary and reasonable measures to accelerate WUC so as to overcome or reduce delay to project activities in order to achieve Practical Completion by the dates for practical completion of the Separable Portions. I am also satisfied that Lyall's expert evidence supports the fact and the mitigating effect of the measures that Probuild implemented to accelerate the WUC, and elements of those works.

1305 I consider that Probuild is also entitled to recover the same acceleration costs on the alternative basis that, as a result of V601's breaches arising from the Project Manager's lack of independence and V601's breach of the Contract in exercising undue influence upon the Project Manager, Probuild incurred acceleration costs for the reasons and of the same nature described in the immediately preceding paragraph.

1306 In respect of both species of breach referred to in the four preceding paragraphs, I have earlier found V601 directly, and by its Project Manager, to have perpetrated the breaches referred to above; and in respect of both species of breach, I am satisfied that they have caused Probuild to incur costs, loss and damage as a result of its

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1070 *Great Eastern Hotel Company v John Laing Construction Ltd* [2005] EWHC 181, [321]; *BG Checo International Ltd v British Columbia Hydro and Power Authority* [1993] 1 SCR 12; *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603.

efforts to accelerate the WUC, and relevant parts of those works.

1307 I also record my view that Probuild is not barred by either cls 32.5(c) or 34.9(c) from recovering such of its costs and loss flowing or arising as outlined above, because:

(a) cl 32.5(c) is confined in its application to loss arising out of a cause of delay and a direction given by the Project Manager under cl 32.4 of the Contract.

Probuild's acceleration costs arise from the Project Manager's said relevant breaches, alternatively arising as the cost of mitigation;

(b) cl 34.9 is limited in its application to recovery by the Contractor of other damages, costs or other compensation, in respect of the Contractor's entitlement for delay and disruption to the WUC.

Probuild's acceleration costs arise as outlined above, and not (in relation to this head of claim by Probuild) as damages, costs or other compensation in respect of the Contractor's entitlement for delay and disruption.

1308 Further, I also reject V601's assertion that Probuild has not produced any evidence that Probuild accelerated the WUC. I also reject V601's assertion that Probuild has not demonstrated any acceleration of the works on the critical paths which Probuild claims are relevant, given that the Project Manager by its conduct in failing or refusing to approve the Contractor's Programs submitted to it for approval, thus prevented the demonstration of acceleration on the 'Approved Contractor's Program' as contemplated by the Contract.

1309 Contrary to the thrust of V601's defence to Probuild's acceleration claim, Lyall considered the impact of Probuild's efforts to accelerate the works by reference to his Baseline WUCP01 Program (as Lyall explained in his evidence, he could not do so on 'the Approved Contractor's Program'). Further, I am satisfied that Lyall's expert evidence has taken into account the impact of Probuild's acceleration-related efforts,

which Lyall refers to as 'mitigation' efforts.[1071] Peter Picking, an expert in construction management called by Probuild, also opined that Probuild's mitigation measures, which included attempted acceleration of relevant parts of the WUC, were reasonable and appropriate.[1072]

1310 I reject V601's assertion that there is no substantiation in Probuild's case as to increasing resources and resequencing works. I consider that the combination of Bready's evidence in his first statement at [619]–[636], and Lyall's evidence referred to above, sufficiently establishes that Probuild's acceleration efforts, including Probuild's efforts to increase productivity and accelerate parts of the WUC in an effort to obviate delay where possible, and otherwise mitigate delay, were substantial and largely effective.[1073]

1071 Lyall Expert Report, 12 April 2018, [17], [163]–[164], [184], [186], [223]–[224], [259]–[260], [295]–[296], [335]–[336], [375]–[376]; Lyall Expert Report, 20 December 2018, [75], [266], [280]; see also Abbott Report 20 December 2018, examples [75] and 253].

1072 Picking Expert Report, 16 October 2018, [2.1.3], including [2.1.3.2]; Picking Expert Report, 20 December 2018, [2.1.2], including [108] and [109].

1073 Bready First Witness Statement: including at [40] (completion of early works and WUC commencement); [43] (possibility of a 'soft start'); [127] (Soft Spots and foundation piling works); [186]–[188] and [194]–[196] (resequencing piling work and slab pours (Soft Spots)); [198] (Building E (Soft Spots)); [199] (Core E1; pre-emptive step (Soft Spots)); [202]–[203] (sheet piling & core E1 (Soft Spots)); [216] (relocation of access ramp (Soft Spots)); [264] (vapour barrier (Hydrocarbon Contamination)); [284] (re-sequencing WUC (Hydrocarbon Contamination)); [285]–[290] (post-certification of vapour barrier: resource concentration to get back in sequence; work occurring around the area affected by the HC (Hydrocarbon Contamination)); [316], [323]–[324] and [326] (redesign to provide V601 with additional time to arrange for kiosk removal (Citipower Kiosk)); [320] and [343] (staged construction of Building D (Citipower Kiosk)); [374] ('looking for ways to catch up' (Citipower Kiosk)); [382] (acceleration to reduce delay (Citipower Kiosk)); [389] (Building D and working around the kiosk (Citipower Kiosk)); [398] (necessary to re-sequence work to progress unaffected areas (Childcare Centre)); [399] and [464] (commercial part of Building C to be constructed as a 'cold shell' (Childcare Centre)); [418] (design changes to be resolved asap to mitigate impact on site works (Childcare Centre)); [432] façade changes (Childcare Centre); [441] (see (a)(iv); attempting to move forward in the absence of complete/undated docs (Childcare Centre)); [449] (redirection of activities (Childcare Centre)); [469] (see (a); re-sequenced resources into Building C to minimise delay arising from vapour barrier (Childcare Centre)); [582] (see (d); sourcing locally rather than overseas (Glazing Delay)); [591] (premium required for production overtime by Melbourne Façades (Glazing Delay)); [596] (additional resources required by Melbourne Façades to meet site requirements (Glazing Delay)); [601]–[602] (incentive agreement between Probuild and Melbourne Façades (Glazing Delay)); [613] (internal fit-out commenced to address delays (Glazing Delay)); [615] (other measures implemented to reduce this delay (Glazing Delay)); [619]–[628] (team adjustments, including windows & services coordinators, a defects supervisor, and additional labour; additional forklift driver and forklift hire and operation; additional Alimak/lift driver; additional builder's lift; additional swing stages; site amenities relocation); [630]–[631] (rented another factory to provide additional space for Melbourne Façades (see also Bready Third Witness Statement, [86]–[87]); incentive agreement with MF); [632]–[633] (out-of-sequence work by plastering and painting

1311 Finally, in relation to the acceleration component of Probuild's claim, I reject V601's assertion that Cox's evidence as to the quantum of Probuild's acceleration claim fails to either identify the documentary basis for his assessment and/or expose a cogent path of reasoning.

1312 In my view, the comprehensive list of briefed materials upon which Cox relied, in his First Report of 8 June 2018 at [6] (Probuild acceleration costs information), and Cox's Materials Appendix 'N', and Cox's Reply Report of 20 December 2018 at [4], adequately meets V601's first point of criticism in relation to his quantum report on acceleration.

1313 I am also not satisfied, as asserted by V601, that Cox fails to sufficiently expose his path of reasoning in his report of 8 June 2018 at [6].

1314 Cox's report explains his process of reviewing additional resources, plant, equipment and associated charges, and the information relating to Probuild's acceleration claim detailed in Appendix 6 of Probuild's closing submissions of 11 June 2019.

1315 Furthermore, and most significantly, Bready's first witness statement at [618]–[636], in conjunction with Probuild's detailed and cross-referenced submission at Annexure 6 [Acceleration] of its closing submissions dated 11 June 2019, substantiate the breakdown of the specific items which make up its acceleration costs claim in the sum of $1,706,535.81. V601 has not sought to engage with the detail or Probuild's proofs of this sum, including failing to engage with or traverse Bready's evidence in

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subcontractors); [637] (acceleration of lift installation works in Building B); [642] (onsite efforts to accelerate WUC). Bready Second Witness Statement: including at [62] (reference to relocation of access ramp to open up a work-front that would otherwise not have been available; see also Bready First Witness Statement, [216]); [71] (WUC re-sequenced to enable work in adjacent areas to continue until vapour barrier installed (Hydrocarbon Contamination)); [91] (re-design of foundation piles (Soft Spots); see also Bready First Witness Statement, [127]); [94] Design solution to accommodate continued presence of kiosk (Citipower Kiosk); [117] and [153] ('cold shell' plan re childcare centre (Childcare Centre)); [162] (cost reduction associated with changing awning windows to glazed windows; see also, [165]–[166]). Bready Third Witness Statement: [44] (refers to pre-emptive action in relation to sheet piling design; see also Bready First Witness Statement, [199])).

relation to Probuild's acceleration claim, and Probuild's claimed costs, loss and damage in respect of that claim.

1316 I observe, however, that the language and scheme of cl 32.4 of the Contract reflects the parties' intent that, in the event that the Project Manager directs the Contractor to accelerate works to overcome or minimise delay, the Contractor is, pursuant to cl 32.5(b), entitled to claim and recover its reasonable and necessary additional direct costs and expenses as a result of acceleration, valued pursuant to cl 36.4. In such circumstances, cl 32.5(c) of the Contract makes it clear that the Contractor is not entitled to any other compensation or claim for loss arising out of the relevant cause of delay or the direction to accelerate.

1317 Further and similarly, cl 34.9(c) of the Contract makes clear the parties' intent that if the Contractor is entitled to delay damages, in respect of an extension of time, such delay damages represent the Contractor's sole entitlement for any such delay or disruption.

1318 For the above reasons, and also because the Contractor's acceleration efforts are directed at overcoming or minimising relevant delay under the Contract, the Contractor should not be both compensated for accelerating the works and also granted an extension of time for delay to the same works, entitling it to recover delay damages. Clauses 32.5(c) and 34.9(c) above contradict this.

1319 In this regard, I note that it appears that neither party put on evidence, or made submissions, clarifying whether the Probuild acceleration claim components were, or were not, overlapping with Probuild's cl 34.9(a) delay damages claim. I consider, however, that it is clear enough from the nature of the components of cost, loss and damage claimed by Probuild as part of its acceleration claim, that a number of the components of that claim are also in the nature of direct on-site time-related costs, including on-site preliminary costs, which are in the nature of delay damages, recoverable under cl 34.9(a) of the Contract in connection with a successful time

extension claim.

1320 I am satisfied that Probuild is (subject to the following) entitled to be paid for the acceleration costs incurred in the sum of $1,706,535.81 (as explained and calculated below); however, I have also separately held that Probuild is entitled to extensions of time claimed by it in relation to the Early Works and EOT claims 2A, 3, 6 and 7, and is entitled to associated Delay Damages under cl 34.9 of the Contract. Those Delay Costs, I note, are in the nature of direct on-site time-related costs, including on-site preliminary costs.

1321 The outcomes outlined in the last preceding paragraph give rise to potential double recovery of the same loss and damage by Probuild.

1322 However, I consider that the rule against double recovery precludes Probuild from recovering that part of Probuild's acceleration claim which would result in it probably recovering the same direct on-site time-related costs, including on-site preliminary costs (delay damages) both as components of its acceleration cost claim and as part of the Delay Damages that Probuild will recover in relation to its successful time extension claims in this proceeding.

1323 If, however, I am wrong in holding that Probuild is entitled to the above extensions of time and associated delay damages, then Probuild is, I consider, entitled to judgment on its acceleration claim to the full extent of $1,706,535.81.

1324 In the premises, I have considered which of Probuild's acceleration cost components are not likely to also form part of Probuild's recoverable cl 34.9 Delay Damages claim, and I am satisfied that the following components of Probuild's acceleration claim referred to in Appendix 6 of its closing submissions dated 11 June 2019 are not in the nature of delay damages, and are costs which would not also be recoverable by Probuild pursuant to cl 34.9.

(a) Additional labour – $428,977.92;

(b) Additional forklift driver – $82,348.44;

(c) Additional alimak driver – $97,669.08;

(d) Additional builders' lift – $5,140;

(e) Additional swim stages – $100,300.36;

(f) Rental of additional factory facilities off-site – $85,770;

(g) Windows: out of sequence work – $234,000;

(h) Plasterboard – $233,000;

(i) Painting – $36,040;

(j) Otis storage costs – $42,500.

Total: $1,345,745.80

1325 The following items in Appendix 6 to Probuild's closing submissions should in my view be disallowed as components of Probuild's acceleration claim to obviate double recovery (given that Probuild has succeeded in its EOT claims and associated Delay Damages Claims) because such costs are in the nature of direct on-site time-related costs, or in the nature of preliminaries, and are all probably components of recoverable Delay Damages by Probuild:[1074]

(a) Windows coordinator – $142,208;

(b) Defects supervisors – $53,819.80;

(c) Service coordinator – $77,328;

(d) Site amenities – $86,380.21.

Total: $359,736.01

1074 Bready First Witness Statement, 26 February 2019, [618], describes these costs as preliminary costs.

Accordingly, Probuild is entitled to recover Delay Damages or alternatively damages in respect of the costs, loss and damage Probuild incurred by way of acceleration costs and mitigation costs, in the sum of $1,346,799 (namely, $1,706,535 less $359,736).

Façade Variation Claim

1326 Probuild claims a variation for unpaid work relating to the precast 'return walls' constructed as part of the façades for the Project. The amount claimed represents the difference between the cost of constructing the return walls using precast concrete and another lightweight material.[1075]

Probuild's submissions

1327 Probuild submits that the variation arises on the proper construction of the Contract, in particular Item 14.0 of the Schedule of Clarifications, which provides that the extent of the precast façade included in the Contract Sum was to be in accordance with the drawings marked up and included in the Preliminary Design. The Preliminary Design at Appendix 3 stated the following:[1076]

> Precast Panel Location Series (email from Hannah DKO) 'refer colored marked up A3 precast drawings' – 19th October 2010.

1328 Attached to the email referred to, from 'Hannah dKO', were colour-coded sketches of 'precast location mark-ups' which Probuild submits did not specify that the return walls were to be built from precast concrete.[1077]

1329 Probuild submits that a divergence emerged between Probuild's tendered price and dKO's developed design for the façade wall, due to the following circumstances:

(a) Probuild was provided with an email dated 19 October 2010 from Ms Hannah

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1075 A chronology of events giving rise to this variation is at Annexure 7: Probuild Closing Submissions, 11 June 2019, [331].

1076 FCB0053 at FCB0255.

1077 Probuild Closing Submissions, 11 June 2019, [333].

Jonasson (Jonasson) of dKO, containing drawings which were then used by Probuild when tendering for the Project.[1078] Those drawings were also incorporated into the Contract by reference to Preliminary Design at Appendix 3 of the Contract (Probuild Drawings).

(b) On the same day, Mauro Miglino of dKO sent another email attaching further drawings depicting the return walls (dKO Drawings), which dKO used when developing the Project's design, but which were *not* incorporated into the Contract and *not* received by Probuild before executing the Contract.[1079]

1330 On 15 June 2012, Probuild submitted a variation claim to the Project Manager regarding the extent of precast concrete façade panels required for the Project.[1080]

1331 The Project Manager rejected Probuild's façade variation claim. Furthermore, Probuild submits that Nave's rejection of the variation claim also demonstrated his lack of independence because, shortly before Probuild submitted this variation claim, Nave sent an email to V601's consultant stating that he would use every section in the drawings, finishes, schedules, specifications, and the Contract to reject the claim.[1081] Probuild also submits that the Project Manager in cross-examination attempted to nullify the significance of this statement and Probuild contends that, as a result, Nave demonstrated that he lacked credibility and was partisan.[1082]

1332 Additionally, Probuild submits that by refusing its claim, and by requiring that Probuild construct the design that dKO had developed based on drawings not provided to Probuild during the tender phase, the Project Manager directed an adjustment to the required precast works (under cl 1, a 'direction' may include a 'rejection'), which either:

(a) engaged the deemed variation arrangements at Item 14.0 of the Schedule of

1078 FCB0255.
1079 Probuild Closing Submissions, 11 June 2019, [334].
1080 Bready First Witness Statement, [693]; Probuild Closing Submissions, 11 June 2019, [336].
1081 FCB3518; Probuild Closing Submissions, 11 June 2019, [338]. See also, T1792.23–26.
1082 Probuild Closing Submissions, 11 June 2019, [338].

Clarifications, such that Probuild is entitled to recover the additional costs incurred upon incorporating additional precast panels into the Project; or

(b) alternatively, gave rise to a variation for the purposes of cl 36 of the Contract.[1083]

1333 Probuild also submits that by not making a determination on the further variation claim that Probuild submitted in relation to precast panels in July 2013, the Project Manager gave rise to a further breach of the Contract by V601.[1084]

1334 Finally, Probuild submits that the Court should accept Cox's value of the Façade Variation works in the sum of $520,436 (plus GST) for the following reasons:

(a) Cox relied on the rates and prices identified in Probuild's subcontract with its precast concrete supplier, SA Precast Pty Ltd, which may be contrasted with Birchall's analysis on behalf of V601, which relied on different rates and prices, the derivation of which is not explained; and

(b) Cox's analysis reasonably reflects the premium that a supplier would charge for small quantities of work.[1085]

V601's submissions

1335 Primarily V601 asserts that the work which Probuild undertook in relation to the return was to the façade on the Precinct Project, and was not in the nature of a variation to the WUC. V601 also contends that Probuild carried out the precast works without giving V601 the opportunity to decide on the materials to be used to construct the façade and that therefore, under cl 36.4 of the Contract, Probuild assumed the risk of additional costs and delay in relation to that work.

1083 Probuild Closing Submissions, 11 June 2019, [339]. See also T1792.29–31, T1793.21–23, and T1793.30–T1794.3.

1084 Probuild Closing Submissions, 11 June 2019, [340].

1085 Probuild Closing Submissions, 11 June 2019, [341].

Contractual provisions

1336 V601 submits that the following contractual provisions are relevant to determining the façade variation claim:

(a) Clause 36.1(c) which sets out the Project Manager's function of directing Variations, stating as follows:

> **36.1 Directing Variations**
>
> …
>
> (c) If the *Contractor* receives a *Direction* from the *Project Manager* which, although not stated to be a *Direction* to carry out a *Variation*, the *Contractor* considers it to be a *Direction* to carry out a *Variation*, the *Contractor* shall:
>
> (i) immediately notify the *Project Manager* that it considers the *Direction* to be a *Variation*;
>
> (ii) as soon as reasonably practicable but in any case not later than 10 *Business Days* after receipt of the *Direction*, provide the *Project Manager* with a detailed quotation for the proposed *Variation* supported by measurements or other evidence of cost; and
>
> (iii) not commence or proceed with any works on *Site* in connection with the *Direction* until a further written *Direction* to do so is received from the *Project Manager*.

(b) Clause 36.2 which states that the Project Manager may issue a written notice of a proposed Variation, in relation to which Probuild is required within the time specified (or otherwise within 10 Business Days) to provide the Project Manager with an estimate of the:

> (i) effect on the *Approved Contractor's Program* (including the *Date for Practical Completion*); and
>
> (ii) cost (including all warranties and time-related costs, if any) of the proposed *Variation*.

(c) Clause 36.4 which sets out the process for pricing a Variation and specifically states that:

> (i) the *Contractor* shall not carry out a *Variation* unless and until a price for the *Variation* has been agreed between the *Project Manager* and the *Contractor*, or determined by valuation …; and
>
> (ii) if the *Contractor* carries out a *Variation* prior to the price being agreed or determined, the *Contractor* shall not be entitled to any additional payment, or any *EOT*, for carrying out that

Variation.[1086]

Prospective consideration

1337 V601 submits that the cl 36 Variation regime establishes the importance of Probuild providing clear and detailed information ahead of time, in relation to potential costs and delay, which in turn demonstrates the intention to allow V601 to decide whether to direct the Variation only once it has all relevant information.[1087] V601 submits that, by carrying out a Variation before V601, as principal, has had an opportunity to make an informed choice, cl 36.4 allocates the risk of any additional cost or delay to Probuild.[1088]

Independence

1338 V601 argues that no issue concerning the Project Manager's independence arises in connection with this claim, because the Project Manager did not conduct an assessment of the price of the façade variation.[1089]

Entitlement to Variation Price

1339 V601 submits that:

(a) the emails relied on by Probuild as giving rise to a direction to Probuild under cl 36 or, alternatively, under cl 20.3 of the Contract to vary the WUC by constructing the façade return walls out of precast concrete make no reference to either a direction or a Variation;

(b) in cross-examination, Bready admitted that there was no express direction under either cl 36.1, or cl 20.3, that Probuild was to construct the return walls of precast concrete instead of lightweight materials; and

(c) there is no evidence that Probuild provided the Project Manager with a notice

1086 V601 Closing Submissions, 12 June 2019, [341]–[343].
1087 V601 Closing Submissions, 12 June 2019, [344].
1088 V601 Closing Submissions, 12 June 2019, [345].
1089 V601 Closing Submissions, 12 June 2019, [346].

or quote in relation to the subject work, as required under cl 36.1(c).[1090]

1340 Further, in its oral closing submissions, V601 highlighted that in responding to Probuild's request for a variation in relation to the façade, Nave stated: 'You have not provided any information to substantiate how or why additional pre-cast panels are in fact required. That is, in lieu of alternative materials or at all.'[1091] V601 contends that contrary to Probuild's submission that through some kind of implication or direct conduct there was a direction that the precast be utilised, Nave in fact asked: 'Why are you doing this? Why are you not doing something else? Why are you not just leaving these out all together? You haven't explained that at all'.[1092]

1341 V601 asserts that the real reason for the increase in price is revealed in an internal Probuild email from Sleeman to Bready, dated 19 March 2012, which states that the price difference was 'due to an error by our estimator'.[1093]

1342 Further, V601 asserts that in Probuild's original Variation claim, it assumed that it had not made any allowance in the Contract Sum for the construction of the return walls. V601 also observes that no revised Variation request was submitted to the Project Manager until 16 July 2013, after all of the precast panels had been installed.[1094]

Probuild's reply submissions

1343 Probuild submits that V601's defence that there is 'no evidence that Probuild provided the Project Manager with a notice or quote as required under cl 36.1(c)', in relation to the façade work in issue, should be rejected on the basis that it has not been pleaded by V601 in respect of the façade variation claim.[1095]

1090 V601 Closing Submissions, 12 June 2019, [347]–[348].
1091 T1922.6–19.
1092 T1022.20–25.
1093 V601 Closing Submissions, 12 June 2019, [348].
1094 V601 Closing Submissions, 12 June 2019, [349].
1095 Probuild Reply Closing Submissions, 12 June 2019, [164].

1344 Further, Probuild submits that V601's submission disregards the Contract and the following evidence for these reasons:

(a) The additional precast required to build dKO's design engaged the deemed variation arrangements at Item 14.0 of the Schedule of Clarifications to the Contract and, for that reason, Probuild is entitled to recover the additional costs incurred upon incorporating additional precast panels into the Project.[1096]

(b) Probuild's claim satisfies the requirements of cl 36.1(c), because the following evidence demonstrates that Probuild provided the necessary information to the Project Manager, for the purposes of cl 36.1(c)(ii), in June 2012:[1097]

(xxix) Probuild issued a variation submission on 15 June 2012 containing a quotation for that work;

(xxx) the Project Manager rejected the submission on 21 June 2012; and

(xxxi) at Construction Meeting #29 on 7 September 2012, Mr Mackenzie of V601 stated that the precast works were to proceed as currently documented. Thereafter Probuild performed that work.[1098]

1345 Finally, Probuild submits that the Project Manager's conduct, outlined above, and relied upon by Probuild, amounts to a 'direction' (and therefore a variation) for the purposes of cl 36.1(c)(iii) of the Contract because:

(a) the Contract defines 'direction' non-exhaustively so as to include a 'rejection', including by the Project Manager; and

(b) by rejecting Probuild's variation submission, and requiring Probuild to construct the design that dKO had developed based on drawings not

1096 Probuild Reply Closing Submissions, 12 June 2019, [165].
1097 Probuild Reply Closing Submissions, 12 June 2019, [167].
1098 Probuild Reply Closing Submissions, 12 June 2019, [166].

provided to Probuild during the tender phase, the Project Manager directed an adjustment to the required precast for the Project.[1099]

Considerations

Outline of key facts

1346 I accept that the following events outlined by Probuild in its closing submissions establish the context of the façade variation claim.

Date	Event	Evidence
19 October 2010	Hannah Jonasson of dKO sends an email to Pek-Soon Kwan, Mr Nave and Mr Miglino of dKO to which is attached colour coded sketches of the precast location-mark-ups.	Bready 1, [668] FCB2380
23 May 2011	Probuild and V601 enter into Contract. The Project Specification at Appendix 3 to the Contract stated: 'Precast Panel Location Series (email from Hannah DKO) refer colored markedup A3 precast drawings' – 19th October 2010' The sketches attached to the 'Hannah dKO' email did not provide for the return walls to be fabricated from precast concrete.	Bready 1, [22] and [667] FCB0053
9 December 2011	Probuild issues a precast tender package to SA Precast.	Bready 1, [673] FCB2241 FCB2243 FCB2246 FCB1982 FCB2024
30 May 2012	Probuild issues the main precast façade package to SA Precast for tender.	Bready 1, [692] FCB 2927 FCB2975 FCB3006 FCB3089 FCB3127 FCB3136
15 June 2012	Mr Bready sends an email titled 'Façade Precast – Variation Submission' to Mr Nave with Probuild's variation claim for the supply and installation of additional precast concrete panels for the return walls (VR-000033).	Bready 1, [693] FCB3521 FCB3523
21 June 2012	Mr Nave rejects Probuild's variation claim VR-000033.	Bready 1, [694] FCB3538
7 September 2012	At Construction Meeting #29 Mr Mackenzie states that precast works were to proceed as currently	Bready 1, [696]

1099 Probuild Reply Closing Submissions, 12 June 2019, [167].

Date	Event	Evidence
	documented.	FCB4334
23 November 2012	At Construction Meeting #36 Mr Bready tabled a hard copy of Probuild's markup of the precast drawings relevant to their façade variation.	Bready 1, [697] FCB4573
16 July 2013	Probuild submits variation claim VR-000150 regarding the extent of the precast concrete façade panel required for the Project.	Bready 1, [670] FCB4916 FCB4918

1347 Clause 1.0 of the Schedule of Clarifications [Appendix 2] of the Contract provides:

> The documentation upon which the Contract sum is based is as set out in Appendix 3 – Specifications and Appendix 4 – Preliminary Design.

1348 Item 14 of the Schedule of Clarifications in the Contract provides as follows:

> Precast Concrete
>
> The extent of precast concrete façade panels included in the Contract sum is to be in accordance with the drawings marked up and included in the preliminary design.

1349 The Contract defined 'preliminary design' in cl 1 as follows:

> Preliminary Design
>
> means the preliminary design of *the Works* included in the documents stated in *Item* 11, including any other documents, data, design or other information whatsoever prepared prior to the *Contract Date* by or on behalf of any of the parties identified in *Item* 20 in respect of *WUC*.

1350 Accordingly, the preliminary design was included in the Project requirements referred to in Item 11 of Annexure Part A of the Contract.

1351 The relevant Project Specification is at Appendix 3 to the Contract. The Project Specification, amongst other things, stated that the Documents Register set out in Appendix 3 (Specifications) provides the details of the Project Specifications noted in the Principal's Project Requirements.

1352 The Architectural Schedules and Specifications – dKO Architecture (Victoria) Pty Ltd at Appendix 3 included:

> Precast Panel Location Series (email from Hannah DKO) refer colored marked up A3 precast drawings – 19 October 2010

1353 Bready's evidence-in-chief in his 26 February 2019 Amended Witness Statement included, in relation to the façade variation issues, that:

> [668] The 'Hannah DKO' email dated 19 October 2010 referred to in the Project Specification was from Hannah Jonasson of dKO to Pek-Soon Kwan, Mr Nave and Mr Miglino of dKO and attached colour coded sketches of 'precast location mark-ups', which Ms Jonasson summarised in her email as follows:
>
> (a) Pink – columns, both structural and decorative;
>
> (b) Orange – façade and infill panels;
>
> (c) Light blue – 'long' slab edge (extended 370 slab);
>
> (d) Light Green – 'short' slab edge (250 Slab with 350 edge/upstand); and
>
> (e) Dark Green – parapet edge (250 slab with precast upstand).[1100]
>
> [669] It is my practice when managing projects to re-tender the major work packages. This occurred for the package to fabricate and supply the precast concrete panels for the Project. The tenders we received in response were considerably higher than the amounts allowed for in Probuild's tender. I asked Ms Kidd to investigate the reason for this. She reported back to me that a reason she identified was that the finalised specification involved a greater area of precast concrete panels when compared with the tender drawings. ~~This was because~~ The drawings attached to the 'Hannah DKO' email of 19 October 2010 did not specify that the return walls were to be constructed using precast concrete. In contrast, the updated drawings included in the tender request Probuild issued after executing the Contract with V601 specified that the return walls were to be made from precast concrete.
>
> [670] On 16 July 2013 Probuild submitted VR-000150 regarding the extent of the precast concrete façade panels required for the Project. Included in that variation were the following documents:
>
> (a) Drawings with purple highlighting showing the extent of the additional concrete facade panels, and dated 21 June 2012.
>
> (b) A document dated June 2012 which was titled 'Precast Takeoff –Panels not Evident on DKO's Markup Dated 19 Oct 2010'. In this spreadsheet Ms Kidd set out all the precast requirements across the Project that were not shown in the 'Hannah DKO' email of 19 October 2010. At the bottom of the spreadsheet she added all the areas of different types of panels used.
>
> I asked Ms Kidd to prepare these documents as part of the process for preparing Probuild's variation, and I reviewed them before they were

[1100] Bready 1, [668].

included with variation. The areas for the additional concrete façade panels used across the Project are consistent with my general recollection of the progress of work on site.

[671] Ultimately, Probuild built the facade return walls using precast concrete panels, which are more expensive to procure and install.

1354 I am satisfied that Probuild was provided with the email referred to above dated 19 October 2010 from Hannah Jonasson of dKO which attached colour-coded sketches of precast location work ups which did not describe the façade return wall to be constructed of precast concrete.

1355 I am also satisfied that Probuild used the dKO drawings transmitted on 19 October 2010 when tendering for the Project, and those drawings, which as explained above formed part of the preliminary design, were incorporated into the Contract by reference.

1356 Further, I accept that Probuild did not receive any further façade panel-related drawings issued by Miglino and dKO before executing the Contract. I also accept that subsequent drawings were produced and used by dKO to develop the Project's final design in the area in issue.

1357 In the circumstances outlined above, Probuild was obliged to construct concrete façade return walls which were of a greater scope than the façade component upon which it tendered, and Probuild is entitled in my view to be paid for this additional scope of concrete façade work as a variation to the Contract.

1358 I also highlight that the Project Manager subsequently rejected the Probuild façade variation claim, but in my view did not at the time of contractual rejection attempt to identify the source of confusion referred to above in relation to the dKO emails and drawings on which Probuild tendered, and the dKO drawings developed post contract in relation to the concrete façade return walls when assessing Probuild's variation claim.

1359 In rejecting Probuild's façade variation claim, Nave stated in an email to Probuild

dated 21 June 2012 that '[t]he contract documents "Preliminary Design" provides the design intend [sic] and there is sufficient information, and alternative details in the contract to complete the design and construction'.[1101] In so asserting, the Project Manager appears however to have ignored Item 1 and 14.0 of the Schedule of Clarifications, and also ignored Jonasson's email of 19 October 2010 and attached drawings, and therefore failed to identify and acknowledge the variation arising from a divergence in the required nature and extent of works depicted in the drawings attached to Jonasson's 19 October 2010 email, and that which V601 ultimately required to be built. Furthermore, in so asserting, Nave suggests design obligations which I do not consider were imposed on Probuild. It was not until Nave gave evidence at trial that the divergence in scope of work in the various dKO drawings was acknowledged by the Project Manager.[1102]

1360 For reasons including the above, I reject V601's primary defence to Probuild's claim which erroneously asserts that 'the subject-matter of the alleged Variations was always within the scope of the WUC', and I also reject that the changed façade scope was somehow a component of any Probuild design responsibility.

1361 I also reject Abbott's conclusion, that a variation does not arise in relation to the façade works both because Abbott's evidence goes beyond the scope of his role as programming and time extension expert and is irrelevant. Abbott's evidence on this aspect is irrelevant because Abbott purports to rely upon, and furthermore Probuild points out that Abbott relied upon, other architectural drawings included in the Contract. Abbott's evidence oversteps his role because it purports to opine on the ultimate issue, and therefore is irrelevant.

1362 I also observe that whereas Probuild has relied upon the drawings attached to Jonasson's email of 19 October 2010 which were incorporated into the Contract to support its claim, the various positions articulated by V601 seek to rely upon other

1101 FCB3538 at 3539 (point 3); Probuild Closing Submissions, 11 June 2019, [336].
1102 T868.

irrelevant architectural drawings in the Contract, without seeking to explain the divergence between the façade drawings communicated to Probuild on 19 October 2019 and the other architectural drawings identified by V601.

1363 I accept that in cross-examination Bready's evidence was that the Project Manager did not give Probuild an express direction requiring Probuild to construct the subject return walls from precast concrete in lieu of lightweight materials.[1103] Bready was not however further cross re-examined on this aspect, including the significance, if any, of there being no express direction.

1364 I also consider that by refusing Probuild's claim, and by requiring Probuild to construct the design that dKO had developed based on the drawings not provided to Probuild during the tender phase, the Project Manager in substance by this conduct directed an adjustment to the required precast façade scope of work for the Project.

1365 Clause 1 of the Contract provides that a 'direction' may include a 'rejection'.

1366 Similarly, V601 insisted at Construction Meeting #29 on 7 September 2012 that the precast works were to proceed as then documented. This insistence by V601 also, in my view, constituted a direction which increased the façade-related scope of work defined in Items 1 and 14.0 of the Schedule of Clarifications and Project Specification Appendix 3, with the consequence that Probuild is entitled under cl 36 of the Contract to recover the additional costs it incurred constructing precast panels for the Project.

1367 Furthermore, in Birchall's costing of Probuild's delay damages and Façade Variation, Birchall notes variances with cost on certain line items (Birchall's Appendix C to his Second Report); however, in respect of a very large number of variances noted by Birchall, he does not provide any explanation or rationale of his asserted calculation. Birchall also, on many occasions, asserts that a cost is irrelevant to a section of costing and has therefore been excluded; however, Birchall does not explain the

1103 T1117.30–T1118.

basis of the irrelevance which he asserts.

1368 I also reject V601's submission that Probuild's claim does not satisfy the requirements of cl 36.1(c) of the Contract. Probuild issued a variation submission on 15 June 2012 containing a quotation for the subject façade variation work, and the Project Manager rejected that submission on 21 June 2012. Thereafter, at Construction Meeting #29 on 7 September 2012, Mr Mackenzie of V601 stated that the precast works were to proceed as then documented. Probuild performed that work. Accordingly, I am also satisfied in relation to cl 36.1(c)(ii), that on 15 June 2012, Probuild, in substantial compliance with that clause of the Contract, provided V601 with notice and the detail of the extra work in issue.

1369 Although V601 mentions cl 36.4 of the Contract in its written closing submissions, V601 neither pleads reliance on cl 36.4 nor expressly submits that the clause prevents recovery by Probuild.

1370 In this instance, as outlined above, Probuild was in substance directed to undertake the subject façade return concrete works and was required by the Proprietor via the Contract to do so. In these circumstances, if cl 34.4 was deployed by the Proprietor, I consider that were V601 to plead cls 36.1(c) and 36.4 and submit defences to Probuild's claim, V601 would be precluded from relying upon either the absence of agreement or valuation as to the price of the extra work, or lack of notice or detail, or the absence of a written direction from the Project Manager.

1371 Finally, I am far from satisfied that the genesis and motive for Probuild's façade variation claim is established by the unexplained reference in an email from Mr Sleeman of Probuild to Bready, dated 19 March 2012, to an error by Probuild's estimator of some unparticularised type.[1104] In my view, the unexplained estimation error referred to in V601's submissions provides an insufficient basis upon which to conclude, as V601 contends, that Probuild sought to claim a variation so as to

[1104] T1117.11–16.

increase the price of the precast facade works because Probuild had earlier underestimated the cost of that work.

Probuild's valuation of the precast variation

1372 In respect of the valuation of the relevant precast and associated work, Bready in his evidence-in-chief in his first statement at page 196, details Probuild's costings in relation to the precast façade variation claim.

1373 Probuild ultimately used precast concrete panels for all of the return walls marked in purple on the drawings Ms Kidd prepared and dated 16 July 2013, and which were included in Probuild's variation request VR-000150. [PRE.004.012.6152] [PRE.004.012.6153] [PRE.004.012.6154] [PRE.004.012.6155] Its claim for the facade variation, valued at $704,055, is calculated as follows:

Column A	Column B	Column C	Column D	Column E
Item	Quantity (m^2)	Cost to supply	Cost to install	Amount
No finish to external panels	29.01	$337	$245	$16,880.91
CO-02 Bricksnaps	24.36	$830	$245	$26,187
CO-03 Bricksnaps	77.72	$814	$245	$82,305.48
CO-04 Bricksnaps	143.70	$814	$245	$152,178.3
CO-05 Formliner	95.89	$550	$245	$76,232.55
CO-06 Formliner	38.27	$532	$245	$29,735.79
CO-10 Applied Finish	1111.30	$357	$245	$669,002.60
Subtotal	*1,520.25*			*$1,052,523*
Less an allowance for a lightweight material				$(412,021)
Total				**$704,055**[1105]

1374 Probuild's Quantum Expert Cox calculates the value of the façade variation at $520,436 (plus GST).[1106]

1375 V601 did not traverse Bready's detailed evidence in relation to the cost of performing the façade variation works, nor did V601's Quantum Expert, Birchall, adequately traverse Cox's detailed evidence in relation to the costs incurred in the performance of the façade variation works, as earlier addressed in relation to Birchall's evidence.

1376 Birchall's costing of Probuild's Façade Variation Claim notes variances with cost on

1105 Calculated as explained at Bready 1, [699]–[700].
1106 Cox First Report, [7.1].

certain line items (Birchall's Appendix C to his Second Report addressing Cox's estimates); however, in respect of a very large number of variances noted by Birchall, he does not provide any explanation or rationale of his asserted calculation. Birchall also, on many occasions, asserts that a cost is irrelevant to a section of costing and has therefore been excluded; however, Birchall does not explain the basis of the irrelevance which he asserts. Birchall's evidence is less acceptable than Cox's evidence in this regard, and as also earlier explained in these reasons for judgment, Cox's evidence is more persuasive.

1377 For the above reasons, including the reasons referred to in the preceding paragraph above, and for the separately outlined reasons as to why I prefer Cox's quantum evidence to that put forward by Birchall, I also consider that Cox's evidence in relation to the value of Probuild's façade variation work is more persuasive than the evidence on that issue put on by V601.

1378 Finally, I am also of the view that the higher cost ascribed to the façade variation works by Bready, who was familiar with the works and what they cost Probuild to construct, corroborates that Cox's evidence and estimate is conservative. Bready ascribed a higher cost to the façade valuation work ($704,000 approximately) compared to Cox, who estimated this work at $520,436 plus GST.

1379 On the basis of the Expert Quantum evidence relied upon by Probuild, and the above matters, I am satisfied that Probuild is entitled to be paid the sum of $520,436 (plus GST) in relation to its performance of the extra façade work.

Key findings and conclusions

1380 For the above reasons I conclude and find as follows:

Interpretation of the Contract

Independence of the Project Manager

1381 Clauses 20.2(a) and (b) of the Contract, amongst other things, require the Project Manager to act:

(a) independently of the parties to the contract;

(b) reasonably in exercising the identified functions, including the independent functions referred to in cl 20.2 of the Contract;

(c) having regard to the express requirements of the Contract; and

(d) not having regard to the commercial interests of either party to the Contract —

whenever the Project Manager acts as an assessor and certifier, in respect of the following independent functions:

(a) whether the *Contractor* is entitled to an *EOT*;

(b) whether the *Contractor* has achieved *Practical Completion*;

(c) whether the *Contractor* is entitled to delay damages pursuant to clause 34.9; and

(d) in the assessment of the price of a *Variation* in accordance with clause 36.4.

1382 The requirement that the Project Manager act independently and reasonably in respect of the above independent functions, by implication, includes an obligation upon the Project Manager to also act impartially and fairly when acting as an assessor and certifier in respect of those functions.

1383 Clause 20.2(b) of the Contract does not permit the Project Manager to consult with either or both of the parties to the Contract in consultations, or in respect of matters, which are of a partisan nature, including for the purpose of supporting one parties'

defence of a contractual claim submitted by the other party to the Contract or to consult with either party to the Contract in relation to impeding or delaying or minimising or defeating, or in any way advantaging either party vis à vis the other party, or disadvantaging either party vis à vis the other party in respect of the matters referred to in cl 20.2 which are to be assessed and certified by the Project Manager.

1384 I find that in breach of the Contract, V601 and the Project Manager co-operated, consulted, and colluded in a partisan manner to devise and implement strategies and tactics which:

(a) were directed at advantaging V601 in dealing with and responding to Probuild's time-extension and delay damages claims under the Contract;

(b) were directed at advantaging V601, including by delaying the determination and certification of, and minimising or defeating, Probuild's contractual claims and entitlements in respect of its extension of time and delay damages claims;

(c) had regard to advantaging the commercial interests of V601 and, in particular, were directed at impeding, delaying, minimising, or defeating Probuild's contractual claims for extension of time and delay damages and thereby advantaging the commercial interests of V601;

(d) lacked independence and were partial, unreasonable, and unfair exercises of the Project Manager's independent functions and disregarded the express requirements of the Contract;

(e) did not have regard to express requirements of the Contract.

1385 I am comfortably satisfied that Probuild's 'indicia' of actions by the Project Manager, in support of its allegations that the Project Manager lacked independence, as detailed in Indicia 1 to 5 of Annexure 2 of Probuild's Closing Submissions dated 11

June 2019, cumulatively and separately each establish both contractually wrongful undue influence by the Proprietor over the Project Manager and establish that both V601, by its Project Manager, and the Project Manager by its principal Nave, in breach of the Contract, including cls 20.2(a)(i)–(iii) and 20.2(b) of the Contract, failed to perform the contractually required assessment, determination and certification functions with the required degree of independence, impartiality, or in a fair and reasonable manner, or in accord with express requirements of the Contract, or without regard for V601's commercial interests.

1386 I am also additionally and separately comfortably satisfied that the Indicia relied upon by Probuild in 6, 7, 8, 9 and 10 of Annexure 2 and summarised below[1107] —

> 6. The Project Manager requesting that its communications with Probuild and determinations relating to the exercise of its independent certification functions be prepared, reviewed or amended by V601 or its agents, and particularly in relation to Probuild's claims for extensions of time, the Façade Return Walls Variation and regarding the certification of Practical Completion.
>
> 7. The Project Manager seeking and, or alternatively, acting upon the advice and recommendations of V601's agents relating to its independent certification functions, or the proper exercise of those functions, and particularly in relation to Probuild's claims for extensions of time, the Façade Return Walls Variation and regarding the certification of Practical Completion.
>
> 8. The Project Manager procuring reports from TBH regarding Probuild's EOT2A and EOT3 claims, knowing that such reports were to be used by V601 or its agents to refute Probuild's EOT2A and EOT3 claims.
>
> 9. The Project Manager participating in meetings and telephone conversations, and being copied into correspondence, between V601, its agents and TBH regarding the defence of Probuild's EOT2A and EOT3 claims, including:
>
> (a) the establishment and maintenance of any privilege in such reports and summary documents; and, or alternatively
>
> (b) the content and timing of any determinations regarding Probuild's EOT2A and EOT3 claims having regard to V601's financing arrangements for the development at 601 Victoria Street, Abbotsford.
>
> 10. The Project Manager failing to disclose to Probuild documents

[1107] Probuild Closing Submissions, 11 June 2019, Annexure 2.

produced by TBH having regard to V601's strategy of maintaining any privilege in such documents.

each separately and cumulatively establish both contractually wrongful undue influence by the Proprietor over the Project Manager, and also establish that both V601 by its Project Manager, and its Project Manager by its principal Nave, in breach of the Contract, including cls 20.2(a)(i)-(iii) and cl 20.2(b) thereof, failed to perform the contractually required assessment, determination and certification functions with the required degree of independence, impartiality, or in a fair and reasonable manner, or in accord with express requirements of the Contract, or without regard for V601's commercial interests.

1387 I find that, as a result of the Project Manager's lack of independence and breaches of its obligations and duties, including those imposed on it by cls 20.2(a)(i)(iv) and 20.2(b)(i)–(iii), the Project Manager's assessments and certifications in respect of Probuild's extension of time claims and delay damages entitlements under the Contract, and the Project Manager's assessment and certification of practical completion under the Contract and the Project Manager's certification of Liquidated Damages pursuant to cl 34.7, including the Project Manager's Certificate Number 5 dated 18 December 2013, are each void and must be set aside.

1388 For the above reasons I dismiss V601's claim for Liquidated Damages in the sum of $4,712,579 as a debt due and payable pursuant to, and by way of enforcement of, the Project Manager's Certificate Number 5 dated 18 December 2013, or otherwise.

1389 I also conclude and find that the Project Manager's partisan administration of the Contract on behalf of V601 and associated lack of independence and the Project Manager's often unsatisfactory and unreliable evidence, by its Principal, referred to in these reasons for judgment, each independently and also cumulatively, comfortably persuade me to give very little or no weight to the Project Manager's evidence, in particular the evidence of its Principal, Mr Nave, in relation to all matters of controversy in this proceeding.

Clause 34 (EOT claims)

Relevant Approved Contractor's Program

1390 At all material times during the performance of the WUC, the Project Manager prevented an appropriate updated 'Approved Contractor's Program' being accepted under cl 32.3 of the Contract, and thereby prevented Probuild as the Contractor from demonstrating delay affecting an activity on the critical path of a Contractor's Program approved by the Project Manager as the 'Approved Contractor's Program' (from time to time), pursuant to, and as contemplated by, cl 32.3 of the Contract.

1391 I find that Lyall's Baseline program (WUCP01) as updated, in substance, constitutes the Approved Contractor's Program, including for the purposes of cl 34.4(b)(ii) of the Contract, and I am persuaded that program WUCP01 enables the identification of delay to an activity on the critical path of the WUC as in substance intended and in compliance with cl 34.4(b)(ii) of the Contract.

1392 I find that cls 34.3 and 34.4 of the Contract remain applicable and operative to the extent that the operation of those clauses was not prevented by the contractually wrongful conduct of the Project Manager failing and refusing to approve the Contractor's Programs submitted by Probuild as contemplated and required under cl 32.3.

1393 I find that the time-extension provisions in cl 34 of the Contract remained operative (subject to the above findings in relation to the 'Approved Contractors Program') and I find that, because at all material times the Contract contained operative time-extension provisions, the conduct of V601 and its Project Manager in breach of cls 20.2, 32.3 and 34 has not set time at large under the Contract.

1394 I find that, in breach of the Contract, V601 by its Project Manager (as V601's Agent) failed to pay Probuild the acceleration costs and bonuses to which Probuild was entitled in breach of cl 32.3 of the Contract.

1395 I find that cl 34 of the Contract, in particular cl 34.4(b)(ii), is not intended to limit or

prescribe how the Contractor may establish that a relevant delay has affected an activity which is on the critical path of the Approved Contractor's Program, and I find that it is contractually open to the Contractor to demonstrate, by whatever rational and persuasive means available, including retrospective as-build delay analysis, that a relevant delay has affected an activity on the critical path of a Separable Portion and/or of the WUC.

Programming evidence – delay analysis

1396 I prefer, and I am persuaded, that Lyall's retrospective delay analysis is, in the circumstances, a contractually permissible and probative, practical, logical, persuasive, and appropriate method of assessing and determining the effect caused by a critical and compensable occurrence in the nature of a delay to the critical path of the WUC.

1397 I accept and prefer Lyall's expert evidence in respect of delay and I find unpersuasive, and do not accept, Abbott's delay-related prospective assessments and evidence in respect of the delays claimed by Probuild. Consequently, I do not accept, and I am unpersuaded, by Abbott's prospective delay assessments.

1398 I am persuaded and find, principally on the basis of the evidence given by Bready and Picking, that Probuild took all reasonable measures to preclude the occurrence of events causing delay, and took all reasonable measures to mitigate and minimise resulting delay.[1108]

1108 Bready First Amended Witness Statement: including at [40] (completion of early works and WUC commencement), [43]: (possibility of a 'soft start'), [127] (Soft Spots and foundation piling works); [186]–[188] and [194]–[196] (resequencing piling work and slab pours (Soft Spots)), [198] (Building E (Soft Spots)), [199] (Core E1; pre-emptive step (Soft Spots); [202]–[203] (sheet piling & core E1 (Soft Spots)), [216] (relocation of access ramp (Soft Spots)), [264] (vapour barrier (Hydrocarbon Contamination)), [284] (re-sequencing WUC (Hydrocarbon Contamination), [285]–[290] (post-certification of vapour barrier: resource concentration to get back in sequence; work occurring around the area affected by the HC (Hydrocarbon Contamination)), [316], [323]–[324] and [326] (redesign to provide V601 with additional time to arrange for kiosk removal (Citipower Kiosk)), [320] and [343] (staged construction of Building D (Citipower Kiosk)), [374] ('looking for ways to catch up' (Citipower Kiosk)), [382] (acceleration to reduce delay (Citipower Kiosk)), [389] (Building D and working around the kiosk (Citipower Kiosk)), [398] (necessary to re-sequence work to progress unaffected areas (Childcare Centre)), [399] and [464] (commercial part of Building C to be constructed

1399 I am persuaded and find that Probuild did not cause relevant delay to the Early Works or the WUC, as a result of failing to adequately resource the Early Works of the WUC.

Probuild's early works claims

1400 I find that Probuild is entitled to the following extensions of time pursuant to cl 9A of the Contract in relation to Early Works:

(a) 165 calendar days, from 25 January 2012 to 7 July 2012, in respect of SP3 and SP4; and

(b) 199 calendar days, from 22 December 2011 to 7 July 2012, in respect of SP1, SP2, SP5, SP6, SP6A, and SP7.

1401 I reject, as unconcluded, V601's alleged clause '9A Agreement' in relation to the Early Works.

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as a 'cold shell' (Childcare Centre)), [418] (design changes to be resolved asap to mitigate impact on site works (Childcare Centre)); [432]: façade changes (Childcare Centre), [441] (see (a)(iv); attempting to move forward in the absence of complete/undated docs (Childcare Centre), [449] (redirection of activities (Childcare Centre)), [469] (see (a); re-sequenced resources into Building C to minimise delay arising from vapour barrier (Childcare Centre)), [582] (see (d); sourcing locally rather than overseas (Glazing Delay)); [591] (premium required for production overtime by Melbourne Façades (Glazing Delay)); [596] (additional resources required by Melbourne Façades to meet site requirements (Glazing Delay)), [601]–[602] (incentive agreement between Probuild and Melbourne Façades (Glazing Delay)), [613] (internal fit-out commenced to address delays (Glazing Delay)), [615] (other measures implemented to reduce this delay (Glazing Delay)), [619]–[628] (team adjustments, including windows & services coordinators, a defects supervisor, and additional labour; additional forklift driver and forklift hire and operation; additional Alimak/lift driver; additional builder's lift; additional swing stages; site amenities relocation), [630]–[631] (rented another factory to provide additional space for Melbourne Façades (see also Bready Third Witness Statement, [86]–[87]); incentive agreement with MF), [632]–[633] (out-of-sequence work by plastering and painting subcontractors), [637] (acceleration of lift installation works in Building B), [642] (onsite efforts to accelerate WUC; Bready Amended Reply Witness Statement: including at [62] (reference to relocation of access ramp to open up a work-front that would otherwise not have been available; see also Bready First Witness Statement, [216]); [71] (WUC re-sequenced to enable work in adjacent areas to continue until vapour barrier installed (Hydrocarbon Contamination)), [91] (re-design of foundation piles (Soft Spots); see also Bready First Witness Statement, [127]), [94]: Design solution to accommodate continued presence of kiosk (Citipower Kiosk), [117] and [153] ('cold shell' plan re childcare centre (Childcare Centre)), [162] (cost reduction associated with changing awning windows to glazed windows; see also, [165]–[166]); Bready Amended Supplementary Witness Statement: [44] (refers to pre-emptive action in relation to sheet piling design; see also Bready Amended First Witness Statement, [199])).

Probuild's EOT2A claim

1402 I find that the 'Soft Spots' referred to in relation to Probuild's EOT2A claim constituted latent conditions under cls 25.1, 25.1A, and 25.2 of the Contract.

1403 I find that, pursuant to cl 36 of the Contract, the Project Manager directed Probuild to redesign its planned piling and retention works to deal with the latent condition referred to in Probuild's EOT2A claim above.

1404 I find that the 'Hydrocarbon Contamination' referred to in Probuild's EOT2A claim constituted a Latent Condition under cls 25.1, 25.1A, and 25.2 of the Contract.

1405 I find that, pursuant to cl 36 of the Contract, the Project Manager directed Probuild to construct a vapour barrier to deal with the Latent Condition referred to in the above, arising from both the above Soft Spots and the above Latent Condition.

1406 In addition to Probuild's cl 9A (Early Works) extension of time entitlements referred to above, I find that Probuild is entitled to the following extensions of time under cl 34 of the Contract, and that Probuild is entitled to a Declaration in respect of each of the following time-extension entitlements:

EOT Claim	**Delay**
2A – Soft Spots	• SP3 – 10 working days – 27 April 2012 to 10 May 2012 • SP4 – 35 working days – 10 May 2012 to 5 July 2012 • SP7 – 35 working days – 10 May 2012 to 5 July 2012
3 – Hydrocarbon Contamination	• SP1 – 28 working days – 5 April 2012 to 24 May 2012 • SP6 – 28 working days – 5 April 2012 to 24 May 2012 • SP6A – 28 working days – 5 April 2012 to 24 May 2012
6 – Building C Childcare Centre	• SP5 – 21 working days – 18 July 2012 to 17 August 2012
7 – Glazing	• SP1 – 41 working days – 13 December 2012 to 6 March 2013 • SP3 – 65 working days – 17 May 2013 to 27 August 2013 • SP4 – 44 working days – 28 June 2013 to 3 September 2013 • SP5 – 44 working days – 1 May 2013 to 9 July 2013 • SP6 – 25 working days – 13 June 2013 to 22 July 2013 • SP6A – 42 working days – 23 December 2012 to 20 March 2013 • SP7 – 44 working days – 28 June 2013 to 3 September 2013

1407 I observe that, in relation to several of its EOT claims, Probuild is entitled to

extensions of time in relation to more than one Separable Portion of the WUC in respect of the same period of time, resulting in overlapping extensions of time in relation to a number of Probuild's time extension entitlements. I consider however that in the way Probuild's time extension claims have been claimed and proved and related delay damages have been apportioned, no deduction or adjustment of periods of extension of time or delay damages arises. Examples of the overlap referred to above are:

(a) pursuant to cl 9A (Early Work) and also SP3 in the period 25 January 2012 to 2 July 2012;

(b) pursuant to EOT2A and also SP4 in the period 10 May 2012 to 5 July 2012;

(c) Pursuant to EOT7 – SP5, 1 May 2013 to 9 July 2013; and

(d) Pursuant to EOT7 – SP6, 13 June 2013 to 22 July 2013.

1408 I find that the Contractor's cl 34.9 entitlement to delay damages is, amongst other qualifications, limited to the costs defined by cl 34.9 and actually incurred.

1409 I find Probuild's Expert witness on quantum and delay damages, Mr Cox, to be persuasive, and his evidence to be probative and preferable to V601's quantum and delay damages evidence.

1410 I find that, by implication, the Contract requires the apportionment of delay damages between separable portions as calculated by Probuild's quantum expert Cox, and that such an apportionment is also logical and just, and necessary to prevent the double recovery of delay damages by the Contractor in the event that it is entitled to an extension of time for the same period in relation to more than one Separable Portion.

1411 I find that Probuild is entitled to apportioned delay damages in the following sums for the above identified time-extension entitlements in respect of the separable

portion of the WUC below:[1109]

	SP1	SP2	SP3	SP4	SP5	SP6	SP6A	SP7
EOT 2/2A			$25,851	$715,514				
EOT3	$30,062					$440,081	$33,970	
EOT6					$96,621			
EOT7	$99,780		$365,483	$909,981	$248,855	$488,515	$118,092	

1412 Accordingly, I find that the total apportioned delay costs that Probuild is entitled to be paid by V601 on account of delay damages pursuant to cl 34.9 of the Contract is $3,572,805.

1413 I also find that V601 was in breach of the Contract both:

(a) directly by its own conduct in failing to grant and have certified and pay Probuild in respect of the time extension and other Probuild claimed entitlements identified as due and payable to Probuild in these reasons for judgment; and

(b) by its conduct in failing to ensure that the Project Manager acted independently as required by the Contract and in compliance with cls 20.2(a)(i)–(iii) and 20.2(b) of the Contract by:

(xxxii) procuring, encouraging and collaborating with the Project Manager, in respect of the Project Manager's failures to comply with its contractual obligation and duties, including those outlined below;

(xxxiii) compromising the independence of the Project Manager;

(xxxiv) failing or refusing to comply with cl 32.3 of the Contract, by its Project Manager, in approving the Contractor's Programs submitted by Probuild;

1109 Quantum Experts' Joint Report 2, 7: Annexure A: Allocation of EOT costs between Separable Portions for each EOT scenario. Neither Probuild or V601 argued that the specific Delay Damages claimed by Probuild should be reduced by reason of the Contractual 'maximum' and 'cap' in Annexure A of the Contract, Item 31A and Item 31B. Neither Probuild or V601 adduced any evidence directed to establishing the sums by which Probuild's Delay Damages entitlements should be reduced under Items 31A and/or 31B.

(xxxv) refusing or failing, by its Project Manager, to grant the extensions of time to which Probuild was entitled in relation to Probuild's EOT claims 2A, 3, 6 and 7, and Probuild's cl 9A Early Works claim;

(xxxvi) refusing or failing, by its Project Manager, to pay Probuild the delay damages to which it is entitled in respect of Probuild's EOT claims 2A, 3, 6 and 7.

1414 I reject Probuild's alternative claim for damages for delay. By force of cl 34.9(c) of the Contract, Probuild is not, in the alternative, entitled to damages in respect of delay or disruption to the WUC for V601's breach by its Project Manager for failing or refusing to grant the above time extension entitlements, and associated delay damages pursuant to cl 34.9 of the Contract, or otherwise.

1415 If I am wrong in relation to my conclusions in the last preceding paragraph and Probuild is entitled to recover delay damages, in the alternative to Delay Damages pursuant to cl 34.9 of the Contract, in respect of V601's above breaches, I consider that Probuild's entitlement to delay damages arising from V601's breaches is in the same sum as the above Delay Damages to which Probuild is entitled.

Achievement of Practical Completion

1416 I find that Probuild achieved the following Dates of Practical Completion in relation to the following Separable Portions:

(a) Separable Portion 1 – 3 July 2013;[1110]

(b) Separable Portion 2 – 31 July 2013;[1111]

(c) Separable Portion 3 – 17 December 2013;[1112]

(d) Separable Portion 4 – 17 December 2013;[1113]

1110 Nave Statement, 3 February 2019, [563], [599], [600].
1111 Bready Amended First Statement, [640], [641]; Nave Witness Statement, [564].
1112 Bready Amended First Statement, [622]; Nave Witness Statement, [568].

(e) Separable Portion 5 – 12 November 2013;[1114]

(f) Separable Portion 6 – 12 November 2013;[1115]

(g) Separable Portion 6A – 12 November 2013;[1116] and

(h) Separable Portion 7 – 17 December 2013.[1117]

Façade variation claim

1417 I uphold Probuild's Façade Variation claim in the sum of $520,436 (plus GST) and I also find that by its conduct the Project Manager, pursuant to cl 36, directed the construction of the façade in precast concrete.

Bonus payment

1418 Both Probuild and V601 dealt only perfunctorily with Probuild's bonus claim. Probuild submitted that it was entitled to a Bonus payment calculated by applying the daily rate specified in Annexure Part A, Item 30 of the Contract, for each Separable Portion for each day on which Practical Completion was achieved earlier than the Date for Practical Completion.

1419 V01 submitted that the calculation of Probuild's entitlement to a Bonus payment is a mechanical function under the Contract, to be performed once the Dates for Practical Completion and the Dates of Practical Completion have been determined.

1420 I find that Probuild is entitled to declarations that it achieved Practical Completion as set out below in relation to the dates of Practical Completion in relation to Separable Portions.

1113 Bready Amended First Statement, [622]; Nave Witness Statement, [568].

1114 I find that Probuild is entitled to a Declaration that it achieved Practical Completion of SP5 (Building C residential), SP6 (Building B), and SP6A (Building A residential) on 12 November 2013, being the date the original Occupancy Permit dated 12 November 2013 was given to the Project Manager.

1115 I find that Probuild is entitled to a Declaration that it achieved Practical Completion of SP5 (Building C residential), SP6 (Building B), and SP6A (Building A residential) on 12 November 2013, being the date the original Occupancy Permit dated 12 November 2013 was given to the Project Manager.

1116 I find that Probuild is entitled to a Declaration that it achieved Practical Completion of SP5 (Building C residential), SP6 (Building B), and SP6A (Building A residential) on 12 November 2013, being the date the original Occupancy Permit dated 12 November 2013 was given to the Project Manager.

1117 Bready Amended First Statement, [663]; Nave Witness Statement, [568(c)].

1421 I find that Probuild is entitled to the payment of a Bonus pursuant to cl 34.8 of the Contract for achieving Practical Completion earlier than the Contract Dates for Practical Completion, adjusted in accordance with the extensions of time granted herein to Probuild, such Bonus payment to be calculated in accordance with the rate referred to in Item 30 (Annexure Part A) of the Contract.

Acceleration costs

1422 I find that Probuild is entitled to acceleration costs, as an element of damages flowing from the Project Manager's failure to certify Probuild's extension of time entitlements to Probuild, V601's breaches found above in relation to its Project Manager's lack of independence, and alternatively on the basis that such acceleration costs are recoverable as a reasonable cost of attempted mitigation of delays by Probuild.

1423 I find the quantum of Probuild's acceleration claim in the sum of $1,346,799.

1424 Probuild is entitled to acceleration costs incurred to overcome or minimise the extent of delay, as an element of damages flowing from the Project Manager's breaches in failing to certify Probuild's extension of time entitlements.

1425 A declaration that in the alternative Probuild is entitled to acceleration costs incurred to overcome or minimise the extent of delay, on the basis that such acceleration costs are recoverable as a reasonable cost of attempted mitigation by Probuild.

1426 Probuild has not however established that the Project Manager gave a 'direction' to accelerate the WUC under cl 32.4.

1427 Probuild is not barred by either cls 32.5(c) or by 34.9(c) from recovering such of its costs and loss flowing or arising from the bases referred to in the last two preceding paragraphs above because:

(a) cl 32.5(c) of the Contract is confined in its application to loss arising out of a cause of delay and a direction given by the Project Manager under cl 32.4 of

the Contract. Probuild's acceleration costs arise from the Project Manager's relevant breaches, alternatively arise as a cost of mitigation;

(b) cl 34.9 of the Contract is limited in its application to recovery by the Contractor of other damages, costs or other compensation, in respect of the Contractor's entitlement for delay and disruption to the WUC. Probuild's acceleration costs are of a nature and arise as outlined in the last preceding sub-paragraph.

1428 I am not satisfied that the whole of Probuild's claimed acceleration costs are separate from and not included in Probuild's entitlement to the delay damages awarded hereunder.

1429 To prevent double recovery, Probuild's acceleration recovery should be limited to recovery of its costs and loss in relation to the measures it took to overcome or minimise delay, which are separate from the reasonable and necessarily incurred direct on-site time related costs, including on-site preliminaries costs, which Probuild is entitled to recover in the nature of delay damages in respect of successful time extension claims in this proceeding.

1430 If, however, I am wrong, in respect of Probuild's extension of time entitlements, and Probuild is not entitled to its claimed EOT and associated delay damages, thereby obviating recovery by Probuild of both acceleration costs which are in the nature of delay damages and Delay Damages under the Contract, resulting in double recovery by Probuild, then Probuild would I consider be entitled to judgment on its acceleration claim in the claimed amount of $1,706,535.81.

1431 I am satisfied that the following components of Probuild's acceleration claim, referred to in Appendix 6 of Probuild's Closing Submissions dated 11 June 2019, are not in the nature of delay damages otherwise recoverable by Probuild pursuant to cl 34.9 and are therefore solely in the nature of acceleration costs:

(a) Additional labour – $428,977.92;

(b) Additional forklift driver – $82,348.44;

(c) Additional alimak driver – $97,669.08;

(d) Additional builders' lift – $5,140;

(e) Additional swim stages – $100,300.36;

(f) Rental of additional factory facilities off-site – $85,770;

(g) Windows: out of sequence work – $234,000;

(h) Plasterboard – $233,000;

(i) Painting – $36,040;

(j) Otis storage costs – $42,500;

TOTAL - $1,345,745

1432 The following items in Appendix 6 to Probuild's Closing Submissions dated 11 June 2019 are disallowed, because they are in the nature of direct on-site time-related costs or in the nature of preliminaries and if recovered by Probuild both as acceleration costs and as delay damages, are precluded pursuant to cls 32.5(a)–(c) and 34.9(a) of the Contract, and are also not recoverable on the basis of the rule against double recovery:[1118]

(a) Windows coordinator – $142,208;

(b) Defects supervisors – $53,819.80;

(c) Service coordinator – $77,328;

(d) Site amenities – $86,380.21;

1118 Bready 1, [618], describes these costs as preliminary costs.

TOTAL – $359,736

V601's claims

1433 For the above reasons I reject and dismiss V601's below claims in respect of:

(a) the sum of $4,712,519 by way of Liquidated Damages to 17 December 2013;

(b) interest due pursuant to cl 37.5 of the Contract on Liquidated Damages due and payable;

(c) V601's claim for Declarations of the Dates of Practical Completion as certified by the Project Manager.

Orders

1434 For the reason earlier referred to in these reasons for judgment, including the above key findings and conclusions, I propose to make the following orders:

1435 A declaration that Probuild is entitled to the following extensions of time pursuant to cl 9A of the Contract in relation to Early Works:

(a) 165 calendar days, from 25 January 2012 to 7 July 2012, in respect of SP3 and SP4; and

(b) 199 calendar days, from 22 December 2011 to 7 July 2012, in respect of SP1, SP2, SP5, SP6, SP6A, and SP7.

1436 A declaration that the 'Soft Spots' referred to in Probuild's EOT2A claim constituted Latent Conditions under cls 25.1, 25.1A, and 25.2 of the Contract.

1437 A declaration that the 'Hydrocarbon Contamination' referred to in Probuild's EOT2A claim constituted a Latent Condition under cls 25.1, 25.1A, and 25.2 of the Contract.

1438 A declaration that Probuild is entitled to the following extensions of time under cl 34 of the Contract in respect of the following Separable Portions.

EOT Claim	Delay
2A – Soft Spots	• SP3 – 10 working days – 27 April 2012 to 10 May 2012 • SP4 – 35 working days – 10 May 2012 to 5 July 2012 • SP7 – 35 working days – 10 May 2012 to 5 July 2012
3 – Hydrocarbon Contamination	• SP1 – 28 working days – 5 April 2012 to 24 May 2012 • SP6 – 28 working days – 5 April 2012 to 24 May 2012 • SP6A – 28 working days – 5 April 2012 to 24 May 2012
6 – Building C Childcare Centre	• SP5 – 21 working days – 18 July 2012 to 17 August 2012
7 – Glazing	• SP1 – 41 working days – 13 December 2012 to 6 March 2013 • SP3 – 65 working days – 17 May 2013 to 27 August 2013 • SP4 – 44 working days – 28 June 2013 to 3 September 2013 • SP5 – 44 working days – 1 May 2013 to 9 July 2013 • SP6 – 25 working days – 13 June 2013 to 22 July 2013 • SP6A – 42 working days – 23 December 2012 to 20 March 2013 • SP7 – 44 working days – 28 June 2013 to 3 September 2013

1439 A declaration that Probuild is entitled to be paid apportioned delay damages by V601 in the total sum of $3,572,805 to Probuild.

1440 I dismiss Probuild's alternative claim for damages for delay.

1441 A declaration that Lyall's Baseline program (WUCP01) as updated, in substance, constitutes the Approved Contractor's Program, including for the purposes of cl 34.4(b)(ii) of the Contract for the purposes of determining Probuild's entitlements to extensions of time.

1442 A declaration that the Contract Dates for Practical Completion are for each Separable Portion and the WUC, to be extended and adjusted by the extensions of time granted to Probuild hereunder.[1119]

Delay Damages

1443 An order that V601 pay Probuild delay damages in the sum of $3,572,805.

Acceleration costs

1444 An order that V601 pay Probuild acceleration costs in the sum of $1,346,799.

1119 Neither Probuild's submissions, written or oral, identified or clarified its asserted/claimed adjusted Dates for Practical Completion.

Façade variation claim

1445 An order that V601 pay Probuild the sum of $520,436 (plus GST) in relation to Probuild's Façade Variation claim.

Bonus payment

1446 A declaration that Probuild is entitled to the payment of a Bonus pursuant to cl 34.8 of the Contract for achieving Practical Completion earlier than the Date for Practical Completion, with such Bonus payment to be calculated as referred to in Item 30 (Annexure Part A) of the Contract at the rate per day between the Date of Practical Completion and the Date for Practical Completion specified in Part A of the Contract (Item 30) in respect of each Separable Portion adjusted by the extensions of time granted to Probuild herein.

1447 A declaration that Probuild achieved the following Dates of Practical Completion in relation to the following Separable Portions:

(a) Separable Portion 1 – 3 July 2013;

(b) Separable Portion 2 – 31 July 2013;

(c) Separable Portion 3 – 17 December 2013;

(d) Separable Portion 4 – 17 December 2013;

(e) Separable Portion 5 – 12 November 2013;

(f) Separable Portion 6 – 12 November 2013;

(g) Separable Portion 6A – 12 November 2013; and

(h) Separable Portion 7 – 17 December 2013.

1448 I dismiss V601's claims in respect of:

(a) the sum of $4,712,519 by way of Liquidated Damages to 17 December 2013;

(b) interest due pursuant to cl 37.5 of the Contract in respect of Liquidated Damages asserted as due and payable;

(c) Declarations of the Dates of Practical Completion as certified by the Project Manager;

(d) the Dates of Practical Completion as certified by the Project Manager, save in relation to Dates of Practical Completion which are not in dispute.

1449 I shall await the parties' proposed form of Final Orders, including in relation to the calculation of the sum of the abovementioned bonus payments by V601 to Probuild,[1120] and including interest and costs.

1450 In relation to costs, subject to any submissions which may be served and filed pursuant to the below directions, my present and preliminary view is that costs, including any reserve costs should be ordered in favour of Probuild and against V601, on a standard basis.

1451 In respect of proposed Final Orders, referred to above, absent agreement between the parties, I direct that Probuild file and serve its proposed form of Final Orders and, if necessary, outline submissions (not exceeding four pages) in support thereof by 4:00pm 10 January 2022, and I further direct that V601 also file and serve its proposed form of Final Orders and, if necessary, outline submissions (not exceeding four pages) in support thereof by 4:00pm 10 January 2022.

[1120] The calculation by the parties of the Probuild bonus payments to be calculated (and if possible agreed) by the parties as referred to in cl 34.8 and Item 40 (Annexure Part A) of the Contract, based on the findings herein as to the Dates for Practical Completion and the Dates of Practical Completion of Separable Portions.