

SUPREME COURT OF QUEENSLAND

CITATION: *Nortask Pty Ltd ACN 077 690 852 v Areva Solar KCP Pty Ltd ACN 149 114 134 (No 1)* [2018] QSC 144

PARTIES: **Nortask Pty Ltd ACN 077 690 852**
(Plaintiff)
v
Areva Solar KCP Pty Ltd ACN 149 114 134
(Defendant)

FILE NO/S: BS No 1564 of 2015

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 28 June 2018

DELIVERED AT: Brisbane

HEARING DATE: 16 -19 & 26 April 2018 and 17 August 2018.

JUDGE: Lyons SJA

ORDER: **I will hear from the parties as to the form of the orders and as to costs.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – where the parties entered into an agreement in February 2013 – where that agreement resulted in the defendant using the plaintiff’s land to store reflectors and other associated items – where the nature of the agreement is in dispute – whether employees of the defendant had actual authority to enter into those arrangements – whether certain employees were held out as officers, employees or agents of the defendant – whether there was an agreement for the plaintiff to load all stored items on the property prior to their transportation to another site

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – where the parties entered into an agreement in June 2013 – where that agreement resulted in the storage of additional reflectors and associated items on the plaintiff’s land – where the terms of the agreement are in dispute – whether it was agreed that the plaintiff load all stored items for transportation to the defendant’s site – whether it was agreed that the plaintiff transport and unload all items at the defendant’s site – whether one of the defendant’s employees

possessed actual or ostensible authority to enter into these arrangements – whether an additional area of land was used

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH - where it is alleged the defendant breached the agreements with the plaintiff – where it is alleged the defendant used other contractors to load stored items, transport these items and unload those items at the defendant’s work site – whether, if the agreement was breached, the plaintiff suffered loss and damage as a result – whether the plaintiff is entitled to damages for trespass or mesne profits

PROCEDURE – CIVIL PROCEDURE IN STATE AND TERRITORY COURTS – MISCELLANEOUS PROCEDURAL MATTERS – UNDERTAKING IN COURSE OF LEGAL PROCEEDINGS - where the defendant counterclaims that the plaintiff breached an undertaking to the court by refusing to allow the defendant to access the site between 6 November 2015 and 17 November 2015 – whether the defendants incurred costs as a result – whether it was unreasonable for the plaintiff to exclude the defendant from the site for those dates

PROCEDURE – CIVIL PROCEDURE IN STATE AND TERRITORY COURTS – CROSS-CLAIMS: SET OFF AND COUNTERCLAIM – COUNTERCLAIM – GENERALLY – where the defendant alleges that the plaintiff took possession of, or converted to their own use, a number of the defendant’s chattels - whether the plaintiff took possession of, or converted to its own use, some of the defendant’s chattels – whether there was evidence to substantiate this counterclaim

Uniform Civil Procedure Rules 1999 (Qld) r 900

Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451

Quarante Pty Ltd v The Owners Strata Plan No 67212 [2008] NSWCA 258

COUNSEL:	S J Armitage for the Plaintiff M J Steele with H Clift for the Defendant
SOLICITORS:	Clifford Gouldson for the Plaintiff Norton Rose Fulbright for the Defendant

Background

- [1] The plaintiff, Nortask Pty Ltd ACN 077 690 852 (“Nortask”), operates a civil contracting, labour and machinery hire business from a site on a rural property on the Warrego Highway, outside Dalby. The site is leased from the managing director of Nortask, Hermes Speziali (“Hermes”), and his wife Janette. The property comprises about 121 acres, some of which is used for farming purposes. Nortask ran its business and stored its plant and equipment in a workshop and hardstand adjacent to the house property.
- [2] The defendant, Areva Solar KCP Pty Ltd ACN 149 114 134 (“Areva”), is a wholly owned subsidiary of a company incorporated in the United States. In 2010 or 2011 Areva entered into an agreement with an energy company for the supply and installation of around 5,000 solar panels and other associated infrastructure for the existing Kogan Creek coal-fired power station outside Chinchilla (“Kogan Creek”). Areva set up a manufacturing plant for the production of those solar panels at a factory in Dalby. Each panel is approximately 16.5 metres long. The associated receivers are 16 metres long and weigh about three tons.
- [3] In early 2013, Areva was unable to store all the manufactured reflectors at its Dalby factory and needed an additional area to store the reflectors and other associated items for a short period of time until they could be installed at the Kogan Creek site.
- [4] Ultimately, almost 3,000 solar panels came to be stored on the Nortask property during 2013. They were not all removed until April 2016. These proceedings relate to a dispute between the parties as to the terms on which the items were stored and the loss which it is argued was suffered by Nortask due to that extended storage on its property.
- [5] Nortask argues that Areva agreed, pursuant to a retainer entered into in February 2013, that Nortask would receive all of the work relating to the unloading and loading of the reflectors. Nortask also argues that a second retainer was entered into in early June 2013 whereby Areva agreed it would utilize Nortask labour and transport to move all the Areva material to the Kogan Creek site. Nortask claims damages for breach of contract in the sum of \$1,807,262.00 plus GST or alternatively damages for trespass or mesne profits in the sum of \$906,768.00 plus GST as well as interest and costs.
- [6] Areva denies the retainers were in the terms alleged and denies any breach. Areva argues that Nortask refused to permit access to the property on six business days between 6 November 2015 and 17 November 2015 and counterclaims \$43,896.00 for the costs of delay and further sums for a number of missing chattels including 31 receivers and associated items.

The issues

- [7] There are a number of issues in contention in this trial including the following:
 - (i) What was the nature of the agreement initially entered into between the parties in February 2013 which resulted in the storage of around 1500 reflectors and associated items between February and June 2013?
 - (ii) In relation to the agreement alleged to have been reached;

- (a) Did Ian Canham (“Canham”) or Gary Robertson (“Robertson”) possess the actual authority, either express or implied, to enter into those arrangements?
 - (b) Did Areva hold Canham and Robertson out to Nortask as officers, employees and/or agents of Areva having the requisite ostensible or apparent authority to enter into the agreement on behalf of Areva?
 - (c) Was there an agreement for Nortask to load all the stored items on the property prior to transportation to Kogan Creek?
- (iii) What was the nature of the agreement reached between the parties in June 2013 which resulted in the storage of additional reflectors and associated items?
 - (a) In relation to the agreement alleged to have been reached, did Robertson possess the actual or ostensible authority to enter into those arrangements?
 - (b) Was there an agreement for Nortask to load all the stored items on the property prior to transportation to Kogan Creek?
 - (c) Was there an agreement for Nortask to transport and unload all the stored items at the Kogan Creek site?
 - (d) Was an additional area of land used?
- (iv) Did Areva breach the agreement and use other contractors to load the stored items and transport and unload those items at Kogan Creek?
- (v) If the agreement was breached, did Nortask suffer loss and damage as a consequence of the breach?
- (vi) Is Nortask entitled to damages for trespass or mesne profits for the use and occupation of the land until April 2016?
- (vii) Did Nortask break an undertaking to the Court by refusing to allow Areva access to the site to remove chattels between 6 November 2015 and 17 November 2015?
- (viii) If the undertaking was breached did the defendant’s incur costs during that period?
- (ix) Did Nortask take possession of or convert to its own use 31 receivers and all the locking pins and controls?

What was the nature of the agreement initially entered into between the parties in February 2013?

The evidence of Hermes Speziali

- [8] The managing director of Nortask, Hermes Speziali, gave evidence about the initial approach by Areva in February 2013 and the arrangements that were entered into as a result. Hermes' evidence was that he had done work for Areva since 2011 by supplying machinery and labour in relation to the building of the factory at Dalby. He initially dealt with Muir Aitken, the production manager, during that period and then later, Brian Neil ("Neil") during that period. In late 2012 and early 2013 Nortask had also assisted Areva at the Kogan Creek Power Station by supplying labour and machinery to unload containers and raw material. At that site he dealt with Gary Robertson. His evidence was that during this initial period Nortask would usually get a request via phone call from Areva. Nortask would then record all the information on a hire docket and sign it off for their records. An order number would then be sent through for the invoice to be issued.¹
- [9] Hermes gave evidence that in early 2013 his son Steven Speziali, ("Steven") the area manager at Nortask, had rung him whilst he was at another of their depots in either Darwin or Mt Isa, to say that Canham, the Areva 'boss', had rung inquiring about the possibility of renting some of their land for storage of reflectors. Hermes' initial reaction was that he did not like the idea of other people coming onto their property because they stored a vast amount of plant and equipment there and they were also managing a crew of about 80 or 90 people as well. He stated that of the total 121 acres, his residence and the Nortask business site occupied about five and a half acres with the rest was used for farming. The property is called Cascina and he has another property nearby called Cascina Grande.
- [10] Hermes gave evidence that after the phone call from Areva, he and Steven went to look at the Nortask yard and marked out an area which was reasonably close to the area that Areva was looking for, namely around 40 acres of land. They did this by painting a corner post with some pink hi-vis paint and then roughly calculating the area. They then discussed whether they could rent out the land and still secure the functionality of the Nortask business. In particular, they wanted to retain control and ensure security by controlling the method of entering and exiting the land. With two operations on the site, they also needed to consider workplace health and safety issues.
- [11] The following day Hermes had a meeting on the property with Canham, Robertson and a woman from Areva whose name he cannot recall. During that meeting, he took them to the corner boundary which had been marked with the hi-vis paint and indicated the area of land that would be available to store the equipment. His evidence was that they defined a physical area visually by reference to posts and the fence line, and they also discussed an entry and exit point. They agreed that there would be two gates on the eastern boundary which is the Warrego Highway gate, and the southern Riders Road gate. The Riders Road gate would be used exclusively by Areva and the Warrego Highway gate by Nortask.
- [12] Canham responded that that was exactly what they were looking for. Hermes said that the length of time the storage was required was specifically discussed and he was told it

¹ T 1-56: 16 – 24 and Exhibits 6, 7 & 8.

was for “four to five months.”² Hermes stated that terms were then discussed between them with him specifying that Nortask would be in charge of controlling the equipment coming in and the traffic going out. He also made it clear that Nortask would do all of the work of unloading of the trucks, taking the reflectors to the storage area and securing the reflectors to the ground.

- [13] Hermes said he made it clear to Canham that they, Nortask, would be the only contractor allowed onsite to do any physical work but that Areva could have a supervisor onsite. He stated that he made it plain “It was Nortask, with Nortask equipment, and only Nortask with Nortask equipment”.³ He gave evidence that Nortask then did all the work including unloading the reflectors, fastening the reflectors and providing the dunnage⁴ upon which to place the reflectors to keep them off the ground.
- [14] Hermes also stated that when the agreement was being discussed, Nortask was in the process of building an all-weather hardstand near its shed so it could permanently park machinery there. A hardstand was necessary to overcome the difficulty they had with black soil at Dalby whenever it rained. He stated he had Council permission to replace an area of black soil with gravel to give it all-weather access. During his discussion with Canham, he indicated the hardstand was being constructed and that Areva could use the hardstand to unload during wet weather. That is, they could use the hardstand for temporary storage during wet weather.
- [15] Hermes considered that an agreement was reached with Canham and Robertson as they all stood on the spot. His understanding of the agreement was in the following terms:

“...You’ll do all of the movement and all of the unloading, all of the securing, all of the checking if there is anything in there that has moved after – after a windstorm, or what have you. You – it will be – you give personnel, your equipment – only your personnel and only your equipment. We will put a supervisor on site. We want – we need access to the supervisor. Access was given to the supervisor upon the first signing in, in the office of Nortask, then it was like no signing in no further. We knew the supervisor. He’d come to work in the morning, the same as our personnel.”⁵

- [16] He stated they shook hands at that point.
- [17] On Monday 4 February 2013, Nortask sent Areva a quote for the storage of the land which was in the following terms:⁶

“4 February, 2013

Attn: Ian Canham @ Areva Solar
Re: Quotation for lease of storage land – Q3412

Dear Sir,

² T 1-70: 31 – 32.

³ T 1-70: 10 – 11.

⁴ Loose wood, matting, or similar material used to keep a cargo in position.

⁵ T 1-73: 19 – 25.

⁶ Exhibit 9.

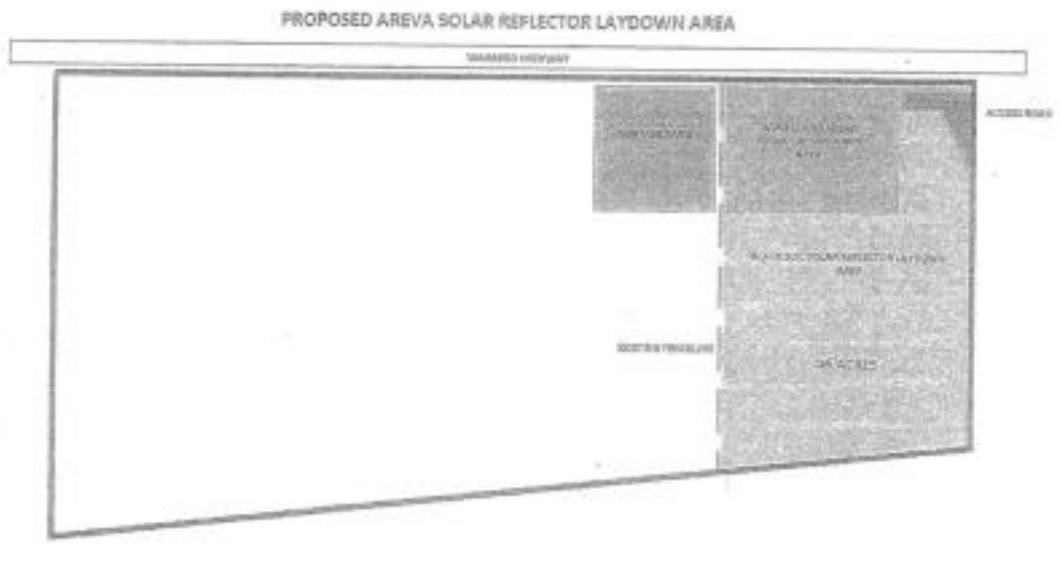
Please find below our quotation as requested.

- Rental of 45 acres of storage area - \$10,680.00 per month + G.S.T
- Hardstand area to be 40000 metres and completed within 3 months.
- Separate gate and access road to be installed.
- Area outside of Hardstand designated area is available to Areva for storage as of now.
- Unloading and loading of units on hourly rate for equipment and labour.
- Securing of solar units at cost plus.
- Removal of securing anchor pegs on completion at cost plus.
- Black soil area access during wet weather cannot be guaranteed.
- Storage required for six months.

If you have further questions please feel free to call me.

Best regards,
[Signed]

Steven Speziali
NORTASK Pty Ltd"



- [18] Hermes's evidence was that whilst a term of 4-5 months was discussed onsite, he had previously spoken with a Western Downs Regional Council representative about the storage of the items on his land and had asked for permission to store the items on his rural land for 6 months because projects blow out. In the end, 6 months was what he offered Areva. He also stated that he calculated the monthly rental figure based on the productivity of the land and what the land in its natural state would return. He also added into that calculation a figure for the impediment to Nortask to store the items.

- [19] Hermes stated, however, that the real return for him was the payment for doing the work on the site:

“That really was the bonus that Nortask – there would have never been any rental of any land if it wasn’t for the ability to do all the handling of the material on site.”⁷

- [20] Hermes stated that shortly after the meeting with Robertson and Canham, a forklift type machine called a telehandler turned up on their site. He called Canham immediately and indicated that they had an agreement and that Areva had to come and get their telehandler because Nortask were going to do the work. He stated that Robertson came and collected the telehandler and said, “Mate, obviously – obviously the message hasn’t got to the right people yet. Sorry for it. We know the term and condition. It won’t repeat”.⁸ Hermes stated that that was the last time that someone else’s equipment was on his land.
- [21] Hermes stated that the day after that the reflectors started arriving. He stated that generally they would get between 18 to 25 reflectors a day which were generally delivered overnight onsite. He outlined the process Nortask then undertook to unload the equipment and transfer them to the site and secure them. He indicated that when the trucks came in, the telehandler was used to unload the trucks. A telehandler basically works like a fork lift but is a larger machine with bigger wheels.
- [22] Hermes gave evidence that the hardstand area of around 30,000m² was completed within 3 - 4 months of the arrival of the reflectors. Hermes gave evidence that by June 2013 they had the full delivery of around 1,586 reflectors. The original figure discussed was between 1,500 to 1,600 reflectors that needed to be stored.
- [23] Hermes gave evidence that he kept a diary into which he would record significant matters to do with the business and his personal life and would write the entry generally the day after a particular event occurred. The relevant parts of the diary for the periods from 2012 to 2015 are in evidence.⁹ I accept that the diary is a contemporaneous record of his version of events. The diary indicates that Areva visited the office on Friday, 1 February 2013. A further entry on Saturday, 2 February notes that Nortask would supply Areva with 40 acres of space on the eastern boundary at Riders Road, in line with the existing eastern fence for a period of 4-5 months at \$10,680.00 per month. The entry continued:

“Nortask equipment and personnel (sic) will unload store & secure reflectors on an hourly rate basis with hire dockets to be filled out & signed daily ...An area of about 30,000m² will be gravelled to an all weather standard. Areva can make use of this area during wet weather as long as it is “not stored” for any length of time...Nortask is to be given an opportunity to quote & be competitive to transport reflectors to job site at Kogan Ck, as well as to quote for the supply of material handlers and cranage (sic) at job site Kogan Ck. I (HS) rang R Council re storing 1500 reflectors. Council “OK without rezoning” for Max of up to 6 months. The deal is on!”¹⁰

⁷ T 1-75: 3 – 5.

⁸ T 1-76: 145 – 146.

⁹ Exhibit 1.

¹⁰ Exhibit 1.

- [24] The entry of 7 February 2013 then records that it was the first day of yard/land hire to Areva and that the solar panels had started arriving with two crews working there unloading and securing the reflectors. Hermes also recorded that he had priced the supply of the dunnage and that it was a big expenditure of \$180,000.00 plus because of the numbers required.
- [25] Hermes also gave evidence that as well as unloading the reflectors and securing the reflectors on the dunnage at Cascina there was a period in March 2013 when there was very heavy flooding and Cascina could not be accessed. They assisted Areva at this time by redirecting some of the transports to Cascina Grande. He stated that this involved about two days of production and that those reflectors were stored at Cascina Grande for about two and a half weeks. At the end of that period Nortask reloaded and transported the items to Cascina.

The evidence of Steven Speziali

- [26] Steven gave evidence that he was the area manager of Nortask and worked in the family based company with his father, his sister and her husband. He indicated that he had worked in the company for about 20 years and that he had qualifications to operate machinery including cranes and excavators. He had previously been the area manager for Nortask in Mt Isa, but was currently based in Dalby. He stated that his basic experience was in project management, personnel management and machinery operation but he was also a qualified boilermaker.
- [27] Steven gave evidence that Hermes was the company director and he had the final say on all matters. He gave evidence that his role was to take care of the day-to-day running of things, particularly quotations and correspondence. If there was anything of any particular substance, however, it would go through to Hermes as well. He stated that he prepared a lot of the documents and correspondence that passed between Nortask and Areva as his father does not use a computer.
- [28] Steven indicated that his first contact with Areva was to provide quotes for labour and equipment to Neil, the manager of the Areva Dalby fabrication plant. They ultimately supplied long-term plant hire and he subsequently dealt with a purchasing officer, Muir Aitken. He indicated that from 2011 through to early 2013 the usual procedure between Nortask and Areva was that they would get a call from someone at Areva saying they needed a particular item. They would then ask Nortask for a quotation which they would send through and Nortask would then be contacted after that and asked whether they could book it in. He stated that they would then subsequently be provided with a purchase order.
- [29] Steven gave evidence that in late January or early February 2013, Canham and Robertson visited their office and asked if it was possible to store Areva items on the land. Hermes was away and he told them it was something they were interested in and he would get back to them after Steven had spoken to Hermes. Steven indicated that there was then a subsequent site meeting with Canham and Roslyn Hidayia ("Hidayia"). He stated that he was not present at the meeting but he had stepped out an area with his father prior to the meeting. He indicated that his father was not overly interested at first because of the logistics of having other companies coming and going on Nortask premises and doing work there, given the safety concerns that he had. He stated, however, that during the discussion his father came up with the idea of Nortask doing the majority of the work

onsite. He stated that Nortask was already doing a lot of work for Areva at the time as they were supplying personnel and telehandlers as well as cranes. They had a good relationship and Areva was happy with their work. His father indicated that if Areva were happy to use their services and machinery for any work conducted on the premises, then he would give them the storage.

- [30] Steven stated that he and his father had looked at the available areas that could be used and they stepped it out and he marked out a bit of an area by reference to a post he painted with pink paint.¹¹ He indicated that it was not a very scientific way of marking the area involved but that after the meeting between his father and Canham, the reflectors started arriving. There were almost 1,600 reflectors there by June 2013 when they were approached again and asked for additional storage.

The evidence of Ian Canham

- [31] Canham gave evidence that he commenced work with Areva on 1 November 2011. He was employed as a construction and project manager and was responsible for all construction works onsite. He initially reported to Phillip Cotton until his retrenchment in November 2012 when he reported to Eric Macbeth (“Macbeth”). He was responsible for all construction staff onsite at Kogan Creek and for the construction of the factory in Dalby which manufactured the reflectors. He stated that when he started, Areva had very poor records and poor project management due to the fact that the office was in Brisbane and they were mobilising to the Dalby site. He indicated that at that stage they were implementing various sections of work and they did not have a contract management payment system in place, or even something to satisfy the BSA requirements in relation to the management of contractors. He stated that when he arrived he put in place a contract administration system for the payment of contractors, the production of certificates, as well as advice as to contractors, field memos, site instructions and variations. He stated that that system was developed at site for the management of major contractors.
- [32] Canham stated that the manufacturing site at Dalby was separate from the Kogan Creek site. At Kogan Creek they used a mechanical contractor for installation, who ended their contract in January 2013 which resulted in a disruption to the project until a new contractor could be engaged. During that period the site was also impacted by severe flooding which meant that they were looking for land to store the reflectors and he was specifically involved in trying to find a location to store them.
- [33] Canham stated that he and Robertson considered a number of different options and did a “comparison of pricing.”¹² In the end, they decided that Nortask was the “most attractive”¹³ for a number of reasons including the location, ready access to the site, as well and the fact that the site met other requirements.¹⁴ He stated that they needed to put some urgent arrangements in place and Macbeth wanted to go ahead with it extremely quickly whilst the BCR was still being drafted. Canham explained that a BCR was a “Budget Change Request” which was done when they needed to change anything which had not been previously budgeted for in relation to a project. He confirmed that he received a verbal go-ahead from Macbeth as follows:

¹¹ T 3-135: 24 – 26; 38 – 41.

¹² T 3-69: 14.

¹³ T 3-69: 15 – 16.

¹⁴ T 3-69: 16 – 17.

“All right. Thank you. And did the work commence prior to the BCR process being completed?---BCR, basically, being drafted for this. It was drafted on that date and we went through and had a verbal meeting, Eric Macbeth - - -

And who’s “we” – yep?--- - - - and myself. I drafted an Excel spreadsheet. We were putting it together and I sent the BCR. Had to go through a process within our office with our contract administrator so we did that. Well, we basically gave the verbal go-ahead for us to be able to start preparing the land for Nortask for that because we’re utilising other areas of that.

So when you say “verbal go-ahead”, that – was that your communication – spoken communication to – Areva’s spoken communication to Nortask that it was accepted?---There was a verbal go-ahead from Eric Macbeth. I followed it up with an email and then there was an email from Roslyn Hidayia to Nortask for the go-ahead.”¹⁵

- [34] He indicated that on 6 February 2013 there was an email from Muir Aitken to himself and Macbeth confirming that the deliveries of the reflectors would commence again tomorrow.¹⁶ It was clear from that email that deliveries were to commence to the Nortask site at 7.30am on Thursday, 7 February 2013.
- [35] Canham then sent an email to Macbeth at 4.38pm on 6 February 2013 enclosing a budget estimate for the storage of the reflectors at Nortask. Also included as recipients in the email were Samuel Yohannes (“Yohannes”) and Melanie Loreille (“Loreille”). Yohannes was the financial director based in the United States and Loreille was the purchasing officer, originally out of Paris, but was sent to the project and was based variously at Dalby or Brisbane. Canham explained that the spreadsheet attached to the email was basically a series of two options for the storage of the reflectors and that the Nortask option involved an estimate of \$328,000.00 for a six month rental.¹⁷
- [36] Canham indicated that ultimately a BCR document was prepared and sent on Sunday, 17 February to Macbeth and others indicating that approval was required as soon as possible as storage of the items had already commenced. Canham explained that at that point Areva had a staged approvals process. He could put a request forward to the project director, Macbeth, who could approve items up to \$100,000.00 but it then had to go to the chief operating officer, Michael Dimercurio (“Dimercurio”), who was based in the United States, if it was over \$100,000.00. Canham stated that when he was forwarded the recommendation for approval on 17 February 2013, work had in fact had been underway for over a week. He also indicated that in the majority of circumstances “the approval process always took place after the work had commenced.”¹⁸ He stated that he left Areva on 31 May 2013.
- [37] Canham confirmed under cross-examination that there were strict policies and procedures in place at Areva and he was required to comply with them as part of his employment contract. In relation to his redundancy, he confirmed that he was suspended from work

¹⁵ T 3-70: 37 – 45; 3-71: 3 – 71.

¹⁶ Exhibit 42.

¹⁷ Exhibit 43.

¹⁸ T 3-74: 23 – 24.

from 16 March 2013 and ceased work on that date with his employment finishing on 31 May 2013. He confirmed that he received a letter dated 31 March 2013 which set out Areva's concerns about the contracts with Nortask and Jesson Plant Hire in relation to "the management of the offer, acceptance and consideration of the Nortask engagement."¹⁹ I also note that the letter continued, "These issues are serious as they have the potential to expose the organisation to significant risk and/or cost."²⁰

- [38] Canham also agreed that a meeting had occurred on 16 March 2013 which had been minuted by him. He stated in re-examination that during the meeting Areva's concerns were laid out to him. His evidence was as follows:

"And they basically raised some objections [indistinct] what [indistinct] been happening on site. It was mainly due to the process. It wasn't being followed for the engagement of, A, Nortask, which was about works that they were undertaking under the direction of Dalby Manufacturing since September. So there'd been a four-month period that they'd been engaged. All of that works had been going through the system. The process that we had to that period was basically – an invoice would come in, and an order would then be raised, and they had a query about the process we had, and I said the way Dalby operates – that was their system."²¹

- [39] Canham stated that after the meeting he sent a copy of his notes to Areva but never received a reply. The Minutes²² were tendered and I note the following entry:

"Ian Canham advised other works conducted comprised the relocation of pad 15 materials by Nortask and this work was estimated and submitted for approval on the 30th January, 2013. Works in association with the storage of reflectors on site and at Nortask yard were the subject of 2 estimates that were provided and developed and were submitted on the 30th January, 2013. Storage of reflectors at Nortask yard was specifically directed by Eric MacBeth to enable the factory to continue production at the manufacturing rate of 30-36 units per day.

Ian Canham advised approval was granted to commence these works and a submission was forwarded on 2nd February, 2013 to Melanie Lorelle for development of the purchase order."²³

- [40] Canham gave evidence that since the commencement of this litigation he received correspondence from Areva through its solicitors "threatening to put a financial penalty on me for giving evidence."²⁴

The evidence of Gary Robertson

- [41] Robertson gave evidence that he had worked as a site manager for many years and commenced with Areva at the end of September 2012 and initially reported to Canham.

¹⁹ T 3-82: 37 – 38.

²⁰ Exhibit 47.

²¹ T 3-89: 9 – 17.

²² Exhibit 48.

²³ Exhibit 48.

²⁴ T 3-91: 18.

After Canham left, he then reported directly to Macbeth. He stated that whilst Macbeth was based in Dalby, he also travelled overseas a lot and had other business involvements. He said that they were both based in an office at Kogan Creek and when Macbeth was there, they would have a morning meeting where priorities were discussed. He would then spend 85% - 90% of his time onsite rather than in the office.

[42] Robertson also confirmed the difficulties the factory ran into in early 2013 because of flooding and the problems they had with the mechanical contractor. He stated that he assisted Canham in looking at several properties for storing the reflectors.

[43] In terms of office processes, Robertson confirmed that on 14 March 2013, Yohannes sent an email to a number of people indicating that to more effectively process purchase requests, they had streamlined the "PR-to-Payment" process, effective immediately, which identified each step and who was to complete each step of the process. The email attached a form which had to be completed and set out the items which had to be included (including quotes if available) and BCRs completed and approved. That email set out the following nine-step process:²⁵

"Please find the PR process from Start to Finish below:

1. Goods/Services needs identified by – Project Team
2. PR Form Completed by – Project Team
3. PR Initiated and Released for review and approval to the following people by – Daniel (per item 1 & 2)
 - a. Project Controller
 - b. Project Director
4. PR Review and Approved by – G. Wilde and E. Macbeth
5. Approved PR Converted to PO by – M. Loreille
6. PO sent to supplier(s) by – M. Loreille
7. Goods/Services provided per the PO/Contract by – Supplier(s)
8. Goods/Services acknowledged by – Task Owner (Please provide Daniel the signed acknowledgement document)
 - a. All Invoice(s) must be sent directly to A/P via e-mail or mail by – Supplier(s)

Accounts.Payable@areva.com (preferred) or

The following address:

AREVA Solar KCP PTY LTD
 Attention Accounts Payable OF27
 PO Box 10845
 Lynchburg, VA 24506-0845

- b. GR Performed in SAP by – D. Wright

²⁵ Exhibit 51.

9. Payment release by – AP, Lynchburg

VA SPECIAL NOTE

No services or goods should be acquired without a Purchase Order or Contract in place.”

- [44] Robertson indicated that the initial number of reflectors intended to be stored on the Nortask property in February was around 1,600 and they were to be there for no more than 5-6 months. He came to the view that as they were approaching almost 1,600 he needed to look for extra areas to store the reflectors on.

The evidence of Eric Macbeth

- [45] Macbeth gave evidence that he started working for Areva Solar in June 2012. He was the project director for the Kogan Creek project, which was a 44-megawatt solar super-heated steam offtake on a coal fired power plant. He stated they had offices in Sydney and Brisbane and a project site at Kogan Creek.
- [46] For the purposes of that project, they needed to manufacture solar reflectors which would super-heat boiler tubes to create the steam to supplement the coal fired power plant. He stated that as a project director, all engineering functions fell under his scope which included the procurement activities and the construction. He also stated they had a manufacturing element and they had 40-50 people based out at Dalby producing the reflectors. He stated that the manufacturing project at Dalby was also managed by him.
- [47] He gave evidence about a BCR which he said was called either a “budget change request” or a “baseline change request”. It is essentially a request to exceed a budget. The BCR would be scrutinised to ensure that there was a justifiable reason to increase the budget and then the money would be approved from Areva’s corporate office and then eventually a purchase order would be assigned to that BCR. He indicated that a purchase order is for a definitive scope of work, when a number was assigned to it against which a bill would be rendered. He stated that all purchase orders ended up going to him for his approval. He would get an email, have a look at it and sign off on it. He had authority up to \$100,000.00 and over that and up to \$500,000.00 went to the vice president, Dimercurio. Anything under \$10,000.00 he didn’t need to specifically approve. Macbeth explained the process of approvals at Kogan Creek in the following terms:

“And so can you just explain the normal process by which Areva could enter into a supplier agreement in relation to the Kogan Creek project?--- As far as entering into agreement – they would – I mean – the process would be – we were required by our procurement to get at least three proposals on any scope of work, unless there was something where we needed one-guy-for-a-day type of thing. But we would get three proposals. We’d meet with the different vendors. Sometimes there’s prolonged negotiations with that vendor. They would submit a quote. It’d be analysed. We’d have questions that would go back and forth in an RFI, request for information, purpose. Those would be cleared up. Then the lowest price would end up winning the bid.”²⁶

²⁶ T 4-53: 34 – 43.

- [48] Macbeth then stated that the next step in the process, once they informed the supplier that they were going to accept their offer, was to “develop a purchase order that would eventually be sent to that supplier”.²⁷
- [49] Macbeth gave evidence that in late January 2013 a cyclone hit the area and due to substantial rain they could not access the Kogan Creek site. They were looking for somewhere to store the reflectors that they had produced because they wanted to continue production during the disruption. The asset at Dalby was very expensive and they didn’t want idle equipment. He had Canham looking for properties to store the reflectors and they ended up getting three or four different quotes. He confirmed that Nortask had the best price out of all the quotes, and told Canham to start putting them there.
- [50] Macbeth also indicated that he knew Canham had received a quote from Nortask dated 4 February 2013 and had communicated with Nortask that their quote had been accepted. He also agreed that he was aware that the reflectors started arriving on 7 February 2013 and that Nortask unloaded the reflectors and secured them on the land. He also acknowledged that it took some time for a formal purchase order number to be issued in relation to those works. He also accepted the proposition put to him by counsel for the plaintiff as follows:

“so it’s the case, isn’t it, really, you accept the proposition that there were incidences when something needed to be done and done urgently where there just simply wasn’t enough time to comply with all of the documentation required by the formal to PR to payment process?...Correct, but I would have called my vice president beforehand and got verbal approval and then just worked on the process to get it done.

...

Yeah, okay. So, you must have had that verbal approval - - -?---Yeah.

- - - in relation to the storage area at Nortask for that first delivery of reflectors; is that correct?---Correct.

All right. And you communicated that to Mr Canham; is that right?---Correct.

All right. And you left it up to Mr Canham then to communicate that to Nortask?---That’s correct.”²⁸

- [51] Macbeth confirmed that ultimately a BCR was created for the storage of reflectors at Dalby which needed to be sent onto Dimercurio in the US because it exceeded his limit of \$100,000.00 limit. Macbeth gave evidence that he received an email dated 20 February 2013 from Loreille in response to an email from Canham dated 17 February which had requested approval ASAP, because works had already commenced at Nortask for the storage of the reflectors. That email of 20 February indicated that as the BCR was still pending, “therefore we cannot issue any PR or PO yet”.²⁹

²⁷ T 4-54: 20.

²⁸ T 4- 124: 12 – 17; 19 – 27.

²⁹ Exhibit 87.

- [52] Macbeth stated that he had received an earlier email from Loreille dated 3 February 2013 in the following terms:

“It appears that the services attached occurred without any purchase order in place. Could you please confirm that there was at least a contract in place with this company?

If there is a contract in place, please forward it to me so that we can create a PO that matches the terms and conditions.

As of today, we have already half a million dollars committed with this supplier.

As a reminder, no supplier is supposed to commence working without a contract in place. Verbal order is not a contract.”³⁰

- [53] Accordingly, on 4 February 2013, Macbeth stated he had sent an email to a number of people about outstanding the Nortask invoices where particular work which had been executed without a PO. He stated that a lot of it appeared not to have been approved, or was falling under purchase orders that were not for that scope of work. He wished to find out what had happened.

- [54] On Friday, 1 March, Macbeth wrote an email to Muir Aitken, William Wilde and others including Canham and Robertson stating that:

“Until a written agreement is established with Nortask a BCR approved and a PO put in place there is not a mechanism to unload or store reflectors, may take numerous days to come to an agreement.

Will not have occur what happened with the tube inspection fiasco.”³¹

- [55] Macbeth gave evidence that the payment of \$500,000.00 referred to by Loreille had been in relation to a boiler tube that they had for the solar facility. They had inspected the coating to make sure there were no defects and during that inspection service Nortask provided labour to help move the boiler tubes which came to almost \$500,000.00.

- [56] As a consequence of that email of 1 March, Macbeth suspended the ongoing deliveries to Nortask until the documentation could be sorted out. Macbeth also referred to an email from Loreille on 2 March to himself, Wilde and Yohannes indicating that Nortask was to stop any work in process for Areva Solar, and that written instruction followed the verbal instruction on 1 March to request an account statement and supporting invoices for the work executed until 1 March. The email stated that all future orders and instructions to work were to be identified by a purchase order number with a sign-off by the project director, Macbeth.³²

- [57] The work resumed on 6 March 2013 when Macbeth received an email from Yohannes attaching the BCR for the Nortask work and recommending that Macbeth approve it conditionally. He then sent an email to Dimercurio indicating that the reflector storage BCR had been signed by him and that it was sent onto him for signature and approval. He then sent it back signed on the same day. Macbeth then sent an email to the team

³⁰ Exhibit 89.

³¹ Exhibit 90.

³² Exhibit 26.

forwarding the reflector storage BCR indicating that the team was to complete it and get it “ready for PR”.³³ On 8 March, there was a further email from Loreille to him indicating that in future, in relation to all unloading activities in the yard lease, the purchase order reference number 1012037832 had been allocated and was to be used for all future invoicing.

- [58] Macbeth indicated that on 10 March he emailed Hidayia (with copies to Yohannes and Loreille) about the BCRs, requesting her to collect the BCRs to ensure the documentation was in order.³⁴ On 16 March he sent an email to Sam Shakir (“Shakir”) and Dimercurio telling senior management that he was putting Canham on suspension with pay until he investigated what was going on in relation to invoices that were approved for payment by him where it would seem that there were invoices in the six figures for work performed without any written agreement.³⁵
- [59] Macbeth confirmed that on 15 May 2013 a purchase order issued approving \$294,140.00 in relation to the unloading of reflectors at Nortask. That amount involved six months rental at \$10,680.00 per month plus the cost of unloading 1,800 reflectors, the hire of a telehandler and the supply of star pickets, restraint strapping, shackles and timber framework.³⁶ He also confirmed that a base line or a BCR was also prepared, noting that the current purchase orders total AUD \$1,581,155.00 and that the revised purchase orders would be \$2,309,313.56 with the revision being in the order of \$728,158.56. That was signed by Dimercurio on 9 May 2013, Macbeth on 30 August 2013 and Shakir on 9 December 2013. That document referred to the unloading and loading of reflectors, site movement of material and the unloading and loading of remaining deliveries: pipes, receivers, and any other.³⁷

The evidence of William Wilde

- [60] William Wilde (“Wilde”) was formerly the Chief Financial Officer of Areva Solar and as he resides in Virginia USA, he gave evidence by video-link during the trial. His evidence was that he visited Australian on two occasions. The first was in September/October 2012, and the second was in February/March 2013. He stated that on the second trip he was in Australia for 7-8 days and visited the Kogan Creek site and the Areva manufacturing factory at Dalby. He stated that during his second visit there was extensive flooding in the Dalby area and he became aware that there was a need for the reflectors to be stored off-site to enable production of the reflectors to continue.
- [61] Wilde stated that he was aware of the internal payments process within Areva and that the email from Sam Yohannes dated 14 March 2013 outlined the step-by-step payment process system which was to operate for Areva. He confirmed that Areva personnel in the United States were supporting the project in a supervisory role and had line relationships with the project team in Australia, with similar support roles from Areva in France. Wilde also confirmed that Exhibit 51 accurately set out the approvals process for payments and that a number of the approvals required were from staff based in the United States or France, including himself, Loreille and Yohannes. He agreed that the process was detailed and involved staff on three continents. When he was taken through the

³³ Exhibit 91.

³⁴ Exhibit 92.

³⁵ Exhibit 93.

³⁶ Exhibit 14.

³⁷ Exhibit 78.

purchase order for Areva with a date of 15 May 2013 which was issued to Nortask, he stated that he was aware that it was a purchase order that had been issued from the Areva system but he did not know how it was actually delivered to Nortask.

[62] Wilde was also referred to the Baseline Change Request document which was executed by Macbeth, Dimercurio and Shakir, and confirmed that both Shakir and Dimercurio were located in the United States.³⁸ He stated that a Baseline Change Request was a predecessor document to generating a purchase requisition. He stated that “The BCR is a type of controlled document for amending the budget for the project, after which the PR can be enabled, following by a PO.”³⁹

[63] When asked if it was correct that once a purchase order was in the system, it would not have been issued until after a Baseline Change Request had been executed, he replied:

“It’s not necessarily so straightforward because a baseline change request is a change to the original budget or an amended budget. Whereas a purchase order may have been generated based on a – on an earlier budget and then a purchase order can have – can be updated for if there’s no funds for the line items. So may have the same purchase order with additional funds that come from a subsequent BCR...once it’s amended.

All right. So- - - ?--- [indistinct] BCR, so – yeah.

Okay. So it’s possible – there are two possible scenarios. First, a – where there is a change, that change might be made by increasing the amount of a purchase order number that had already been issued; is that correct?-- Yes.

And the second scenario is where there is a change being made, rather than adjusting a prior purchase order number, a new purchase order might be created; is that right?---Yes.”⁴⁰

Assessment of evidence in relation to the first agreement

[64] I accept that generally all the witnesses were credible and reliable and able to give a good account about the events in the relevant period. Whilst Wilde was an honest witness, he was not involved in the day to day operational issues in Australia through most of the relevant period, given he was based in the USA. I have outlined the evidence of each witness in some detail in order to indicate that in many essential respects the evidence of each witness was corroborative of the evidence of each of the other witnesses. Where there is a discrepancy, I consider that Hermes Speziali’s evidence is to be preferred for a number of reasons. First, he kept a contemporaneous diary note of the events in question. I have seen that document⁴¹ and consider it to be a genuine document which records his perspectives on many matters concerning his business and his private life.

[65] Furthermore, in giving his evidence, he was able to give the basis for certain business decisions he made and outlined his reasons for those decisions which in my view added to his credibility. In particular, I consider his explanation as to why he was not initially

³⁸ Exhibit 78.

³⁹ T 4-34: 3 – 5.

⁴⁰ T 4-34: 9 – 26.

⁴¹ Exhibit 1.

in favour of Areva storing the reflectors on his property to be quite compelling. He outlined that those reasons included workplace health and safety issues and his concerns about having people who did not work for him on his property. I also consider the reason he gave for changing his mind to be completely credible. He changed his mind when he realised he could dictate to Areva that they exclusively use Nortask labour and equipment to unload, store and reload on his property with obvious financial benefits to him. I consider that Hermes was an astute and canny business man who knew that such a condition would not only alleviate his safety concerns but also be very lucrative for him. I consider he was very frank in his evidence and I accept his outline of events.

- [66] Whilst I consider that both Canham and Macbeth were credible witnesses, neither had a precise recollection of the exact dates on which conversations occurred in January and February 2013. Their evidence as to the fact that meetings occurred and the places they occurred was consistent with the evidence of Hermes and Steven. I consider that they were both particularly honest and forthright in exposing some of the failures in the Areva systems and processes at the time. I also note that Areva took steps to prevent Canham giving evidence in this trial in circumstances where he had refused to sign a confidentiality agreement at the time he was made redundant in March 2013. I accept Canham's evidence that he received a letter from Areva's then solicitors, Gilbert + Tobin, stating that he could suffer financial consequences for giving evidence. That such a letter was sent is a matter of serious concern.
- [67] I do not consider that the evidence of Canham and Macbeth is inconsistent with that of Hermes in relation to the agreement. Whilst Canham said in his evidence that he did not have authority himself to enter into the agreement with Nortask, he stated that he obtained verbal approval from Macbeth to proceed with Nortask. Macbeth also stated he had verbal approval from his vice president to approve the arrangement. Neither specified a date when those verbal approvals were obtained in the evidence they gave to the court and it was clear that they were making decisions in response to rapidly unfolding events.
- [68] Hermes' evidence is that the agreement was concluded in principle during the meeting at his property, which on his diary entries, was on either 1 February 2013 or 2 February 2013. It is difficult to be certain of the date, given that his evidence was that he would often record the outcome of an event in diary entry for the day after. I accept that it was either on one of these two days that the agreement was concluded, given those diary entries. In my view, there are a number of documents which corroborate the fact that an agreement was reached on that date. The contemporaneous Minutes of the Meeting on 16 March 2013 taken by Canham indicate that he submitted the estimate of the relocation of the reflectors to the Nortask site work for approval to Macbeth on 30 January 2013.⁴² The Minute records that Canham was told "approval was granted to commence these works and a submission was forwarded on 2 February, 2013... for development of a purchase order."⁴³
- [69] There are then emails in evidence between Canham and Macbeth dated Sunday 3 February 2013 in response to an earlier email from Stephen Maclaren ("Maclaren") attaching a Flood Warning for the area which had been issued that day.⁴⁴ Whilst those

⁴² Exhibit 48.

⁴³ Exhibit 48.

⁴⁴ Exhibit 40.

emails indicate that Areva is still looking for more “backup”⁴⁵ land, I consider they had already made a decision about the Nortask land. This is because in his email to Canham at 11.54 am that day Macbeth states, “Something needs to be put in place with Nortask Monday.”⁴⁶ That email in my view confirms that the verbal approvals required were already in place as between Macbeth and his superior and as between Canham and Macbeth. There had clearly been discussions with Nortask the previous week about the terms, which had resulted in the verbal approvals. The email of 3 February was a very clear indication from Macbeth confirming that Canham could proceed to put the written arrangements in place.

- [70] In my view, all the terms must have been discussed and agreed by 3 February with nothing left to sort out other than the paperwork because terms were not referred to in that email from Macbeth to Canham. The available inference, in my view, is that those terms had been sorted out already on the site on 1 or 2 February. The essential terms were clear: it was a rental agreement for the area of land visually indicated to Canham at the meeting for the period discussed, at the rental discussed and with Nortask labour and equipment to be used exclusively at the rates Areva was already paying.
- [71] Steven sent through the detail for the paperwork in writing on Monday, 4 February 2013 and on 6 February 2013 Canham forwarded the details to Macbeth to start the written approvals process for an agreement they had already entered into. In my view, that was the written approvals process for an agreement which had been reached in broad terms on 1 February. The paperwork for the agreement took some time and the purchase order did not actually issue until 3 months later on 20 May 2013. In the absence of a specific date when they obtained verbal approval, I accept Hermes’ sworn evidence that the essential terms had been sorted out by 2 February 2013. On 2 February he recorded in his diary in relation to the events of the previous day that “the deal is on”.⁴⁷
- [72] The evidence also indicates that a date on an Areva purchase order cannot be relied upon as a date which accurately records when an agreement was put in place. The evidence of all of the witnesses, including the former Areva employees such as Wilde, revealed that Areva had poor processes in place in relation to the management of contracts and the necessary documentation which was required in relation to those contracts in February 2013. Canham gave very clear evidence that Areva did not have proper document management systems set up when he commenced with them and he endeavoured to implement one. In this regard I note an email from Dan Cudworth to Steven dated 13 May 2013 stating that he was directed by their accounts department to contact him in relation to Purchase Order 1012060210 as he “was trying to clean up some current issues with their purchase orders.”⁴⁸ He requested copies of the original quotes which “may had been forwarded to someone here in the past.”
- [73] The evidence of poor processes and record keeping is also corroborated by the email of 3 February 2013 from Loreille to Canham and Macbeth which states that previous work involving Nortask had proceeded without a purchase order in place. Loreille asked, “Could you please confirm that there was at least a contract in place with this company....As of today we have half a million dollars committed with this supplier. As

⁴⁵ Exhibit 41

⁴⁶ Exhibit 40.

⁴⁷ Exhibit 1.

⁴⁸ Exhibit 66.

a reminder, no supplier is supposed to commence working without a contract in place. Verbal order is not a contract. The department that engaged Nortask need to let them know that these invoices will take time to be processed.”⁴⁹ That email confirms that Nortask had been verbally engaged previously and that the relevant paper work to facilitate payment via a purchase order was provided subsequent to the engagement.

- [74] Whilst the defendant is endeavouring to assert that Areva’s strict processes required all the paperwork to be in place before any agreement was entered into with Nortask in February 2013, the assertion is simply not borne out by the evidence before me as outlined above. The evidence indicates that a stricter system of approvals was ultimately put in place in March 2013.⁵⁰ That process was time consuming and complicated given it involved a nine step process and approvals from personnel on three continents. That documentation was clearly often only achieved after relevant events had taken place and was not contemporaneous. The most obvious example of that is the BCR form was signed by Dimercurio on 9 May 2013, Macbeth on 30 August 2013 and Shakir on 9 December 2013.⁵¹ In any event, such a system was clearly not operating in February 2013 when the agreement with Nortask was reached.
- [75] Against that background, I am satisfied that Areva were urgently looking for space to rent in late January 2013 and a decision was clearly made that the Nortask option was the best option for the reasons that both Canham and Macbeth outlined in their evidence. The evidence indicates that given the flooding and the disruption to the installation at Kogan Creek, a decision needed to be made quickly. Indeed, the email exchange between Canham, Macbeth and Maclaren on Sunday, 3 February confirmed that urgency. Having considered the oral evidence and Hermes’ diary note for Saturday, 2 February 2013 which records that “Deal with Areva. Nortask will supply Areva with 40 acres space”,⁵² I consider that an in-principle oral agreement was in fact reached between Hermes, on behalf of Nortask, and Canham, on behalf of Areva, by 2 February 2013 with the relevant documentation to follow. I consider the agreement was reached at the Nortask site when Hermes and Canham shook hands. This was subsequent to a meeting at the property on that date when Canham was shown the area which could be used, which comprised approximately 40 acres.
- [76] The agreement was not reduced to writing on that date but on 4 February, Steven sent a document called “Quotation for lease of storage land” which recorded the agreement. It noted a rental of 45 acres at \$10,680.00 per month (+ GST) for 6 months. It also recorded “Unloading and loading of units on hourly rate for equipment and labour” as well as the “Securing of solar units at cost plus” and “Removal of securing anchor pegs on completion at cost plus.” The letter also indicated that a hardstand area of 40,000 metres would be completed within three months and that a separate gate and access were to be installed.⁵³ A previous email of 1 May 2012 to Muir Aitken at Areva had set out the Nortask rates for labour and the long term hire of equipment.⁵⁴
- [77] I note that no paperwork actually issued to Nortask after the letter to Areva of 4 February and before the reflectors started arriving. The reflectors simply started arriving on

⁴⁹ Exhibit 89.

⁵⁰ Exhibit 51.

⁵¹ Exhibit 78.

⁵² Exhibit 1.

⁵³ Exhibit 9.

⁵⁴ Exhibit 8.

7 February 2013 which confirms, in my view, the conclusion that an agreement was already in place at that point in time.

- [78] The email exchanges which are in evidence for the period between 4 and 7 February 2013 indicate that there were then a series of emails between various personnel at Areva trying to sort out the paper work as between themselves.⁵⁵ There is no evidence before me that anyone at Nortask queried whether an agreement was in place but rather, all presumed there was indeed an agreement in place. An email from Aitken to Macbeth and others at Areva on 6 February indicated that 15 deliveries to Nortask would commence the following morning Thursday, 7 February 2013 at 7.30am at 30 minute intervals.⁵⁶ That correspondence, in my view, confirms the oral agreement that Hermes reached with Canham by 2 February 2013 and that the Areva paperwork would catch up with operational decisions already made.
- [79] Counsel for Areva argues that even if an agreement was reached, it was not an agreement which gave Nortask exclusive rights to the unloading and reloading of equipment at the Nortask site. I consider there are three facts which indicate to me that it was clearly agreed and understood between the parties that Nortask would perform all the work at Nortask using Nortask equipment. The first is the evidence that when a telehandler turned up onsite it had to be removed because Hermes made it clear only Nortask labour and equipment was to be used. I accept Hermes' evidence that Robertson agreed that it would not happen again which I consider endorses the exclusive nature of the agreement. The second is the reality is that there is no evidence before me that anything other than Nortask labour and equipment was used onsite. The third is the fact that the pivotal BCR document from Canham to Macbeth requesting the additional approval of funds for the storage, which was not sent until 17 February - some 10 days after the deliveries commenced - was clearly based on the fact that Nortask would be doing all the work and providing all the equipment.
- [80] Furthermore, an email on that date from Canham to Macbeth and others at Areva stated that "Approval is required ASAP as works have commenced to enable production outputs to be maintained."⁵⁷ On 20 February, after some two weeks of reflector deliveries, the emails indicate that a BCR had not been approved and accordingly no purchase order to Nortask could issue. No purchase order or BCR involving any other entity was ever anticipated or prepared. That evidence indicates to me that an exclusive agreement in the terms alleged was indeed entered into in response to rapidly evolving circumstances, but that Areva's approvals process and documentation systems were lagging behind decisions that had already been made on the ground orally by Areva senior management, with the necessary verbal approvals in place.

Did Canham or Robertson possess the actual authority, either express or implied, to enter into those arrangements?

- [81] Nortask pleads that an agreement was entered into in February 2013 at a meeting with Areva's representatives and Hermes and that an essential component of that agreement was the right to load the reflectors at the Nortask property prior to transportation to Kogan Creek. Areva argues that there was no agreement in those terms and that Nortask did not

⁵⁵ Exhibits 89, 41, 42, & 43.

⁵⁶ Exhibit 42.

⁵⁷ Exhibit 44.

have an exclusive right to load the chattels. Areva also relies on the fact that there is no purchase order in evidence in those terms and that the quote of 4 February 2013 from Nortask is not in those terms. Areva also argues that Canham acknowledged that he did not have authority to make such an agreement and that there is no evidence that Macbeth, who had authority to make the agreement, did so.

- [82] In my view, Canham, on behalf of Areva, entered into an agreement with Hermes on behalf of Nortask by 2 February 2013 after he obtained verbal approval from Macbeth and after Macbeth received verbal approval from his superior. That was their evidence at trial and that evidence is corroborated in several respects by the documentary evidence as outlined above.
- [83] I also consider that the agreement entered into by 2 February 2013 was in the terms pleaded. That agreement clearly engaged Nortask to unload and then load the reflectors and other items delivered to the property and to secure the reflectors and remove the securing pegs as per the letter from Nortask dated 4 February. That was clearly understood to be an exclusive arrangement.
- [84] In my view, Canham had actual authority to enter into the exclusive agreement given the verbal approval by Macbeth. A convenient statement of the relevant principles involving actual authority were discussed by the New South Wales Court of Appeal in *Quarante Pty Ltd v The Owners Strata Plan No 67212*:

“Actual authority arises where a principal grants and an agent accepts authority for the agent to perform specific tasks on behalf of the principal. Actual authority involves a consensual transaction, although consent may be express or implied... Where actual authority is said to be conferred expressly and in writing, as in this case, the scope of the authority is ascertained by reference to the express words of the agreement and any implications to be drawn from the agreement.”⁵⁸

Did Areva hold Canham and Robertson out to Nortask as officers, employees and/or agents of Areva having the requisite ostensible or apparent authority to enter into the agreement on behalf of Areva?

- [85] I also consider that, in any event, Areva held Canham out to Nortask as an employee of Areva who had the requisite ostensible or apparent authority to enter into the agreement or agreements on behalf of Areva. There can be no doubt that such agreements had been entered into in the past and Canham had been held out as having authority to enter into such arrangements. Indeed, the email from Macbeth of 4 February states “I need to terminate the person... who *engaged Nortask without a PO or contract*” (my emphasis).⁵⁹ That email accepts in clear terms that Nortask had indeed been *engaged* without the relevant paperwork in place. Areva obviously accepted that there had indeed been an agreement that Areva was bound to perform.
- [86] One of the leading authorities is *Pacific Carriers Ltd v BNP Paribas*.⁶⁰ This case is widely cited as authority for principles of ostensible and actual authority and has been cited and considered in cases across Australia. Those key principles are:

⁵⁸ [2008] NSWCA 258 at [99].

⁵⁹ Exhibit 88.

⁶⁰ (2004) 218 CLR 451

“[36] Where an officer is held out by a company as having authority, and the third party relies on that apparent authority, and there is nothing in the company’s constitution to the contrary, the company is bound by its representation of authority. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is not enough that the representation should come from the officer alone. Whether the representation is general, or related specifically to the particular transaction, it must come from the principal, the company. That does not mean the conduct of the officer is irrelevant to the representation. In many cases the representational conduct commonly takes the form of the setting up of an organisational structure consistent with the company’s constitution. That structure presents to outsiders a complex of appearances as to authority. The assurance with which outsiders deal with a company is more often than not based, not upon inquiry, or positive statement, but upon an assumption that company officers have the authority that people in their respective positions would ordinarily be expected to have. In the ordinary case, however, it is necessary, in order to decide whether there has been a holding out by a principal, to consider the principal’s conduct as a whole.

...

[38] A kind of representation that often arises in business dealings is one which flows from equipping an officer of a company with a certain title, status and facilities

[39] The reference to corporate administrative procedures under which an officer is armed with a document to which he or she can, by signature, impart an appearance of authenticity is a reminder of the wider principle of estoppel which may be relevant to a question of ostensible authority.” (Citations omitted).

- [87] There is no dispute between the parties that the reflectors started arriving at Nortask on 7 February 2013. Nortask labour and equipment was used exclusively to unload and secure the reflectors with dunnage and other items being supplied by Nortask. An access gate was installed and an Areva supervisor was used, as Hermes stated in his evidence. The clear conclusion, in my view, is that Areva accepted the terms and conditions of the offer made by Nortask by 2 February 2013 by its unequivocal actions in accordance with the agreement. Furthermore, Areva paid for the rent of the land at the price agreed and the invoices which issued for the labour and equipment were at the hourly rate, as agreed.
- [88] The fact that there was an email from Loreille a month later on 2 March to Hermes and Steven, which informed them about the approvals processes required and a further email of 8 March indicating the purchase order to use, is no answer to the agreement which I consider was entered into a month before in February 2013.

Was there an agreement for Nortask to load all the stored materials on their property for transport to Kogan Creek?

- [89] There can be no doubt, in my view, that the answer to the question of whether there was an exclusive agreement between Nortask and Areva to load all the stored materials on their property for transport to Kogan Creek is yes.

Events after the agreement was entered into

- [90] The agreement entered into by 2 February 2013 did not include any agreement in relation to the transport of the reflectors. When the deliveries commenced at Nortask in February 2013, Nortask was not transporting the reflectors from the factory in Dalby to the Nortask property pursuant to that agreement. Neither was Nortask transporting the stored reflectors to Kogan Creek. I also note that Purchase Order 1013036191 dated 15 May 2013 (approving an amount of \$294,140.00 to Nortask) contained payments in relation to land rental, labour to unload, the supply of star pickets, strapping, shackles, delivery of site material and hire of a telehandler but no fees in relation to the loading and transport of the reflectors to Nortask.⁶¹
- [91] On 15 March 2013, Loreille sent an email to Steven requesting a quote for all the items which were already the subject of the agreement as well as a quote for the transport of the reflectors from the factory in Dalby to Nortask and from Nortask to Kogan Creek.⁶² On 17 March 2013, Robertson also emailed Steven requesting a quote just for the transport.⁶³
- [92] On 18 March 2013, an itemized quotation was sent to Loreille which stated that in relation to the reflectors, the yard lease was as previously quoted as was the dunnage and timber. The quote then gave an itemised breakup of rates for the loading and unloading of reflectors based on whether the hire was casual, weekly or a month or longer. The quote also included a specific quote for transport from Dalby to Nortask at \$166.00 per load and from Nortask to Kogan Creek at \$497.00 per load. It was to be valid until January 2014.⁶⁴ Further requests for similar quotations for transport were made on 26 April 2013.⁶⁵
- [93] It is uncontroversial that in late May 2013 it became clear that Areva needed more space to store additional reflectors. The Handover Notes from Robertson to Macbeth for the period 14 May to 23 May 2013 indicate that the number of reflectors onsite at Nortask at 20 May was 1040, with 162 at site and 2800 still to be manufactured.⁶⁶ The note states “I have estimated a further 1600 will be required to be stored after site is full. Spoken to Nortask re this extra storage they do have the capacity for the extra when required.”⁶⁷ The final summary note then stated that in fact 1700 would need to be stored and that he (Robertson) was going to start the BCR process.⁶⁸

The evidence of Hermes Speziali in relation to the June agreement

- [94] Hermes gave evidence that initially he did not have very much contact with Macbeth, with most of his contact being through Canham or Robertson. That changed, however,

⁶¹ Exhibit 14.

⁶² Exhibit 29.

⁶³ Exhibit 49.

⁶⁴ Exhibit 11.

⁶⁵ Exhibit 64.

⁶⁶ Exhibit 53.

⁶⁷ Exhibit 53.

⁶⁸ Exhibit 53.

in June or July 2013 when the Kogan Creek project was undergoing problems and Nortask was approached again by Areva with a request to store more plant and equipment and for it to be stored for a longer period than the originally planned. He stated that prior to June or July they would speak roughly once a month.

- [95] Hermes' diary notes of 20 May 2013 also record that "Gary from Areva has requested "more space" to store up to 2800 reflectors."⁶⁹ Robertson told him the Kogan Creek site was still off-limits to Areva and they could not store any more material at the factory. Hermes was asked whether he could give Areva another area to store 1,600 or 1,700 reflectors. He told him that before a commitment was made he needed to know when the reflectors were leaving as his existing agreement with the Council was for a six months storage period which had begun in February and he was concerned about an extension. Hermes stated that Robertson was unable to give him a date and would get back to him.
- [96] Hermes said that during that period he worked out the rate and concluded it would be similar to the existing price given that a similar number of items would be delivered of around 1,500 or 1,600. He stated that it would be \$10,680.00 a month plus GST and that they would do all the unloading and loading. Hermes stated that the only way he would allow anything extra to come on the property was if they got all of the work to unload, secure and reload for taking away.
- [97] The Diary entry of 3 June 2013 is as follows:
- "Gary Robertson of Areva visited the office, wanting to know if it was possible for Nortask to store another 16-1700 reflectors as the project was still in "stoodown" mode & Areva was wanting to work the manufacturing plant double shifts, and return the leased factory to its owners to contain costs. "As the company is bleeding!" With no possibility of reflectors going to project site the only alternative is to store until the project re-open. Can Nortask help and at what price – "Pls consider and let me know A.S.A.P".⁷⁰
- [98] Hermes gave evidence that they sent off a quote on 6 June 2013⁷¹ which gave the rate of \$10,680.00 for the additional storage area (the same price as per the previous quote for the supply of the star pickets and wire) and further provided "Labour and telehandler hire rates to unload/load and secure reflectors as per previous rate."⁷² Hermes stated that, not long after the quote was sent, he was told by Robertson that the site would reopen in the first week of October 2013 and that in the second week the reflectors would leave Nortask to go out to Kogan Creek. He told Robertson that he had sent the quote and it was for a similar price in a similar space. Robertson told him he would let him know the outcome.
- [99] The diary entry of 6 June records that the count of reflectors on Nortask land was 1586 and that Hermes had submitted a price for the storage of another 1700. The entry of 7 June was as follows "Areva has rang back following request for further storage. Jobs will reopen first week in October. Reflectors can be sent to site from the second week of October Non Fail".⁷³ An entry of 8 June also records the current fee for 1600 was

⁶⁹ Exhibit 1.

⁷⁰ Exhibit 1.

⁷¹ Exhibit 10.

⁷² Exhibit 10.

⁷³ Exhibit 1.

\$10,680.00 and that space for a further 1700 would be charged at the same rate as would the price for the supply of star pickets and wire.

- [100] Hermes stated he heard nothing for some period of time and then in early July he was contacted again. Robertson came to him and stated that Areva had received his quotation but that the company was losing money on the project and he asked if there was anything else that he could do to cut a deal where he would get something out of it, and Areva would get something out of it without further bleeding:

“And I said to Gary, I said, “Look” – I said, “Let me do some thinking”, and I said, “You’re asking now something that I never contemplated. Let me do some thinking, and I’ll get back to you.” I called back Gary, and I gave him the proposal that it involve grouping – I don’t know what [indistinct] put it – grouping the current res – reflectors there were onsite closer together rather than having a big space in between it [indistinct] them up, you know, put them up together, closer together, so to generate more space in within the number of reflectors that we had then. *I would then make up the balance of the land required to take the leftover numbers that didn’t fit in on the gain land [indistinct] grouping. I wouldn’t have charged Areva any money for it on the proviso – on the trade-off---*

Wouldn’t charge Areva any money for what?---For the – for the further storage.

Yeah?---For the further storage.

Yes?---On the proviso that Nortask would be given the task of transporting every item that come on the land and unloading it at Kogan Creek. He could not give me an answer. He went – he said that he went – that he was going to go and – and put it to whoever he needed to talk to.

All right. And so then what happened? So the meeting was left – that meeting was left on the- - -?---That meeting---

Or that meeting or telephone conversation - - -? --- - - - just dealt with the – with the requirement, “What can you do so that we don’t – we don’t bleed any further, and can you come up with something?”” I gave him the proposal. He took it to the powers that be.”⁷⁴ (my emphasis)

- [101] Hermes stated that the next he heard about this was when he got a call from Robertson around 4:00pm-5:00pm on a Sunday afternoon. Robertson told him that the company has made a decision: “We’re taking option 2 of your proposal.”⁷⁵ He also told him that receivers would be sent as well as reflectors and that whilst they were the same length they weighed about 750kg or roughly 3 tonnes in weight. He stated that the difference was the unloading could not be done by a telehandler, given the weight, and the fact that it was very fragile and valuable. Hermes was told it was a very expensive item and could not be damaged, so they would need bigger equipment. He stated that they used a 50 tonne crane to do all of the lifting of the receivers on-site at Nortask. The significance also was that he was told that the receivers needed to be placed on the hardstand in order to ensure that the dunnage would not sink.⁷⁶

⁷⁴ T 1-88: 3 – 30.

⁷⁵ T 1-89: 1 – 2.

⁷⁶ T 1-80: 32 – 35.

- [102] Hermes gave evidence that Robertson told him during that conversation that he needed access to the site and that he had to organise the receipt of the receivers at the property quickly, as he did not wish to hold up the transport because they would charge a penalty. He stated that in the meantime he would work on raising a purchase order that would be put through in due course. He stated that the receivers and other items would start to be delivered the next morning. The diary entry of Sunday, 14 July records: “Gary from Areva rang me at 4.30pm. Wants to unload all receivers and reflectors and pipe work to Nortask yard because of ‘big boys locking horns’.”⁷⁷ The entry for the next day records that Nortask was again unloading reflectors at the Nortask yard.
- [103] Hermes stated that he then needed to mobilise fairly quickly because he had to organise a crane and the crew to handle the receivers as well as the other equipment that was needed. He stated that the receivers came in a cradle, and the cradle had to be unbolted and needed pneumatic tools. He stated that needed quite a bit of organising and he spent the rest of that afternoon organising it. He stated that the following morning at 7:00am, the first truck turned up and they unloaded the items. He stated that Robertson was present when the items were received. Reflectors then began to be received on-site on a fairly continual basis for a number of weeks. Hermes stated that they continued to receive an amount of \$10,680.00 a month in total for the rental of the area and they were paid an hourly rate for unloading and securing of all of the items. The hourly rate was recorded on hire docket sheets and signed off daily.
- [104] Hermes gave evidence that by the end of September or early October, all of the additional items were delivered to the Nortask yard. He stated that roughly they had almost 3,000 reflectors as well as about 100 receivers and tonnes of piping, valving spools and other items.
- [105] Hermes outlined on a map⁷⁸ the additional area that Areva occupied after June 2013, which he stated included at least 80% of the hardstand as that was where the receivers had to be stored. The map indicated two distinct areas which comprised the initial area set aside and then an additional area adjacent to it.
- [106] Hermes stated that at every opportunity he enquired of Robertson whether they were on-track to have the items removed in October. He also asked for an order to cover the activity that was going to be involved in the removal of the items that is, the loading at Nortask and the unloading at Kogan Creek. He already had a standing order in relation to the unloading of the items at Nortask and the securing of the reflectors and receivers and the only outstanding order was for the work to be done in the future. He stated he did not have an order for the reloading of the items or for the transportation to Kogan Creek. He stated:

“All right. And – sorry, go on, what else were you requesting from Areva?---And we were requesting – as to their internal requirement, we were requesting an order to cover that activity and I – I – an affirmative answer as to the – the final day, second week of October.

All right, And why was it important that you receive confirmation of that date, being the date that they would commence relocating the materials from the Nortask yard to Kogan Creek site?---Well, it – it – a number so

⁷⁷ Exhibit 1.

⁷⁸ Exhibit 12.

far of – of – of values. One of those by having an order – as we were promised, we were able to then to invoice and the paperwork and the invoice would have been processed by Areva. We understood that the – the – the requirement of the order was an internal – an internal requirement of Areva because the money didn't come from within Areva Australia; the money come from, I don't know, the USA, France, I'm not privy to it, but – and they – they only work on order, that only work orders. That we – we did know. And we repeatedly ask for this order to cover the activity and none come. We ask them to reconfirm that the day would be beginning of October and repeatedly we were told, yep, that – that will be the date.

All right. So the second week of October, so 7 October - - -?---Yep.”⁷⁹

[107] Hermes stated that on 1 October he heard nothing:

“I stated before your Honour that I committed to the – to Western Regional Council on the – on the second week of October, being an absolutely undeniable date of starting removing the goods from Nortask yard. Reluctantly, the council gave me a – a basic approval that they would turn a blind eye of more material coming to site, given that that date would be maintained. Now, I got promised by the highest person in Areva that I - - -

Who - - - ?--- - - - would be communicated - - - - - in

particular?---A gentleman by the name of Eric Macbeth.

Yes. All right?---That I would be – when – by – by Eric, if not the 1st of October to confirm that the job was re-opening, it would be definitely the second. And come the 1st of October I remember looking at the watch from 12 o'clock onwards every – every 10 minutes, knowing that the council would – would put me to the sword, anyway, no – no communication from – from Areva. I rang and rang and rang and I could not get Eric Macbeth to answer the phone. In fact, the only communication I got was Western Regional Council towards late afternoon decide - - -

All right. All right. I just want to focus, first on - - -? ---Anyway, there was nothing happening on the 1st of October.

...

All right. So after the materials have been left on your site in October of 2013 and you are getting very little communication or advice from Areva as to what was happening, what did you do in response to that?--- Well, we have no choice. We – we end up – we end up going legal. Areva bailed on their – vacated site, they disappeared. There was no-one, no-one left, no-one to talk to. And I tried to talk to a gentleman, Anthony – Anthony Wiseman, I think, which is – I got to find out he's a director of Areva and he – never I got – I've been able to talk to the man.”⁸⁰

⁷⁹ T 1-96: 26 – 44.

⁸⁰ T 1-96: 47 – 1-97: 35.

- [108] Under cross examination, Hermes agreed that he knew at least from 1 March 2013 that all the work that Nortask did for Areva required a purchase order number to facilitate payment. He denied, however, the proposition that he knew in June 2013 that Robertson could not make an agreement on behalf of Areva. He stated:

“I don’t know the inside working of Areva. I only knew that Mr Robertson was the one authorising every activity on site, every one of them. In fact, no authorisation ever come from Lorrae nor from –from- definitely none from Macbeth for the full duration of the project.”⁸¹

- [109] Hermes acknowledged, however, that on 12 June 2013, his diary notes record Robertson telling him that he had to talk to Macbeth about the storage of the reflectors and would let him know. In relation to a payment issue at the same time, he also agreed that Robertson indicated he would chase up an overdue bill with the Areva accounts department.⁸² He reiterated however that it was Robertson who “ordered the work in 95 percent or better of all activity.”⁸³

- [110] During cross examination, Hermes was taken to a letter from Nortask dated 26 February 2014, which outlined the original agreement between Areva and Nortask in relation to the reflectors and the history of the delivery of the reflectors from 8 February 2013 through to 6 June 2013 and stated that Areva had reached the original agreed quota of reflectors. The letter then indicated that a new quote was then sent on 6 June for the storage of a further 1700. The letter continued:

“12 June 2013 - Hermes and Gary discuss value of rental of additional area offset if Nortask is awarded transport of all reflectors delivered to be delivered to Kogan Ck site. Areva and Nortask agree to this arrangement.

As to date Nortask has not received any indication from Areva that the transportation of reflectors to the Kogan Ck site will be awarded to Nortask. Due to these circumstances an outstanding amount is owing for the storage of additional reflectors on Nortasks Land.

From June 2013 to end of February 2014 we have a total of nine months additional rent totalling \$47,565.00 plus GST (\$5285.00 plus GST per month x 9). This amount will be credited in full back to Areva if Nortask is awarded the transport of all reflectors from Nortask yard to the Kogan Ck job site. In the meantime payment of this account would be greatly appreciated.”⁸⁴

- [111] In his evidence, Hermes stated that the date for the agreement with Robertson referred to above was in fact 14 July and not 12 June. Hermes was also taken in cross examination to a meeting he had with Macbeth in June 2015 when he told Macbeth that Nortask had done work on a particular understanding as follows:

“on a clear understanding?---Yeah, that is correct.

And then Mr Macbeth told you - - - ?---Yep.

⁸¹ T 3-20: 2 – 5.

⁸² T 3-22: 9 – 45.

⁸³ T 3-22: 37 – 38.

⁸⁴ Exhibit 39.

- - - and you can see this in lines 4 and 5 – Gary Robertson had no authority to make that agreement?---Yeah, that is – that is correct as well, yeah.

All right. So you already knew that, though, in 2013, didn't you, that Mr Robertson did not have authority to make the agreement?---Mr Robertson was the face and the agent of Areva on-site throughout the project. So as far as we knew, it was Areva. As far – and – and furthermore, throughout the project, your Honour, not a scrap of paper was ever produced to say, “You dealing with Mr Robertson is not accordingly to the agreement with – between Areva and – and Nortask, and we – we want this to cease.” There was never a problem. We got money. We got it late, your Honour, because the – the processing of orders was always late – was always late, unmistakably. We would start work without any purchase order. And in the face, nothing would've happened, as far as Nortask was concerned, as – on this project, if it wasn't for the likes of Gary Robertson, on 95 per cent of the cases, backed up by Muir Aitken, Brian Neil and Ian Canham.

Now, Mr Robertson never told you that anyone else had given approval for any agreement between - - - ?---Sorry, could you repeat that?

Mr Robertson never told you that anybody else had ever – at Areva, had ever given approval for any agreement between Nortask and Areva?---Mr Robertson never dis – disclosed any private information in his dealing with Nortask. He was – he was the face of Areva. He issued instruction, we carried out directive, as per those instruction, and that was the end of it. It was basically a straight-out business relationship.”⁸⁵

- [112] Hermes also gave evidence that initially Canham had told him that he was the ‘top man’ at Areva and that ultimately Robertson did the same job under a different title when Canham left. He confirmed that all his dealings were with Canham or Robertson and not Macbeth. He also indicated that he was never told that Canham had been suspended or the reasons for it.

The evidence of Gary Robertson

- [113] Robertson gave evidence about the need to store an additional 1,700 reflectors and his discussions with Hermes about how they could best accommodate the extra reflectors. He stated he had discussions with Macbeth about the additional rental and whether they had used up all of the 45 acres they had already rented, whether they could put more on that area, whether they could get it any cheaper. He stated that he was trying to get the price down with Nortask to make it cheaper. He stated that he ended up having discussions with Hermes about moving the reflectors and other materials around and tightening them and bringing them closer together.
- [114] Robertson gave evidence that during the discussions with Hermes he was offered two options: one was the same deal that he had been offered originally (they would pay an additional fee of \$10,680.00 for the extra items) and then Hermes came up with a second proposal that he would waive the rent if he got to transport the items off-site. He stated that he took that proposal back to Macbeth who did not give him an immediate response.

⁸⁵ T 3-24: 14 – 42.

It seemed to drag on. He told Hermes could not give him an answer because he did not have an answer to give him.

- [115] Robertson gave evidence that Macbeth ultimately got in touch with him and told him “we need to get stuff stored on that block tomorrow.”⁸⁶ Accordingly, he got in touch with Hermes and told him of the need to deliver reflectors tomorrow and other material the following day. He stated that he had completed a BCR dated 22 May 2013⁸⁷ which indicated that they needed to rent storage for an extra 1,700 reflectors, as well as dunnage and the hire of star picket driver, a telehandler and labourers. The document noted that the approval was required by Macbeth. The expected start date of 1 June and the completion date was 7 June 2013.
- [116] Robertson stated that when Macbeth got in touch with him to organise the extra deliveries he did not indicate any difficulties with the approval. He then spoke to Hermes about arranging the additional storage and went down to supervise the unloading the next day.
- [117] Robertson agreed under cross examination that Luke Kambarbakis from Areva did some measurements of the land they were renting from Nortask and in an email dated 29 August 2013 to Macbeth and Maclaren he attached a site plan of the Nortask yard. This showed that the total area being used for the storage of reflectors at that stage was 45 acres.⁸⁸ He stated however that there was a mistake about the reference point from which Kambarbakis took the measurements as he gave him the wrong post to take the measurements from.⁸⁹
- [118] Robertson was also taken to an email chain⁹⁰ which referred to the invoice from Nortask dated 26 February 2014.⁹¹ This invoice referred to an arrangement reached on 12 June 2013 (now corrected to 14 July 2013) that the rental of the additional land would be offset if Nortask was awarded the transport of all items to Kogan Creek. When Macbeth queried the invoice in his email of the same date, Robertson confirmed that he emailed Macbeth shortly after as follows:

“Just to reassure you I in no way said that the discussion was based around him submitting a price for transport of the reflectors not a guarantee of work we also had Luke measure (sic) the area of land and he told us we were within the original 45 acres I think I raised bcr for a further 1600 reflectors at That time but we stopped it after Measureing (sic) the area”⁹²

- [119] During re-examination Robertson stated that he had been informed that Maclaren had told Macbeth that he had given Nortask the job of transporting the reflectors to Kogan Creek. He stated that he was offended by that assertion because “None of it was right. I couldn’t do that. I hadn’t got the authority to do that-to start off- and wouldn’t do that.”⁹³

⁸⁶ T 3-104: 26.

⁸⁷ Exhibits 54 & 55.

⁸⁸ Exhibit 60.

⁸⁹ T 3-120: 23 – 35.

⁹⁰ Exhibit 61 referring to Exhibit 39.

⁹¹ Exhibit 39.

⁹² Exhibit 61.

⁹³ T 3-121: 24 – 25.

- [120] Robertson gave evidence that he prepared handover notes for the period 29 October to 8 November 2013 which indicated that there were 2,599 reflectors stored at Nortask, and that included all of the first lot of reflectors and second lot of reflectors.

Evidence of Steven Speziali

- [121] Steven gave evidence that the requests for quotations for various items of work would come from a variety of people in Areva including Canham, Robertson Neil and Muir. He stated that he knew that payment for any work to be done required a purchase order from Areva but that purchase order numbers were not always rendered before work started. At times they were rendered shortly after work started or in the case of short jobs they would come after the job was completed. He indicated that initially they did not know about Macbeth until the meeting in early 2013 after which they were instructed that “there had been issues with purchasing officers going through the right channels with Areva and that, yeah, from then on, purchasing had to go through, I think it was, Melanie Lorrae, yep.”⁹⁴
- [122] Steven confirmed that Nortask’s quote for the extra storage dated 6 June 2013 did not contain a quote for the transport of any items from Nortask to Kogan Creek and that no purchase order was ever issued by Nortask for transport to Kogan Creek. Steven also acknowledged that the email from Hermes to Areva dated 12 February 2014 asked when the contract to transport the reflectors and receivers to Kogan Creek would be awarded. When asked that he therefore must have known that there had been no decision about that contract to transport the receivers, he replied:

“No. We had been led to believe that a decision had already been made earlier when the arrangement for the second lot of storage was in place. We were asking for an official awarding of the contract and the start date as we had been asking for quite a while.

All right. But you say there, don’t you, that in the second line of the second paragraph:

If Nortask is awarded the transport of materials, it would need to purchase additional prime mover units to ensure all machinery requirements are met.

?---That is correct.

Okay. And that’s because there had, in fact, been no - - - ?---Well, we, at – at this stage, had still not been given an official purchase order and a start date to start moving equipment.”⁹⁵

- [123] He gave evidence that an additional number of reflectors arrived in mid-2013 and that part of the agreement about the reflectors was that the existing reflectors would be moved closer together so that the additional space would not be another 45 acres. He stated that the total space ultimately occupied was, at a guess, 55 to 60 acres and was definitely in excess of the original 45 acres.⁹⁶ Areva was also using the majority of the hardstand as well as the black soil area.

⁹⁴ T 4-6: 6 -8.

⁹⁵ T 4-16: 4 – 20.

⁹⁶ T 4-16: 44.

- [124] Steven also stated that the occasions when Areva was excluded from Nortask land were during periods of wet weather when there were concerns about access to both the black soil and the hardstand areas.

Evidence of Eric Macbeth

- [125] Macbeth stated that in mid-2013 there was a period of some weeks whereby the reflectors were taken directly from the Dalby factory to Kogan Creek site. However in June 2013, they were again faced with the issue of what to do with the reflectors and a decision was made to recommence deliveries to the Nortask property. Another 1700 reflectors were delivered between July and October 2013 together with some receivers and pipework.
- [126] He gave evidence that it was decided to move the existing items on the Nortask site closer together, particularly when they realised, after some measurements were taken by Kambarbarkis, that Areva had not filled all of the original allotment of 45 acres. He did not consider a new arrangement was ever entered into with Nortask about the storage of the additional reflectors. He stated:

“All right. And the solution ultimately was to enter into an arrangement with Nortask whereby it could take the additional materials from July 2013 onwards?---I don’t believe an arrangement ever occurred. We just mapped it out and said there’s 45 acres, we’re not using it, we – it just became a dead issue.”⁹⁷

- [127] Macbeth was taken to a BCR⁹⁸ which referred to an allowance of \$32,000.00 for an additional 6 months of 27 acres. In relation to the ultimate arrangements that were entered for the storage of the extra materials, his evidence was as follows:

“MS ARMITAGE: So an agreement was reached, was it not, between Areva and Nortask whereby Nortask agreed to accept and store on its land an additional 1700 reflectors and then receivers and other materials; is that correct?---I don’t believe an arrangement ever occurred. We just ended up realising that we were – were under the 45 acres and we ended up storing more reflectors there.

All right. And what about the – what arrangement was ever put in place then with Nortask whereby it was agreed to accept not just reflectors, but also receivers and other materials?---Some of it was with costs that were included with the telehandlers, but we were still under the 45 acres.

...

MS ARMITAGE: So there wasn’t a situation where you instructed Mr Robertson to negotiate with Nortask as to the terms or as to on what basis they would be prepared to accept an additional 1700 reflectors stored on their property?---That’s correct. There was no negotiations on additional land for the reflectors.

And what about any negotiations as to the basis upon which – no, I’ll withdraw that. So your evidence is to the effect that there was no negotiations principally because there was no additional land required?--

⁹⁷ T 4-124: 42 – 45.

⁹⁸ Exhibit 79.

-Correct. We would have to have manpower to unload the reflectors so there'd have to be negotiations on unloading the reflectors and using manpower in that manner, but as far as the land of storage; correct.

All right. And Mr Robertson was the person who did the negotiation in relation to the – on what basis the unloading and loading would occur; is that correct?---For the – the 1700, yes.”⁹⁹

- [128] Macbeth denied in his evidence any knowledge that Nortask had offered to forego the additional rental, if in addition to the unloading and reloading of reflectors at the Nortask site, they were also given the work of transporting all the materials from Nortask to Kogan Creek. He stated that he only became aware of that assertion in the February 2014 letter from Nortask.

What was the nature of the agreement entered into in June 2013?

- [129] The plaintiff pleads that in early June 2013 a second agreement was entered into for the storage of an additional 1,500 to 1,700 reflectors on the property until the Kogan Creek site reopened in October 2013. That agreement was in the same terms as the first agreement except that no additional rental fee would be charged. Nortask argues that it ultimately agreed to store the additional reflectors without a further rental fee because Areva agreed Nortask would be granted the exclusive right to transport all the stored reflectors to the Kogan Creek job site and to unload them at the site. That new agreement was to be on the same terms for the hire of labour and equipment. Nortask also argues that it was agreed that the stored items would start to be removed by the beginning of the second week of October 2013 and be cleared by February 2014.
- [130] There is no doubt that between July and September 2013, an additional 1,300 solar panels were stored on the property together with other related materials belonging to Areva. The evidence also indicates that Nortask agreed to take the additional reflectors and agreed that all the reflectors would be moved closer together on the existing area. There can be no doubt that the same rates for labour and hire were to apply in relation to the unloading and loading of the new reflectors and other materials given, that is what occurred. I consider that given the arrangements were essentially the same, except for the rental fee, that clearly meant that Nortask would do the eventual reloading of the materials at the Nortask yard prior to transportation to Kogan Creek. I have already made it clear that I have found that the initial agreement meant that Nortask had the exclusive right to unload and then load at the Nortask site. That part of the agreement continued in relation to the extra reflectors.
- [131] The evidence indicates that no additional rental was charged for the storage of the extra materials. Macbeth stated it was because no extra area in excess of 45 acres would be used. Hermes stated he did not charge a fee because, even though additional land was used over the initial 45 acres, he had agreed to forego the rental on the basis that he believed there was an agreement that he would ultimately be awarded the contract to transport the items to Kogan Creek.
- [132] I accept that Hermes had the expectation that he would get the contract and therefore did not charge additional rent. There is, however, no evidence to indicate that a concluded agreement was ever reached between Areva and Nortask that it would be awarded the

⁹⁹ T 4-134: 9 – 18; 34 – 47.

transport contract. The strongest piece of evidence is the letter from Nortask to Areva of 26 February 2014 which includes the phrases “As to date Nortask has not received any indication from Areva that the transportation of reflectors to the Kogan Ck site will be awarded to Nortask” and “if Nortask is awarded the transport...of all the reflectors...to Kogan Ck.”¹⁰⁰ The only objective assessment of that letter is that the contract for transportation to Kogan Creek had not been awarded.

- [133] The letter of 26 February 2014 also stated that because Nortask had not been advised of the award of the transport contract, they were now charging rent for the additional area.¹⁰¹ In my view, that adds further support to a conclusion that no concluded agreement had been reached about the transport contract. In particular, I note that there is no quote from Nortask to Areva in relation to transportation costs after July 2013. Neither Hermes nor Steven could point to any paperwork to show a concluded agreement. Robertson’s evidence did not support a conclusion that a concluded agreement had been reached.

Did Robertson possess the actual or ostensible authority to enter into those arrangements?

- [134] Both Hermes and Steven gave evidence that they were well aware after March 2013 of Areva’s policy and approvals process in relation to the formalisation of agreements. Given the history in relation to the first agreement and the subsequent approvals process that was put in place, Hermes must have been put on notice on the afternoon of 14 July 2013 that he could not just rely on Robertson’s verbal approval in relation to what was, essentially, the awarding of an exclusive contract to provide the transportation of the stored materials to Kogan Creek. The decision of *Tipperary Developments Pty Ltd v Western Australia*¹⁰² referred to what is reasonable reliance in such circumstances as follows:

“A principal can only be made liable on the ground of ostensible authority where the third party reasonably relied upon the representation as to authority.... There is no reasonable reliance when the nature of a transaction or other circumstances put the third party on inquiry as to whether the purported agent has the requisite authority.”¹⁰³

Was there an agreement for Nortask to transport all the stored items and unload them at Kogan Creek?

- [135] I consider therefore that there was no concluded agreement in relation to the awarding of the contract for transportation of the stored materials to Kogan Creek in lieu of rent. What is clear is that Nortask allowed the additional receivers to be placed on Nortask land without a further additional storage fee being paid.

Was an additional area of land used?

- [136] I accept, however, that an additional area of Nortask land was used to store the additional materials. It was not an additional 45 acres but it did involve an additional area which was not insignificant. I accept Hermes’ evidence that the map, which is Exhibit 12, shows

¹⁰⁰ Exhibit 39.

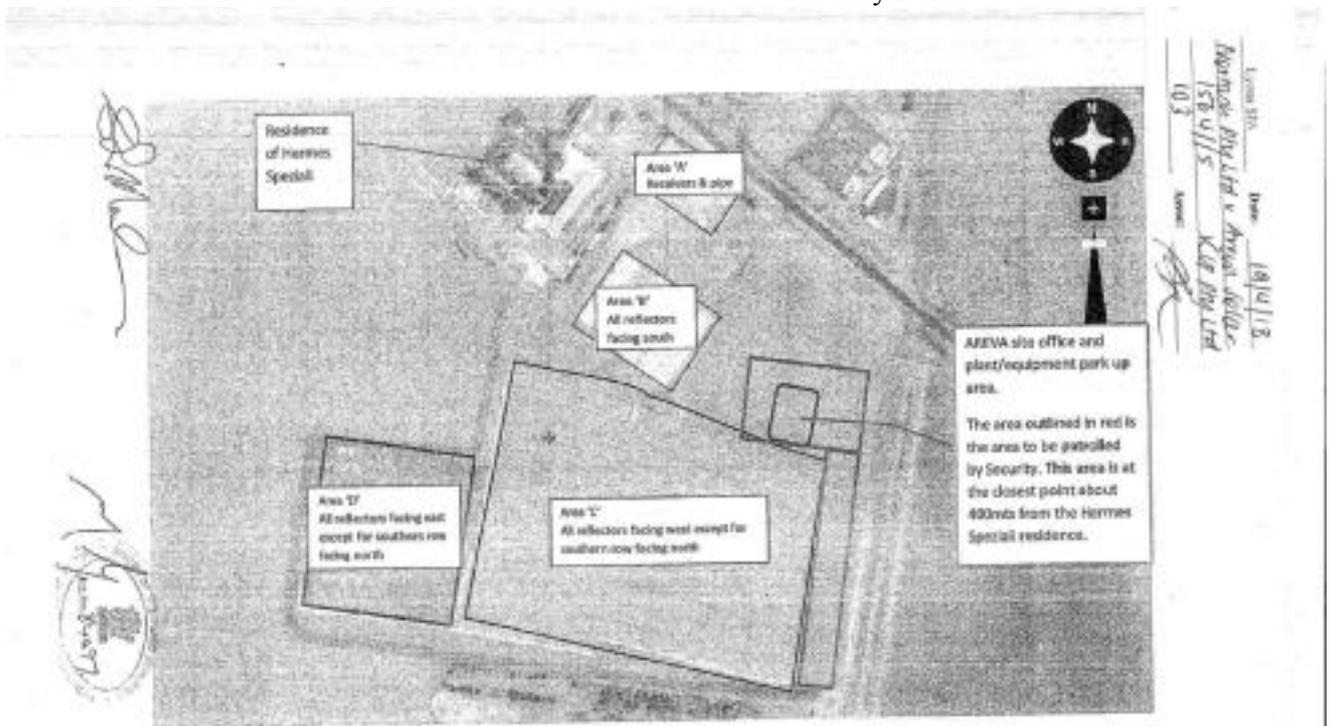
¹⁰¹ Exhibit 39.

¹⁰² (2009) 38 WAR 488.

¹⁰³ *Tipperary Developments Pty Ltd v Western Australia* (2009) 38 WAR 488 at [110].

the additional area taken up by the extra reflectors and other materials. Almost all of the hardstand was ultimately taken up with receivers, given they could not be stored on the black soil due to their weight. The evidence was that about 80% of the hardstand was ultimately occupied, when the initial agreement contemplated it was to be used to unload and load and not to store Areva items.

- [137] I do not accept Macbeth's evidence that he believed that all of the extra reflectors could be accommodated within 45 acres, given Robertson's clear evidence that extra land would be required to accommodate them. I also not accept Counsel for Areva's submissions as to his calculations as to the area the materials occupied, given there was no allowance made for space to secure or to access the items. I also take into account the map prepared by Maclaren in September 2015¹⁰⁴ which sets out the areas where Areva's chattels were stored. That map clearly shows receivers stored on the hardstand as well as an area marked "Area D" for storage which accords with the additional storage area shown in Exhibit 12. The area marked as "Area D" is approximately one third of the area marked in "Area C" which accords with the original storage area. The area marked as "A" shows the additional area on the hardstand where the receivers had to be stored after July 2013.



- [138] I also note that in the letter to Areva of 26 February 2014, Hermes indicated that there was a total of nine months additional rent totalling \$47,565.00 plus GST (\$5285.00 plus GST per month x 9).¹⁰⁵ Hermes stated this was based on the extra land they were occupying. I infer, therefore, it was calculated on the basis that around 20 additional acres was been occupied by the additional materials. That is the approximate area of additional storage as shown on Exhibit 12 in areas "A" and "D". I also note the May 2013 BCR prepared by Areva was based on an additional 25 acres being required. I conclude therefore that the total additional storage area based on the maps together with the evidence of Steven and Maclaren and the BCR was around 20 acres.

¹⁰⁴ Exhibit 103.

¹⁰⁵ Exhibit 39.

- [139] The plaintiff has, however, failed to establish that there was a concluded agreement between the parties that an additional rental fee would be charged for the storage of the extra materials.

Did Areva breach the agreement and use other contractors to load the stored items?

- [140] As previously stated, I consider that the evidence indicates that there was an agreement initially put in place by 2 February 2013 and then confirmed in July 2013 that Nortask would do all of the reloading of all the material at Nortask onto trucks for transportation. The initial quote of 4 February makes that clear as does the quote of 6 June 2013.
- [141] I accept that Nortask has suffered loss due to the fact it did not perform that work. Around 2,886 items were stored at Nortask by October 2013. The plaintiff pleads that the contract for the relocating and loading of reflectors and other materials of the defendant stored at the property would have resulted in a net profit (excluding GST) of \$341,928.00. Counsel for the defendant rejects this figure in his final submissions on the basis that Items 20, 30 and 40 of Exhibit 14 indicate a figure of \$120,000 for the unloading costs of 1600 reflectors and on that basis it is unlikely that the plaintiff's estimate of loss of the loading contract is realistic. Given that the Purchase Order is dated 15 May 2013, but relates to deliveries up to 15 March 2013, I am not satisfied that it in fact relates to 1600 reflectors. In this regard I note that Areva's own estimate for the loading of 2,756 reflectors at the Nortask yard as set out in the May BCR was \$348,634.00.¹⁰⁶
- [142] I will accordingly allow the amount of \$341,928.00 plus GST for breach of that agreement.

Is Nortask entitled to damages for trespass or mesne profits for the use and occupation of the land until April 2016?

- [143] The arrangement whereby the additional materials were allowed to be stored on the property was clearly on the basis that all of the items would start to be removed by the second week of October 2013. The plaintiff accepts that under that agreement all the materials would have been removed by February 2014. The stored materials were commenced to be removed in September 2015 and the last of the chattels was removed on 18 April 2016. The plaintiff therefore argues that the defendant trespassed on the property from February 2014 to April 2016 and that, whilst an amount was paid monthly pursuant to an agreement with Areva from February 2014 to May 2016, Areva breached its agreement with Nortask and failed to utilise Nortask's services in the manner agreed. In particular, Nortask was not used for the removal of the chattels.
- [144] Nortask argues that it has therefore suffered loss and damage and furthermore, that it lost the use and occupation of the farming area during rehabilitation activities for an estimated period of around 14 months and incurred expenses in relation to the rehabilitation of the land during that period. Nortask also claims a loss of income from farming activities during the period. Nortask therefore claims damages for breach of contract in the sum of \$1,807,262.00 plus GST together with damages for trespass or mesne profits in the sum of \$906,768.00 together with interest.

¹⁰⁶ Exhibit 79.

- [145] In relation to the claim for trespass, I accept that the defendant trespassed on the plaintiff's property from February 2014 to April 2016.
- [146] In terms of the loss the plaintiff suffered as a result of that trespass, it would seem reasonable that the plaintiff be allowed to recover the amount of \$10,680.00 per month for 26 months for the original 45 acres which is an amount of \$277,680.00. I also accept that an additional area of land was used over and above the original 45 acres. No precise measurement has been given for the area of additional land although and I have concluded, doing the best I can, that the figure is around 20 acres. I have already noted the letter of 14 February 2014 seems to assume an area of around 20 acres at a figure of \$5285.00 per month. I consider it reasonable that the plaintiff be compensated for the occupation for the additional area. I will allow an amount of \$5285.00 per month for 26 months which is \$137,410.00.
- [147] There can be no doubt that damage has been caused to the land due to the chattels being on the land for an extended period of more than three years. Hermes gave evidence that he had a meeting with Maclaren in late 2013 about the weeds that had grown and the consensus was that they would need a massive amount of chemicals to do any sort of weed control and that there was a risk it would contaminate the galvanised coating of the reflectors. It was agreed that it was too late for effective weed control and that they would just let them grow until all the materials left the site and at that point weed remediation and control would take place. Hermes stated that Maclaren indicated that Areva would pay for that work to be done. Hermes sent a letter to Macbeth dated 24 September 2014¹⁰⁷ which set out his figure of \$106,929.00 plus GST for remediation which included items for slashing and mulching, deep ripping, chisel ploughing and cultivating as well as a figure for chemicals and the cost of the land being non-productive for 12 months at \$5208.00 per month.
- [148] Hermes gave evidence that after all the Areva materials left the site in April 2016, an extensive process of rehabilitation was undertaken. This took about 18 months to complete and the first crop was full of weeds. Nortask claims labour costs were no less than \$66,394.00, the cost of insurance of the chattels at \$8,600.00 and inspection costs of \$100.00 per day between February 2014 and September 2015 (total of \$60,500.00) are also claimed. Loss of income from farming activities during a rehabilitation period of 14 months is also claimed at \$10,680.00 per month.
- [149] Areva, however, argues that the land was remediated when all the chattels were removed. I note that Maclaren, who was present during the period the chattels, also gave evidence about the remediation that was undertaken.

Evidence of Stephen Maclaren

- [150] Maclaren is a Health, Safety, Environment and Quality Manager and he gave evidence that he worked for Areva Solar from 26 September 2011 to April 2016 as a contractor. He was involved in moving reflectors from land owned by Nortask in late 2015 as he had been engaged by Areva as the project manager and to manage the relocation of Areva chattels from Nortask to the Kogan Creek power station. He stated that the removal commenced in September 2015 and concluded around 17 April 2016.

¹⁰⁷ Exhibit 20.

- [151] In terms of the remediation that took place, he stated that after they had removed all the Areva property including the cradles, reflectors, dunnage and steel posts, they used a bobcat with a levelling bar and went over the whole property to smooth it all out and to make sure there were no ruts left from the use of plant or equipment such as trucks. In relation to the black soil area, he stated that they had progressively, throughout the removal period, used the same bobcat to fill in any ruts and to remove weeds and the like and left the land basically flat. The weeds were scraped and piled high, put into bins and removed.
- [152] When asked how the property was left after the removal of the last item he stated:
- “---Well, the hardstand area – I believe we left it in the same condition as what we found it in, if not better, because we’d removed weeds where certain items were stored. And the black soil paddock – we removed all the chattels, all the other items and removed all the weeds, and it was basically just levelled out. So it was in good condition.”¹⁰⁸
- [153] Under cross-examination, Maclaren confirmed that there had been a meeting onsite in September 2014 with Hermes and Trent Finlay to discuss how to control the weeds which had grown up around the equipment. He recalled that there had been discussion as to what type of spraying could be done and what kind of rehabilitation was required around the reflectors. He did not agree that there was any concluded agreement as to what remediation should occur. He stated also that he had inspected the material that was on the site and they commenced the removal in September 2015 and had generated a map depicting where the materials were stored and located on the site.
- [154] Having considered that evidence, I am not satisfied that Nortask has satisfactorily established that it should receive all the costs of rehabilitation claimed, in light of Maclaren’s evidence about the steps that Areva took. I accept, however, that some extra work would have been required over and above Areva’s efforts to return the land to a state where it was suitable for crops to be planted. In particular, I note that Maclaren did not indicate that any chemicals were used by Areva to destroy the weeds. In this regard I note that the quote Nortask had sent to Areva on 24 September 2014 included the following figure “Chemicals, labour and equipment to apply chemical - \$32868.00 + GST. (Chemical spraying as soon as seeds germinate. We estimate that eight to ten seeds sprouting will occur before depleting the seeding which has occurred which was close to two years).”¹⁰⁹ Given the equipment stayed for a further year before it started to be removed, I will allow a further 50% on that figure which is a total of \$49,302.00. I will not allow the costs associated with dip ripping, chisel ploughing or cultivating given they are associated with preparation prior to planting a crop which, on the evidence before me, is not a business which Nortask conducted.
- [155] I also do not consider that Nortask has established the insurance costs claimed. I also consider that Nortask’s claim for inspection costs not to be reasonable in circumstances where it was never an agreed item in the agreement in February 2013 or July 2013.
- [156] In relation to the claim for the loss of income of \$149,520.00 plus GST from farming activities over a period of 14 months due to the need to rehabilitate the land, there are a number of difficulties with that aspect of the claim. The first is that the plaintiff has not

¹⁰⁸ T 4-145: 4 – 8.

¹⁰⁹ Exhibit 20.

shown how the loss of income from farming activities is a loss to Nortask given that the farm was owned by Mr and Mrs Speziali and not Nortask. Second, there is no evidence of any tax returns or other documents filed which would substantiate the loss of income claimed. In this regard I consider that there is some force to the defendant's submission that Hermes' evidence was that the gross income for the entire farm last year with 80 acres under cultivation was between \$154,000.00 and \$164,000.00. That equates to a gross receipt of around \$2,000 per acre. As not all of the land occupied by Areva was able to be cultivated given the size of the hardstand was about 10 acres, the gross profit was probably around \$70,000.00 and not the amount claimed (which is double that figure). The plaintiff has therefore failed to substantiate this claim.

- [157] Accordingly, the total I will allow for trespass is \$277,680.00 plus GST¹¹⁰ together with \$137,410.00 plus GST and \$49,302.00 for remediation which is a total of \$464,392.00.
- [158] The plaintiff pleads that amounts totalling \$192,827.98 inclusive of GST (\$11,748 x 14 months plus \$16,221.70 and \$12,134.28) were paid by the defendant between 2 March 2015 and 11 May 2016. That amount needs to be deducted from \$464,392.00 which is \$271,564.00, rounded down.
- [159] Total Damages are therefore \$341,928.00 plus \$271,564.00, plus GST which is \$613,492.00 plus GST together with interest.

Events after February 2014

- [160] On 19 January 2015, Gilbert + Tobin, the solicitors for the defendant, wrote to the solicitors for the plaintiff advising that Areva terminated the lease, abandoned the chattels and transferred title in the chattels to the plaintiff.¹¹¹ On 27 January 2015, Clifford Gouldson, the solicitors for Nortask, wrote to the Gilbert + Tobin and requested that the defendant take proper steps to remove the chattels from the property. On 18 February 2015, Gilbert + Tobin reasserted Areva's title to the goods.
- [161] On 29 May 2015, the defendant provided undertakings to the Court that it would remove all the chattels from Cascina commencing from 13 July 2015 and would continue to do so until they were all removed from the property. An undertaking was also given that the defendant would not intentionally attempt to crush or destroy any solar reflector. On 22 September 2015 the plaintiff provided undertakings to the Court including undertakings that it would allow the defendant access to the property from 28 September 2015, it would not impose any further conditions and would not interfere with the defendant carrying out the removal of the chattels.

The counterclaim for compensation for the delay costs.

- [162] The process of removal by the defendant commenced on 28 September 2015, however the defendant claims that for a period of 6 days from 6 November 2015 the plaintiff refused the defendant access to the property to remove its chattels. It is also argued that, during the exclusion period, Areva incurred total delay costs of \$43,896.00 or \$7,316.00 per day for the cost of employees as well as the cost for the hire of subcontractors and equipment.

¹¹⁰If GST is applicable.

¹¹¹ Exhibit 15.

- [163] The defendant therefore claims compensation pursuant to r 900 of the *Uniform Civil Procedure Rules 1999* (Qld) (“UCPR”) from the plaintiff, being the delay costs as a result of the plaintiff’s breach of its undertakings.

Did Nortask breach an undertaking to the Court by refusing to allow Areva access to the site to remove chattels between 6 November 2015 and 17 November 2015?

- [164] Maclaren gave evidence that during that period of removal they were locked out of the property for a period of about 6 days in November of 2015. He stated that they were told that the lock-out was due to the fact that there was wet weather and the property was not suitable for plant movement. He confirmed that there had been rain at the time although it was not raining when they were locked out. He confirmed they were allowed access after six days.
- [165] Steven’s evidence was that it was not unreasonable to exclude Areva from the site during that period due to the wet weather because Nortask employees were not able to work during that period either. He considered that it was in accordance therefore with the Consent Order of Dalton J dated 22 September 2015 which attached undertakings from the parties including and at Annexure B - Conditions in relation to the removals process - stated “Areva will not be permitted to perform work after wet weather, if such wet weather also prevents Nortask from using the hardstand, until clearance is provided by Nortask acting reasonably.”¹¹²
- [166] I accept Steven’s evidence that Nortask employees were unable to work during that period. I accept that given the notorious issues in relation to the effect of rain on black soil and the fact that heavy machinery was being used to lift reflectors and receivers onto trucks, it was not unreasonable to suspend access to the Nortask site for 6 days after rain. Nortask labour and equipment was not being used and Nortask had no control over the way in which those heavy items were being removed.
- [167] Accordingly, I can see no basis for a compensation order for the delay costs, given the refusal to allow Areva access to the site was not unreasonable in the circumstances.

Counterclaim: did Nortask take possession of, or convert to its own use, 31 receivers and all the locking pins and controls?

- [168] Areva claims that certain items were missing when an inspection was performed on the chattels in October 2015. That aspect of the evidence is totally unsatisfactory and indeed woefully inadequate. I am not satisfied that Areva has satisfactorily established the number of items that were actually delivered to the Nortask site, let alone the number of items that were there at a particular point in time. There is simply no evidence that Nortask took possession of or converted to its own use the items alleged.
- [169] The counterclaim is dismissed.

Orders

- [170] I will hear from the parties as to the form of the orders and as to costs.

¹¹²Exhibit 80 at page 5.