SUPREME COURT OF QUEENSLAND

CITATION:	*Alexanderson Earthmover Pty Ltd v Civil Mining & Construction* [2019] QSC 259
PARTIES:	**ALEXANDERSON EARTHMOVER PTY LTD** (plaintiff) **v** **CIVIL MINING & CONSTRUCTION PTY LIMITED** (defendant)
FILE NO:	13314 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	22 October 2019
DELIVERED AT:	Brisbane
HEARING DATES:	4 April 2019, 5 April 2019, 17 April 2019 written submissions received 12 April 2019, 1 May 2019, 8 May 2019
JUDGE:	Ryan J
ORDERS:	**In the defendant's application filed 12 March 2019:**

As to paragraph 1:

(i) I strike out, with leave to re-plead by 17 December 2019, the following paragraphs of the Second Further Amended Statement of Claim (2FASOC):

- 36 – 38;
- 40; and
- 44.

(ii) I direct the defendant to plead to the re-pleaded paragraphs of the 2FASOC by 10 February 2020.

As to paragraph 2:

(i) Having struck out the paragraphs of the 2FASOC listed above, the following schedules fall:

- Schedule A, B of the 2FASOC; and
- Schedule A1, A2, G, H, of the Plaintiff's Further and Better Particulars.

(ii) I grant the plaintiff leave to re-plead the schedules by 17 December 2019.

As to paragraph 3:

I order that:

(i) By 17 December 2019, the plaintiff is to amend the first seven particulars of paragraphs 41(a) and 53 of the 2FASOC to include details about the part of the site relevantly affected by sufficient rain.

(ii) By 17 December 2019, the plaintiff is to provide further particulars of the directions referred to in paragraphs 41(a)(viii) and (ix).

(iii) By 17 December 2019, the plaintiff is to provide further particulars of the directions referred to in paragraph 96.

(iv) By 17 December 2019, the plaintiff is to comply with Rule 155(2)(c) in its pleading of paragraphs 101 and 104.

In the defendant's application filed 16 November 2018:

I order that Brown J's order 3, made on 26 September 2018, be varied so as to read:

"The defendant is to respond to the particulars requested by the plaintiff:

(a) in its request for particulars of the defence and counterclaim dated 29 June 2018; and

(b) in the reply and answer,

by 15 October 2018."

In the plaintiff's application filed 16 November 2018:

As to paragraph 1:

(i) I strike out the particulars of paragraph 117(c) FADCC, with leave to re-plead by 10 February 2020.

I order that:

(ii) The defendant is to amend its traversals in the following paragraphs of the Further Amended Defence and Counterclaim (FADCC) by 10 February 2020:

- 49(a);
- 50;
- 51(b);
- 70;
- 102;
- 103;
- 107(b); and
- 116(a).

(iii) The defendant is to respond to the following paragraphs of the Second Further Amended Statement of Claim (2FASOC) (which paragraphs have been amended since the plaintiff's application was filed) by 10 February 2020):

- 31;
- 32;
- 35; and
- 43.

(iv) The defendant is to provide particulars of paragraph 116(b) FADCC by 10 February 2020.

(v) The defendant is to provide particulars of the following assertions in the FADCC by 10 February 2020:

- in every paragraph in which the defendant has asserted that it did provide the plaintiff with "sufficient access" – particulars of when and where it gave the plaintiff "sufficient access" and how and when the fact of access was communicated to the plaintiff; and
- in every paragraph in which the defendant has

referred to "the plaintiff's own delays" or "delays for which the plaintiff was responsible" or similar – particulars of the nature of the plaintiff's delays.

As to paragraphs 2 and 3:

I order that:

(i) The defendant is to provide particulars of the following paragraphs of the FADCC by 10 February 2020:

- 11(b) – "the Construction Program set out in the Contract";
- 37(b), 39, 40 (a), 48, 49(b), 50(b), 51(a), 54(a), 57(a), 59(a), 61(a) and 62(a) – particulars of when and where it gave the plaintiff "sufficient access" and how and when the fact of access was communicated to the plaintiff;
- 57(b), 60(a)(i), 61(c)(i), – particulars of the nature of "the plaintiff's own delays" or "delays for which the plaintiff was responsible" or similar.
- 25 (of the counterclaim) – further particulars of the representation made by Mr Alexanderson in November 2011.

As to paragraphs 4 and 5:

(i) I order that, in relation to item 16(dd) in the final version of the Schedule of Non-Disclosed Documents (emailed to my associate on 1 May 2019), if the notification was in the form of a document, and that document is in the defendant's possession and control, it is to be disclosed to the plaintiff by 17 December 2019.

(ii) As to items 16(kk) and 16(ll) in the final version of the Schedule of Non-Disclosed Documents (emailed to my associate on 1 May 2019) – the question of their disclosure is to be deferred until

the next review of this matter.

Otherwise, the applications are dismissed.

And further: Within 14 days, the parties are to provide a copy of these orders to the Supervised Case List Judge and arrange for the next review of this matter.

I will hear the parties as to costs.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – GENERALLY – whether statement of claim includes global causation – whether particulars inadequate – whether particulars ambiguous, irrelevant or confusing – whether particulars support allegation made

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – OTHER MATTERS – Disclosure – expert reports from other proceedings – whether party may withhold from disclosure part of a document said to be irrelevant

Recording of Evidence Act 1962 (Qld)
Uniform Civil Procedure Rules 1999 (Qld)

Aimtek Pty Ltd v Flightship Ground Effect Pte Ltd [2014] QCA 294
Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd (No 2) [2009] WASC 69
Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Ltd [2008] QCA 100
Atlantic 3-Financial (Aust) Pty Ltd & Anor v Marler & Anor [2003] QSC 197
Barclay Mowlem Construction Limited v Dampier Port Authority (2006) 33 WAR 82
Beavan v Wagner [2017] QCA 246
Bloeman v Atkinson [1977] Qd R 291
Bromley Investments Pty Ltd v Elkington [2002] QSC 427
Bruce v Odhams Press Ltd [1936] 1 KB 697
BTU Group & Ors v Noble Promotions P/L & Ors [2002] QCA 505
Churton v Frewen (1865) 63 ER 669
Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd [2017] QSC 85
Curlex Manufacturing Pty Ltd v Carlingford Australia General Insurance Limited [1987] 2 Qd R 335
DM Drainage & Constructions as trustee for DM Unit Trust t/a DM Civil v Karara Mining Limited [2014] WASC 170

Equititrust Limited v Tucker & Ors (No 2) [2019] QSC 248
Frith v Schubert & Anor [2010] QSC 444
Great Atlantic Insurance Company v Home Insurance Company [1981] 1 WLR 529
I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Limited (2002) 210 CLR 109
In Roma Pty Ltd v Adams & Anor [2012] QCA 347
John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd (1996) 13 BCL 292
John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd & Anor (1996) 8 VR 681
Lacaba Ahden Australia Pty Ltd v Bucyrus (Australia) Pty Ltd [2006] QSC 147
Laing Management (Scotland) Ltd v John Doyle Construction Ltd [2004] BLR 295
LBS Holdings P/L v The Body Corporate for Condor Community Title Scheme 13200 & Ors [2004] QSC 229
McGrath Corporation Pty Ltd v Global Construction Management (Qld) Pty Ltd & Anor [2011] QSC 178
Menkens v Wintour [2007] 2 Qd R 40
Meredith v Palmcam Pty Ltd [2001] 1 Qd R 645
Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water Supply Joint Board [2004] QSC 329
Newmont Yandal Operations Pty Ltd v The J Aron Corporation and the Goldman Sachs Group Inc & Ors (2007) 70 NSWLR 411
Parbery & Ors v QNI Metals Pty Ltd & Ors [2018] QSC 276
Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd (2003) 196 ALR 257
Project Leaders Australia Pty Ltd v Mt Isa Association Friendly Society Limited [2003] QSC 032
QNI Resources Pty Ltd v Sino Iron Pty Ltd [2016] QSC 62
Queensland Pork P/L v Lott [2003] QCA 271
Rapid Roofing P/L & Anor v Natalise P/L (as trustee for the St Ange Family Trust) & Anor [2008] QCA 237
Rose v Terry Hewat Commercial Diving Pty Ltd, SC (Qd), Demack J., no. 115 of 1995, 17 August 1999, unreported
Santos Ltd v Fluor Australia Pty Ltd [2017] QSC 153
Telstra Corporation v Australis Media Holdings Ltd (NSWSC, unreported, 10 February 1997, McLelland CJ in Eq)
Thiess Pty Ltd v FFE Minerals Australia Pty Ltd [2007] QSC 209
Thomson v STX Pan Ocean Co Ltd [2012] FCAFC 15
Watts v Rake (1960) 108 CLR 158
Williams & Humbert v W & H Trade Marks (Jersey) Ltd [1986] 1 AC 368

COUNSEL: B E Codd, with C M Matthews for the Plaintiff
L M Campbell for the Defendant

SOLICITORS: Frigo Adamson Legal Group Proprietary Limited for the Plaintiff
Clayton Utz for the Defendant

Table of Contents

Introduction

[1] This judgment deals with several procedural applications in a construction dispute.

[2] The applications (three) were listed for a two day hearing. That was a gross underestimate.

[3] The parties struggled to cooperate. They could not even agree on a list of issues for the Court[1] or the order in which the Court should hear the applications. Each suggested the other had brought its application, or part of it, too soon. The pleadings were still in a state of flux. Further significant amendments were foreshadowed by the plaintiff. The defendant, who was still in the process of disclosure, was yet to plead to the two latest versions of the statement of claim.[2]

[4] The plaintiff urged me to adjourn the defendant's global claim complaint about the plaintiff's pleadings until it had obtained expert evidence. The defendant urged me to adjourn the plaintiff's complaints about its disclosure until it had exhausted its searches. The defendant also submitted that I ought to defer consideration of any complaint about its pleadings until it had a chance to respond to amendments to the plaintiff's pleadings. Neither party however conceded that its own application was premature.

[5] Having regard to the nature of the issues, the length of the written submissions and the scores of authorities provided to the court, it was not surprising that the parties were unable to finish their oral submissions in the time allocated for the hearing. I was required to deal with outstanding matters by way of the existing, and further, written submissions. That process did not run smoothly and the outstanding matters did not easily lend themselves to resolution on the basis of written submissions. I remind the parties of their obligations under rule 5 of the *Uniform Civil Procedure Rules* 1999.

[6] My orders reflect my view that it is appropriate to grant each of the parties a reasonable period of time to re-plead allegations which I have struck out; to respond to amended pleadings; or otherwise address pleading deficiencies. The timetable I have set is based on my understanding of the complexity of the issues which need to be addressed. It also accommodates the end of year vacation period.

[7] This matter is under the supervision of the Supervised Case List Judge. The parties are to provide to her Honour a copy of my orders and request a review of this matter. Her Honour will no doubt address the timetable at the next review.

Background

---

1 Which they were directed to prepare.

2 The Further Amended Defence, responding to the Amended Statement of Claim, was filed in October 2018. The application to strike out paragraphs of the defence was filed on 16 November 2018. The Further Amended Statement of Claim was filed on 25 January 2019 and the Second Further Amended Statement of Claim was filed on 21 March 2019.

[8] Wiggins Island Coal Export Terminal Pty Ltd (Wiggins) engaged the defendant, Civil Mining and Construction (CMC), to complete civil works at the Wiggins Island Coal Export Terminal (the Terminal).

[9] The defendant (CMC) engaged the plaintiff, Alexanderson Earthmover (AE), as a Subcontractor to complete certain of those civil works, namely –

- the excavation of materials from the GPN Borrow Pit and the OLC Cut;[3]
- the transportation of the excavated materials to the Reclamation Bunds C site; and
- the placement and compaction of the excavated materials to form the Reclamation Bunds C.

[10] A reclamation bund acts as a holding dam, which traps materials but allows water to drain out of the bund over time. Several bunds were to be constructed at the Reclamation Bunds C site at the Terminal. The material for their construction was to be taken from the OLC cut and the GPN Borrow Source (a clay quarry). There was a road from the OLC cut, and another road from the GPN Borrow Source, both of which connected with a road which led to the Reclamation Bunds C site. These roads were made of compacted clay. Removing material from the OLC cut required travel over two creeks, Beals Creek and Pyealy Creek.

[11] The contract between CMC and AE was dated 13 October 2011. It provided for AE's works to be valued on the basis of a schedule of rates. AE carried out the works between October 2011 and September 2012.

[12] On 15 December 2017, AE commenced proceedings against CMC. It claimed –

- the recovery of the proceeds of a bank guarantee;
- damages for breach of contract, based upon CMC's failure to give AE sufficient and timely access to the site;
- monies payable under the contract for standby of AE's plant, equipment and personnel arising from inclement weather;
- monies payable under the contract based upon the volume of material excavated by AE from the GPN Borrow Pit;
- monies payable under the contract, based upon the volume of material placed in the Reclamation Bunds C; and
- two claims arising out of AE's placing fill material of a different type to that specified in or by the contract which was not provided for in the schedule of rates.

[13] CMC counterclaimed for –

- restitution of amounts paid by it to AE in pursuance of BCIPA;

---

[3] The Overland Conveyor Cut.

- restitution of overpayments made by it to AE in relation to inclement weather and delay; and

- damages on the basis of AE's alleged misrepresentations.

[14] The hearing before me involved competing applications to strike out pleadings and, as put by Mr Campbell for CMC, "skirmishes aplenty".

[15] There were three applications before me: one by AE and two by CMC.

AE's application

[16] AE applied for nine orders in an application filed 16 November 2018.

[17] I was able to deal with part of the application at the hearing. These reasons deal with the balance of it, namely AE's applications for orders –

- striking out parts of the defence and counterclaim;

- concerning the defendant's particulars;

- requiring the defendant to make certain disclosure; and

- requiring the defendant to convert emails which had been electronically disclosed to "full text searchable multi-page PDF files".

[18] After the application to strike out parts of the defence and counterclaim was made, the plaintiff filed two later versions of its statement of claim – the Further Amended Statement of Claim (FASOC) filed on 25 January 2019 and the Second Further Amended Statement of Claim (2FASOC) filed on 21 March 2019. The paragraphs of the defence and counterclaim about which AE complained responded to an older version of the statement of claim, that is the Amended Statement of Claim (ASOC).

CMC's applications

[19] In an application filed 16 November 2018, CMC applied for the variation of an order made by Brown J on 26 September 2018.

[20] In another application filed 11 March 2019, CMC applied for orders –

- striking out parts of the Further Amended Statement of Claim (FASOC);

- striking out certain particulars; and

- requiring particulars of certain paragraphs of the FASOC.

Progress of the hearing and additional submissions

Complaints superseded or inutile

[21] CMC submitted that AE's complaints about certain paragraphs of CMC's pleadings had been superseded because of amendments to AE's statement of claim.

[22] CMC submitted that, if the plaintiff complained about CMC's response to one of its paragraphs, which the plaintiff had amended since making the complaint, then CMC ought to be provided with an opportunity to respond to the amended paragraph before I considered any complaint about its response to the old version of it. Also, CMC submitted that, if it were successful in its application to strike out a certain paragraph of the 2FASOC, any complaint by the plaintiff about the corresponding paragraph of the Further Amended Defence and Counterclaim (FADCC) was inutile.

[23] CMC agreed to prepare a schedule which listed the paragraphs of the FADCC about which there had been a complaint, which responded to paragraphs of the plaintiff's pleadings which had been "materially amended" or to paragraphs of the plaintiff's pleadings which CMC alleged were defective and ought to be struck out. AE was to add to that schedule its response to CMC's position.

[24] The schedule was completed by the parties and provided to the Court on 1 May 2019.

Disclosure

[25] Although the parties made some oral submissions about disclosure at the hearing, I was required to consider that issue primarily on the basis of written submissions.

[26] The plaintiff had attached to its original written submissions a document entitled "Schedule C – Schedule of Non-Disclosed Documents". It provided an amended copy of that schedule at the hearing.

[27] The amended Schedule C[4] contained a short statement of the basis upon which the plaintiff said it was entitled to disclosure of a certain document and *its understanding* of the basis upon which the defendant resisted disclosing the document. I received the document acknowledging that it contained the plaintiff's understanding of the defendant's position rather than the defendant's own statement of its position.

[28] There had in fact been further disclosure after Schedule C had been amended and I asked the parties to provide me with a revised list of the documents the subject of dispute.

[29] On 12 April 2019, CMC provided its version of Schedule C.

[30] CMC's version of Schedule C was sent under cover of an email dated 12 April 2019 which explained that the document contained its "reasons" with respect to the documents in dispute, which were "largely the same as those recorded in exhibit KR-87 of Ms Reading's affidavit of 3 April 2019 (Court document 70), but have been slightly expanded upon in some respects and updated to respond to the submissions contained in the plaintiff's version which was handed up to the Court".

[31] The email continued –

> "We note that the version of the schedule handed up by the plaintiff did not include the defendant's reasons for non-disclosure as were set out in KR-87, but rather, included an earlier version which was subsequently superseded.

---

4 Exhibit F for identification.

> The document has also been updated to strike through documents which were disclosed by the defendant following the hearing.
>
> The defendant's understanding was that it was Her Honour's intention for the parties to jointly provide a schedule setting out each parties' position with respect to the outstanding documents. Unfortunately we have been unable to reach agreement with the solicitors for the plaintiff as to the content of the document.
>
> Accordingly, if Her Honour is so minded, we are content for the plaintiff to provide a separate response to the defendant's reasons as contained in the attached schedule, within 7 days."

[32] The plaintiff replied to that email by informing me (through my associate) that it objected to CMC's schedule being provided to me.

[33] In an attempt to resolve this issue, I brought the matter on for review on 17 April 2019. At the review, Mr Codd submitted that CMC had re-opened its case and made fresh submissions in the document it provided to me. He also complained – in effect – that he had not appreciated that CMC would rely on KR-87 and parts of it were plainly objectionable.

[34] Mr Codd's concern, as I understood it, was that I would act on CMC's solicitor's *opinion* about the relevance of a document. Without having considered in detail CMC's document, I said to Mr Codd that, if I intended to rely upon something other than my evaluation of relevance in making decisions about disclosure, then I would give him an opportunity to reply. Mr Codd submitted, as he had done at the hearing, that I ought to call for the documents to determine their relevance.

[35] I permitted Mr Codd to reply (in writing) to the submissions contained in CMC's revised Schedule C which he asserted were fresh submissions.

[36] Having now reviewed KR-87, I suspect Mr Codd's complaint to have been about statements in KR-87 beginning with something like "In my view, none of the paragraphs of the WICET Judgment referred to by the plaintiff confirm that the report is directly relevant …"

[37] I did not notice statements of that type in the revised version of Schedule C sent under cover of the email dated 12 April 2019. Regardless, the limited weight to be given to such a statement of opinion is obvious. As will be seen below, where necessary, I conducted my own review of the nominated paragraphs of the WICET judgment to determine whether the documents sought were directly relevant to the allegations in the present matter.

[38] On 1 May 2019, the plaintiff sent to the court a further revised Schedule C, containing its responses to CMC's "reasons". This was the document upon which I was to base my decision about AE's application for disclosure.

[39] Seven days later, on 8 May 2019, CMC sent to me, via my associate, unsolicited, its response to AE's submissions of 1 May 2019 which it sought to make as a matter of "procedural fairness".

[40] AE (by e-mail) objected to those further submissions. It submitted that I ought not to receive them because I had made no direction permitting them, nor had CMC sought AE's consent to them.

[41] I informed the parties that I would deal with whether or not I should receive CMC's submissions in these reasons.

[42] Each party has accused the other of slipping fresh submissions into documents intended to be for the assistance of the court. This difficulty arose because the parties grossly underestimated the time it would take for the court to hear the three applications and because, in many respects, the applications were premature – after they were filed the plaintiff's pleadings were amended and disclosure continued – which meant that the written submissions which the parties exchanged before the hearing were outdated.

[43] I am dealing with matters of procedure and my focus is on bringing these procedural matters to a resolution, having regard to the philosophy of the *Uniform Civil Procedure Rules* and practice direction 18 of 2018. AE's submission, that I ought not to consider further submissions from CMC, is made in the context of an argument about disclosure.

[44] Having regard to the content of AE's written submissions of 1 May 2019, which included unfounded accusations against CMC's solicitor, I considered it appropriate to permit CMC to respond to AE's written submissions to the extent that they raised matters which had not been raised previously.

Related litigation: *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2017] QSC 85

[45] At least from the plaintiff's perspective, relevant to this matter is the fact that the defendant was the plaintiff in an action against Wiggins in which it made four major claims, including a claim for variations and directions said to have affected the bulk earthworks on the Reclamation C Bunds, and a claim for delay costs for the works as a whole.

[46] The related matter was heard by Flanagan J. His Honour's judgment was published on 19 May 2017: *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2017] QSC 85 (*CMC v WICET*).

[47] AE asserted that the *CMC v WICET* litigation was "factually overlapping" and "parallel" to the proceeding between it and CMC. Several of AE's complaints about CMC's particulars were to the effect that, having been a party in the *CMC v WICET* litigation, CMC must be able to, and did not need more time to, provide the particulars sought by AE.

[48] I note CMC's contrary assertion that the present proceedings are "by no means" parallel to the *CMC v WICET* proceedings, which concluded a year before the present proceedings were commenced. I note also CMC's contention that the proceedings are not "factually overlapping". CMC submitted that the delays complained about in *CMC v WICET* were not the delays complained about by the present plaintiff. The present plaintiff contended that the delays were the result of its being unable to use its plant. The delay alleged in *CMC v WICET* was one which was a consequence of delayed productivity and inefficiency.

Relevant principles

[49] In *Equititrust Limited v Tucker and Others (No 2)* [2019] QSC 248, Bowskill J recited the uncontroversial principles which apply to applications of this kind. Relevantly, her Honour said (emphasis by her Honour, footnotes and citations omitted) –

> "[6] The starting point is rule 5 of the *Uniform Civil Procedure Rules* 1999 (Qld), which provides:
>
> '(1) The purpose of the rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.
>
> (2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.
>
> (3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.
>
> (4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.'
>
> [7] I keep that steadily in mind in determining these applications, as rule 5(2) requires the court to do. The parties (and their lawyers) are also obliged to act consistently with rule 5 …
>
> [8] In relation to the strike out applications, the applicants rely upon r 171 UCPR, which confers a discretion on the court to strike out all or part of the statement of claim if it, relevantly, discloses no reasonable cause of action; has a tendency to prejudice or delay the fair trial of the proceeding; or is otherwise an abuse of the process of the court.
>
> [9] Where the effect of the invocation of the power would be to summarily dismiss a party's claim, or part of it, the court is to adopt a cautious approach and the discretion should only be exercised in the clearest case …
>
> [10] The focus of such an application is the pleading itself. As such, the court ordinarily assumes the factual allegations made by the plaintiff can be established; particularly where the application is brought at an early stage …
>
> [11] …
>
> [12] …
>
> [13] Where the application to strike out is on the basis of deficiency in the pleading, which may be remedied by re-pleading, the particularly cautious approach warranted in cases of summary dismissal does not apply. A pleading may be deficient, and be liable to be struck out (for

example on the ground that it has a tendency to prejudice or delay the fair trial of the proceeding) because it fails to fulfil the function of a pleading, which is to identify the issues which require the court's attention and determination, provide a structure for the proceeding by providing the framework for disclosure and admissibility of evidence at trial, and to ensure a fair trial by giving the other parties fair notice of the case they must meet. The function of a pleading is discharged 'when the case is presented with reasonable clearness'. Conversely, a pleading will be deficient if it is 'ambiguous, vague or too general', such that the other party does not know what is alleged against them.

[14] A pleading must contain a statement of all the material facts (that is, the facts necessary for the purpose of formulating a complete cause of action) relied upon (r 149(1)(b)). Particulars are not meant to be used to fill material gaps in a pleading. They serve a different purpose, which is 'to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet'; although in practice the distinction may be difficult to discern.

[15] Importantly, though, 'pleadings are not an end in themselves, instead they are a means to the ultimate attainment of justice between the parties to litigation'. As the Full Court of the Federal Court … observed in *Thomson v STX Pan Ocean Co Ltd* [2012] FCAFC 15 at [13], for these reasons 'the courts do not, at least in the current era, take an unduly technical or restrictive approach to pleadings'. As their Honours also observed, contemporary approaches to case management are in part responsible for this change. They refer in this regard to the observations of Martin CJ in *Barclay Mowlem Construction Limited v Dampier Port Authority* (2006) 33 WAR 82 at [4]-[8], where his Honour said:

> '4. It is, I think, important when approaching an issue of that kind to bring to mind the contemporary purposes of pleadings. The purposes of pleadings are, I think, well known and include the definition of the issues to be determined in the case and enabling assessment of whether they give rise to an arguable cause of action or defence as the case may be, and appraising the other parties to the proceeding of the case that they have to meet.
>
> 5. In my view, the contemporary role of pleadings has to be viewed in the context of contemporary case management techniques and pre-trial directions. In this Court, those pre-trial directions will almost invariably include; firstly, a direction for the preparation of a trial bundle identifying the documents that are to be adduced in evidence in the course of the trial; secondly, the exchange well prior to trial of non-expert witness statements so that non-expert witnesses will customarily give their evidence-in-chief only by the adoption of that written statement; thirdly, the exchange of expert reports well in advance of trial and a direction that those experts confer prior to trial; fourthly,

the exchange of chronologies; and fifthly the exchange of written submissions.

6. Those processes leave very little opportunity for surprise or ambush at trial and, it is my view, that pleadings today can be approached in that context and therefore in a rather more robust manner, than was historically the case; confident in the knowledge that other systems of pre-trial case management will exist and be implemented to aid in defining the issues and appraising the parties to the proceedings of the case that has to be met.

7. In my view, it follows that provided a pleading fulfils its basic function of identifying the issues, disclosing an arguable cause of action or defence, as the case may be, and appraising the parties of the case that has to be met, the Court ought properly be reluctant to allow the time and resources of the parties and the limited resources of the Court to be spent extensively debating the application of technical pleadings rules that evolved in and derive from a very different case management environment.

8. Most pleadings in complex cases, and this is a complex case, can be criticised from the perspective of technical pleading rules that evolved in a very different case management environment. In my view, the advent of contemporary case management techniques and the pre-trial directions, to which I have referred, should result in the Court adopting an approach to pleading disputes to the effect that only where the criticisms of a pleading significantly impact upon the proper preparation of the case and its presentation at trial should those criticisms be seriously entertained.'

[16] Martin CJ's observation in [8] reflects the observation made many years earlier, by Lord Templeman in *Williams & Humbert v W & H Trade Marks (Jersey) Ltd* [1986] 1 AC 368 at 435-436 that:

> 'My Lords, if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself.'

[17] Also in the *Barclay Mowlem* case, Martin CJ was critical of objections to the pleading which were 'pedantic and pettifogging in nature' (at [9]); and drew a distinction between the 'lawyer looking at that pleading, genuinely interested in knowing what issues are to be tried and the case that has to be met, [who] would have no difficulty in ascertaining those matters' (at [10]) and the 'lawyer interested in

> technical advantage, obfuscation and delay', 'feign[ing] ignorance of the substantive issues that emerge from that pleading and the case which has to be met' (at [12]).'

[50] I have approached these applications having regard to these principles.

PART A: CMC's application to strike out parts of AE's pleadings – overview

[51] CMC applied to strike out certain paragraphs of the FASOC and their particulars (including certain appendices). It applied for particulars of other paragraphs of the FASOC. Of course, by the time of the hearing, the statement of claim had been amended to take the form of the 2FASOC. I have considered CMC's complaints against the 2FASOC.

[52] CMC submitted that AE's pleadings did not "coherently articulate" its case. It submitted that certain paragraphs of the statement of claim ought to be struck out because they failed to disclose a reasonable cause of action; failed to sufficiently inform CMC of the case it had to meet; or would, if permitted to proceed to trial, prejudice, embarrass or delay a fair trial.

[53] In its written submissions, CMC referred to many authorities in support of its strike out application, including *Thiess Pty Ltd v FFE Minerals Australia Pty Ltd* [2007] QSC 209, in which White J said at [38], "[T]he defendant cannot be expected to intuit what the plaintiff intends to convey in its pleadings by its own understanding of the facts in the circumstances giving rise to the litigation".

[54] CMC referred to *Thiess* for the following statement about particulars also (at [35] , White J quoting from *Bruce v Odhams Press* [1936] 1 KB 697) –

> "The use of particulars is intended to meet a further and quite separate requirement of pleading, imposed in fairness and justice to the defendant. Their function is to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial."[5]

[55] CMC referred to *Bloeman v Atkinson* [1977] Qd R 291 to make the point that in relation to a request for particulars, it was not enough for a party to simply refer to a document as the basis of its case – it was required to state the effect of the portion of the document upon which it relied.

[56] AE complained that many of CMC's complaints about AE's pleadings were irregular including because they had not been first made in correspondence under Part 8 of Chapter 11 of the *Uniform Civil Procedure Rules* or were "of recent invention". For that reason, and because CMC failed to comply with orders of Brown J made on 5 December 2018 and 5 February 2019, AE argued that CMC's application ought to be dismissed.

---

[5] At 11, [35] quoting Scott LJ in *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at 712-713.

[57] I am of the view that the matters raised have been fairly ventilated and should be determined by me. I have therefore considered CMC's application on its merits.

CMC's complaints about particular paragraphs of the FASOC/2FASOC

[58] I have only considered for strike out those paragraphs which were the subject of oral submissions. I note that several of the paragraphs about which complaint was made had been amended (as per the FASOC and the 2FASOC).

Paragraph 27(c)

The non-compliance with rule 444 point

[59] AE submitted that CMC's complaint about paragraph 27(c) of the 2FASOC was one of the matters I ought not to entertain because CMC had not previously complained about it in its "rule 444 letter".

[60] CMC accepted that its complaint about paragraph 27(c) was not "squarely made" in its rule 444 letter but submitted that there was nothing in AE's complaint because this application "did not fall within the scope of rule 443". CMC argued that there was no prejudice to AE in CMC making this complaint now. Indeed, AE had in fact amended paragraph 27(c).

[61] CMC relied upon *Meredith v Palmcam Pty Ltd* [2001] 1 Qd R 645. In that case, the same complaint was made. The Court of Appeal explained that while the court had a *discretion* to hear a non-compliant application, there had to be good reason for it to do so (emphasis added):

> "[8] … the defendants themselves were in breach of their obligations under the Uniform Rules. They applied to strike out the plaintiff's action without first complying with r. 444 of the UCPR. His Honour considered that the plaintiff's reliance on that omission was "unanswerable", which, in the end, he regarded as conclusive against the defendants' application to strike out the statement of claim. Rule 444 requires that before making an interlocutory application of the types set out in r. 443, an applicant must write to the respondent specifying the applicant's complaint, a brief statement of the relevant facts, the relief sought by the applicant, why the applicant should have the relief, the time … within which the respondent must reply to the letter and that the letter is written under part 8 of chapter 11. Certain other procedural requirements follow. **Although the court has the discretion to hear an application which does not comply with these requirements, good reason would have to be shown if it were to do so.** This is because the requirements of r 444 serve the very useful purpose of alerting the respondent to the applicant's complaints giving the respondent the opportunity to respond or remedy the problem. This often obviates the need for the applicant to bring an application in court which serves the purpose of the UCPR set out in r. 5(1) to 'facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense'. For this reason we have

> formed the opinion that this is not a matter in which it would be appropriate to grant leave to appeal …"

[62] CMC also relied upon *BTU Group & Ors v Noble Promotions P/L & Ors* [2002] QCA 505. At first instance, the Applications Judge dismissed an application for further disclosure under rule 223 because the applicant had not complied with rule 444. The Court of Appeal held that rule 444 had no application to an application brought pursuant to a specific rule (that is, rule 223) –

> "[4] … strictly construed Rule 444, which is of limited application, does not apply to [the application].
>
> [5] However, experience (both of the Judges and legal practitioners) has shown that the Rule 444 procedure is useful on a much wider basis than is expressly contemplated by its provisions. In consequence the procedure has been extensively used in situations outside the strict scope of operation of the rule. That practice should be encouraged because in many instances it obviates the necessity of an application to the court. However, where the application is not one which is expressly caught by Rule 444, it would be a wrong exercise of discretion to dismiss the application because that procedure was not followed."

[63] I consider it appropriate to deal with CMC's complaint about paragraph 27(c) now. *If* CMC requires my leave to bring this complaint, I grant it. It is a poor use of the court's time to decide whether there has in fact been a breach of rule 444 in relation to a complaint about a limited number of paragraphs of the 2FASOC. The court's time is best used by my dealing now with every complaint before me.

[64] Even if there has been a breach of rule 444, that alone would be an insufficient reason for my refusing to deal with the complaint. AE has been able to address the arguments raised and has not suggested that it has been prejudiced or any other good reason why I should refuse to deal with the complaint.

[65] Whether the fact of CMC's failure to notify AE of some of its complaints before bringing its application has a bearing on costs may be considered separately from the merits of CMC's application.

The substance of the complaint

[66] CMC's complaint about paragraph 27(c) was that it was objectively ambiguous, confusing and in the nature of a submission, yet it was identified as a basis for the damages claim in paragraph 44 2FASOC.

[67] It invited me to contrast 27(c) with 27(a) and (b) which, it submitted, were more specific. CMC argued that 27(c) ought to be struck out because it did not identify a relevant act or omission – it simply referred to unidentified conduct attributable to the plaintiff.

[68] AE submitted that 27(c) was a point of law which it was entitled to plead under rule 149(2). That rule states –

> "In a pleading, a party may plead a conclusion of law or raise a point of law if the party also pleads the material facts in support of the conclusion or point."

[69] In its submissions, AE acknowledged that 27(c) as pleaded in the FASOC required "minor amendment … to clarify the allegation". It had made that amendment, as reflected in the 2FASOC.

[70] AE submitted that there was no disadvantage to the defendant in 27(c) being pleaded – and indeed, AE submitted, it was a necessary element of the way in which the claim was articulated.

[71] AE submitted, in effect, that the defendant's approach was to concentrate on the minutiae of the pleading, without considering it as a whole. Further, AE submitted, paragraph 27(c) was properly utilised in paragraphs 43, 44 and 45 of the 2FASOC and it was relied upon in the Reply and Answer (in paragraph 30 – which refers to paragraphs 26 to 34 of the 2FASOC).

Conclusion

[72] Paragraph 27(c) is not to be struck out.

[73] I consider that paragraph 27(c), read in the context of paragraph 27 as a whole, and in the context of the whole of the 2FASOC, provides reasonable clarity about the case that the defendant has to meet.

[74] To make that point, I note that the relevant part of the pleading is to this effect –

- under the Subcontract (or Contract),[6] CMC was to provide, and maintain for, AE "Sufficient Access" to commence and undertake its work by 19 October 2011;
- that Sufficient Access included unimpeded access (apart from reasonable construction traffic) to physical locations upon which or over which AE was required to perform work or traverse to perform work and reasonable trafficable travel paths;
- CMC was to pay AE at Standby Rates for any "stop work, delay commencement of work" or "standby for any reason beyond [AE's] control";
- failure to provide Sufficient Access was a breach of contract for which AE was entitled to damages or a "stop work" et cetera entitling AE to be paid at Standby rates (paragraph 27(a));
- "further and in the alternative", an inclement weather event, *an act or omission of the defendant*, suspension or any other event beyond the control of the plaintiff, entitled the plaintiff to be remunerated at Standby Rates (paragraph 27(b));

---

[6] I note that the 2FASOC refers to the agreement between AE and CMC as the Contract rather than the Subcontract.

- "further and in the alternative", an act or omission of the defendant or its servants or agents, *which resulted in conduct contrary to the terms of the Subcontract*, was–
    - a breach of contract in respect of which AE was entitled to –
        - its consequential loss or damage"; and/or
        - relief from an obligation under the Subcontract to the extent to which the act or omission interfered with AE's performance of the obligation; and/or
        - its costs arising therefrom as damages (paragraph 27(c)).

[75] In my view, the drafter's meaning is reasonably clear. It is not vague or ambiguous. The plaintiff is conveying that it is making a claim for breach of contract against CMC or, in the alternative, a claim for Standby Rates because it was stopped or delayed in its work, or required to Standby, for reasons or events beyond its control. It also asserts that it was relieved of its obligations under the Subcontract to the extent to which CMC's acts or omissions interfered with AE's performance of its obligations under the Subcontract.

Paragraphs 36 – 38

[76] CMC's primary complaint was that AE's "Access Claims" (which included these paragraphs) were deficient because they were (improperly) pleaded as global claims. AE had not pleaded the necessary facts said to give rise to the causal connection between the alleged breach and the resulting loss or contractual entitlement.

[77] CMC submitted that AE's claim was to be understood as follows –

- AE claimed that it was entitled to recover payment for Standbys which were caused by CMC's failure to give it sufficient access to different parts of the site as a breach of contract and as "Standby for any reason beyond the plaintiff's control";
- AE asserted three separate access delays in its 2FASOC, namely delays brought about because –
    - CMC failed to complete the construction of the first section of the GPN haul road by 11 October 2011[7] (paragraph 33);
    - CMC failed to complete the Pyealy Creek haul road crossing by the access date of 17 November 2011 (paragraph 34); and
    - CMC failed to give AE access to the rail receival area (paragraph 35).

[78] The assertion of three separate delays was at the heart of CMC's complaint about the global basis upon which the standby claims were made. Indeed, counsel for CMC

---

[7] CMC provided limited access to the GPN haul road on 27 November 2011; and sufficient access "on or between 4 February 2012" [sic].

observed, a fourth delay was asserted in paragraph 35A of the 2FASOC, associated with AE's plant standing by while rocky materials were won.

[79] He complained that the separate delays were referred to, and dealt with, collectively in the 2FASOC at paragraph 36, which was in these terms:

> "Pursuant to the matters pleaded in paragraphs 33 to 35A hereof, the defendant delayed the use by the plaintiff, in whole or in part, of its plant, equipment and personnel, or parts therefor for the performance of the Work [the **Defendant's Delays**]."

[80] CMC complained that AE had not identified which of the access delays caused which plant, and which people, to be placed on standby. Counsel submitted that –

- AE's failure to establish a causal link between the access delays and the standing by of particular plant was prejudicial to CMC;
- the particulars did not establish the causal nexus as required: rather they confirmed that the claim had been pleaded on a global basis; and
- this was not a case in which the plaintiff was entitled to plead globally because it was impossible or impracticable to untangle the causative nexus.

[81] I will not discuss all of the authorities to which CMC referred to make its point that it was incumbent upon AE to plead the necessary facts which were said to give rise to the pleaded causal connection between the alleged breach and the alleged loss or contractual entitlement. It is enough to repeat the principle as stated by Douglas J in *LBS Holdings P/L v The Body Corporate for Condor Community Title Scheme 13200 & Ors* [2004] QSC 229 at [3]:

> "… [F]acts must be set out which lead to a reasonable inference that the acts complained of and the loss claimed stand to each other in the relation of cause and effect and that the plaintiff must plead the necessary facts showing that causal link …"

[82] In support of its complaint that AE's pleadings were deficient, CMC referred to *DM Drainage & Constructions as trustee for DM Unit Trust t/a DM Civil v Karara Mining Limited* [2014] WASC 170, a decision of Beech J.

[83] In that case, Karara applied to strike out DM Civil's statement of claim on the ground that it failed to disclose a reasonable cause of action or, alternatively, if permitted to proceed to trial, it would impose an unreasonable and unfair burden on Karara and would prejudice, embarrass or delay a fair trial of the action.

[84] Whilst CMC relied on this case for it statements about global claims, I note that Beech J discussed the general principles applicable to strike out applications, and the purpose of pleadings in the context of case management, which discussion is also relevant in the present matter and which I have taken into account.

[85] With respect to case management principles, his Honour quoted from Martin CJ's judgment in in *Barclay Mowlem Construction Limited v Dampier Port Authority,*[8] including the following paragraph (which, for ease, I will repeat here, even though it appears above) –

> "… provided a pleading fulfils its basic functions of identifying the issues, disclosing an arguable cause of action or defence, as the case may be, and apprising the parties of the case that has to be met, the Court ought properly be reluctant to allow the time and resources of the parties and the limited resources of the Court to be spent extensively debating the application of technical pleading rules that evolved in and derive from a very different case management environment."

[86] Beech J continued (footnotes omitted) –

> "[31] It will be seen from this passage that it remains an essential requirement for a pleading to fulfil its basic functions of identifying the issues, disclosing an arguable cause of action and apprising the parties of the case that has to be met.
>
> [32] A statement of claim must not plead allegations at too high a level of generality. A pleading must be sufficiently particular to conform with one of the primary objects of pleadings, to inform the opposing party of the case that it must meet. Whether it is sufficient to plead simply that one thing caused another, or whether further facts must be pleaded to establish a causal link, will depend on the pleaded facts and circumstances.
>
> [33] The caution with which a pleading will be struck out on the ground that it does not disclose a reasonable cause of action is well known.
>
> [34] Pleadings may be struck out on the ground that they may prejudice, embarrass or delay the fair trial of the action 'because they are evasive, they conceal or obscure the real questions in controversy, they are ambiguous or not reasonably intelligible, they raise immaterial or irrelevant issues, they fail to confine the issues or state the case of the party in question with reasonable particularity, or they raise a case in terms which are simply too general'."

[87] The complaint in *DM Civil* was that the claim was a global claim (and a modified total costs claim) but that it did not satisfy the essential requirements of such a claim. DM Civil denied that its claim was of such a character.

[88] Beech J explained at [36] that a global claim was one in which a plaintiff claiming under a construction contract contended that a defendant was responsible for multiple interacting events. Rather than attempting to identify the precise loss from each event, a plaintiff pursued a claim for a global loss which it said was caused by all of the events for which a defendant is responsible.

---

[8] Referred to by Bowskill J in *Equititrust* above.

[89] His Honour was satisfied that DM Civil's claim was a global claim and a modified total costs claim. As to the claim being a global claim, his Honour said –

> "[41] The claims are global in nature because nothing in the statement of claim or schedules attempts to draw any causal link between any particular items in sch A (the giving of access or approval), sch B (the sequencing directions), or sch F (the issue of IFC drawings) and any particular consequence in relation to any particular part of the work identified in sch C, or to the incurring of any particular cost referred to [in] sch C …"

[90] His Honour explained that that proposition was not seriously contested by DM Civil, but DM Civil contended that Karara did not appreciate the nature of its case.

[91] His Honour further explained at [54], by reference to authority, that a global claim was permissible only where it was impossible or impracticable to disentangle part of the loss which is attributable to each head of claim, and where that situation has not been brought about by delay or other conduct on the part of the claimant.

[92] Drawing on *DM Civil* and other authorities, CMC argued that AE's access claims, pleaded in paragraphs 36 – 38 and 40 – 45, were global claims. It argued that nothing in the FASOC (or the 2FASOC) or the schedules attempted to draw a causal link between the alleged breaches of contract by way of delayed access to separate parts of the site and the consequence (that is, the standby of certain plant and personnel). It argued that causation was pleaded on a global basis in circumstances where such a plea was not permitted.

[93] CMC outlined the prejudice it alleged it would suffer were the trial to proceed on the 2FASOC. The alleged prejudice included CMC's being unable to show that plant and personnel were on standby not because of an access delay but because of something for which AE was responsible. If the plaintiff could not "untangle the web" then it was required to say so. The position was compounded, CMC alleged, because AE pleaded that the delays caused by CMC delayed the use by AE "in whole or in part" of its plant, equipment and personnel.

[94] CMC asked me to look at the way in which paragraph 36 was amended, as marked up in the FASOC. The amendment was by way of reference to the schedules containing further and better particulars. CMC argued that no matter how voluminous the particulars, they did not identify the causal nexus between the access delays in 33 to 35 and the claims in 36 to 38.

[95] Counsel for CMC took me through the various particulars schedule. He pointed out certain inconsistencies between the delay periods pleaded and the delays identified in schedule 1A. He submitted that delayed entry to a haul road, for example, would have a different impact on different types of plant (*cf* an excavator, a dump truck or a compactor). He made a similar complaint about claims for delayed labour/operator hours.

[96] Counsel argued that paragraph 36(e) just "skirted around the issue". That paragraph explained that the plant and equipment which was not utilised as per schedule A2 was on standby.

[97] CMC submitted that the Consequential Delays in paragraphs 41 – 43 of the FASOC and the paragraphs dealing with the additional supervision and labour costs (paragraphs 44 – 47) suffered from the same defect because they were premised upon having been caused by each and every one of the Defendant's Delays pleaded in 32 – 40.

[98] In response to the complaint that it had made a global claim, AE submitted that CMC did not understand the case it had pleaded. Its case was that the defendant did not, "at the times standby was claimed" have "sufficient" of the work areas available for the plaintiff to apply its resources to "efficiently".

[99] AE argued that CMC erroneously asserted that AE's claim was an impermissible global claim. It argued that principles which arose in the context of damages claims for breach of contract on lump sum contracts were not applicable to schedule of rates contracts which provided a contractual remedy to the plaintiff. It asserted that CMC had "conveniently" misconstrued the plaintiff's pleading in paragraph 37(f) of its outline. AE set out its case at paragraph 78 of its outline. It invited me to compare the outlines in this respect. That comparison follows.

[100] In paragraph 37 of its outline, the defendant stated –

> "The general structure of the Access Claims is as follows –
>
> a) that the contract required CMC to provide and maintain for Alexanderson's benefit "Sufficient Access", defined as being an obligation to ensure unimpeded access to all locations on site where Alexanderson was required to perform the work or traverse to perform work (paragraph 26);
>
> b) a contractual entitlement to payment at Standby Rates for any *"stop work, delay commencement of work*" or "*standby for any reason beyond the (plaintiff's) control*" (paragraph 26(d));
>
> c) failure to ensure "Sufficient Access" would be a breach of contract entitling Alexanderson to payment at the Standby Rats, further and alternatively inclement weather, any act or omission of the defendant or anything else beyond Alexanderson's control would entitle it to payment at the Standby Rates (paragraph 27);
>
> d) that various directions were given by CMC to Alexanderson to mobilise to site even though areas were not available for work (paragraphs 28 to 32);
>
> e) that CMC failed to give Alexanderson access to each of four areas of the site over varying periods between October 2011 and April 2012 by specific access dates applicable to each work area (paragraphs 33 to 35A) (referred to in these submissions as the **Access Delays**);
>
> f) pursuant to those Access Delays pleaded in paragraphs 33 to 35A, CMC delayed the use by Alexanderson of its plant, equipment and personnel to perform the work (defined as "the Defendant's Delays"), which Alexanderson says were the sole cause of the plant being placed on standby (paragraph 36);

g) pursuant to all of the matters pleaded in paragraphs 26 to 36, as a consequence of the Defendant's Delays some of the plant was not able to be utilised at times (defined as "the Standbys") (paragraph 37);

h) this entitled Alexanderson to payment under the contract for "the Standbys" (paragraph 38);

i) the Access Delays, "*in whole or in part*" prevented Alexanderson from completing the work by the date for practical completion of 20 March 2012 (paragraph 40);

j) as a consequence of the Access Delays, Alexanderson was further disrupted by inclement weather between the date for practical completion and the date of practical completion in September 2012, and was required [to] work on two public holidays (paragraph 41) for which it claims payment at the Standby Rates and damages (paragraph 42 and 43);

k) pursuant to all the previous matters, the Access Delays were a breach of the contract for which Alexanderson seeks damages for additional costs (paragraphs 44 and 45)."

[101] At paragraph 78 of its submissions, AE stated (footnotes omitted): –

"The plaintiff's claim is:

a) The plaintiff was required by the Contract and the defendant to, and did, mobilise all of its plant equipment and personnel as soon as practicable after 19 October 2012.

b) Upon the aforesaid mobilisation, the only work area available to the plaintiff was the GPN Borrow Pit rock screening area and that area could only utilise limited plant.

c) The plaintiff's plant, equipment and personnel were otherwise unable to be immediately utilised by reason of the defendant's failure to provide access to each of the work areas upon which the plaintiff was to perform work except for:

(i) dayworks instructed by the defendant or the contractor's representative;

(ii) for limited activities in work area progressively released;

until the defendant released, progressively, each of the three main work areas.

d) The plaintiff was entitled, under the Contract, to be paid by the defendant for its plant, equipment and personnel for the periods when each was unable to be used for the performance of the work by reason of a matter beyond the control of the plaintiff.

e) The amount the plaintiff was entitled to be paid was $1,761,349, as calculated by reference to rates agreed in the Contract for each item of plant or equipment, and each worker, prevented from performing the work."

[102] AE noted the "key differences" between the way it pleaded its case and the way CMC understood it were apparent in CMC's paragraphs (f) and (g). AE contended the differences were the consequence of CMC treating the claim on a "minutiae basis" rather than reading the claim in context.

[103] AE submitted that there was one cause of standby pleaded – namely, that the defendant told the plaintiff to get the plant to site and when the plant arrived, there was nothing for it to do. There were then three "key elements whereby the cause of the standby was abated". CMC did not understand its claim: it was not the access delays that caused the standby – it was the direction to get to site. AE argued that it claim as articulated "did not contend for a loss based upon multiple interacting events for which the defendant was responsible".

[104] I pause here to note that, in my view, CMC's outline of AE's pleading bears a closer resemblance to the 2FASOC than AE's outline. In my view, CMC's outline of the 2FASOC cannot be said to be a consequence of its failure to read the statement of claim as a whole.

[105] AE argued that CMC's application, insofar as it made a global claim complaint, ought to be dismissed for the same reason as a similar complaint was dismissed by McMurdo J (as his Honour then was) in *Lacaba Ahden Australia Pty Ltd v Bucyrus (Australia) Pty Ltd* [2006] QSC 147. In that matter, his Honour found, among other things, that the defendant did not understand the plaintiff's case.

[106] Lacaba claimed that it had not been fully paid for its work in the erection and commissioning of a dragline at a coal mine. Lacaba contended that it was entitled to further sums because its achievement of practical completion had been delayed by causes beyond its control, including the defendant's acts or omissions.

[107] One of Lacaba's claims was in connection with a performance bonus to which it was entitled, for each day by which the actual date of practical completion preceded the agreed date. The agreed date had been postponed by a certain number of days to 19 April 2000. Lacaba achieved practical completion on 17 April 2000. It received a two day bonus but claimed that the date for practical completion ought to have been extended to 21 May 2000, entitling it to bonus for another 32 days.

[108] Under the contract, the agreed date for practical completion might be extended if the delay in achieving practical completion was brought about by a cause beyond Lacaba's control. Lacaba identified the events which it said were beyond its control and which together delayed practical completion by 32 days. Those events were set out in Schedule 1 to its claim. The events included "item 8" which involved events said to have caused 25 of the 32 days delay. Those 25 days fell in the post-machinery period.

[109] The defendant complained that the plaintiff had not pleaded or particularised the facts by which each of the item 8 events was a cause of delay in achieving practical completion.

[110] His Honour had previously required the plaintiff to amend item 8 so that it corresponded with the plaintiff's case as articulated by its expert. Item 8 was re-pleaded by –

- stating that it estimated that 25 days delay was caused by events for which it was not responsible; and
- listing the causally significant events, namely (a) item 8 variations; and (b) other events identified in its experts report.

[111] It continued,[9] (my emphasis):

> "3. As to the manner in which the causally significant events caused the 25 days delay –
>
> (a) The delay caused by the item 8 variations (without taking account of their displacement and disruptive impact) may be assessed by apportioning delay according to the proportion between the manhours expended on scope work during the post-machining period and manhours expended on variation work during the post-machining period. Using this methodology, Lacaba estimates that the item 8 variations cause between 18 and 19 days delay during the post-machining period.
>
> **Particulars**
>
> The way in which the 18 day estimate is reached is explained in section 3.6 of the expert report … The way in which the 19 day estimate is reached is explained in paragraph 131 of the expert report …
>
> (b) Lacaba estimates the balance of the 25 days it has claimed may be regarded as having been caused by the displacement and disruptive effect of the item 8 variations and the other events identified in … paragraph 135 of the expert report.
>
> **Particulars**
>
> The way in which the assessment may be reached that the balance of the 25 days claimed may be regarded as having been caused by the displacement and disruptive effect of the item 8 variations and the other events … is explained in section 3.6 of the expert report, in particular section 3.6.6 of the expert report.
>
> (c) In respect of the estimates pleaded in the previous subparagraphs, Lacaba says that:
>
> > **(i) It is impossible or, alternatively, impracticable for Lacaba to identify a connection between each of the causally significant events which it has identified and a discrete amount of delay. The delay which was suffered occurred because of a complex**

[9] As set out in [5] of the judgment.

interaction between the causally significant events and their consequences.

(ii) There is no other explanation for that delay than the causally significant events which Lacaba has identified."

[112] Thus, as His Honour explained, Lacaba's case was that, but for the *combined effect* of the events described in item 8, the work in the post-machining period would have been completed in two days – not 27 days. Its expert's report said so by reference to certain evidence. However, the defendant complained that the expert's report did not explain the way in which *each event* had a causal effect on the date of practical completion.

[113] The defendant accepted that the plaintiff was not required to particularise a discrete *period of delay* caused by each alleged delaying event. But it argued that the plaintiff should provide particulars explaining why it asserted that an event was, or would of necessity be, causative of delay, so that it could understand and respond to the case. It referred to its own expert's (Mr King) statement that he needed to understand the causal relationship between the events alleged to have created delay, and the delays, so as to determine their impact on the completion of the project. Mr King could not understand the causal relationship from Lacaba's expert's (Mr McQueen) report because it did not identify, "variation by variation" how the additional work impacted upon succeeding activities.

[114] In dismissing the application for particulars, his Honour said (my emphasis) –

> "[11] As it appears to me, the defendant and its expert have not understood the plaintiff's case, although this is not due to a want of particulars. The plaintiff does not say that each event was causative of delay by postponing a 'succeeding activity'. Rather, its case is that most of this delay was simply due to additions to the plaintiff's overall workload by the defendant's requirement for variations. Specifically, the requirement of the plaintiff's performance of the variations which it performed after 21 March inevitably caused the overall job to be completed later than it would have been had those variations not had to be performed. Mr McQueen has calculated that the delay caused in that way accounts for 18 of the 25 days which are claimed. That calculation is criticised and I will return to it. But whether that calculation is flawed, the plaintiff's case in this respect is in my view clear: completion was delayed by the number of days reasonably required to perform those 2,463 hours spent on variation works. Now there may be many answers to that case. For example it may not be the case, as Mr McQueen has calculated, that these 2,463 hours correspond with 18 days of work. Or it may be that contrary to what Mr Smith will say, at least some of these variations could and should have been performed at an earlier time. But in this particular respect, the case is articulated with sufficient clarity.
>
> [12] As to scope work performed after 21 March 2000, the plaintiff's case is that the completion was delayed by having to perform 1,271 hours of work instead of something in the range of 300 to 600 hours. The

> difference is attributed to what is described in the plaintiff's case as disruption and displacement ...
>
> [13] In respect of both disruption and displacement, the plaintiff's case thereby describes the alleged causal connection between the events relied upon and the alleged delay in the post-machining period. The plaintiff's case does not employ Mr King's methodology … Rather, the case is that the same work took longer to perform because the intrusion of other work disrupted the orderly and economical performance of the scope work … The displacement case … is that there is an inherent likelihood that by the plaintiff's having to perform extra work before 22 March in the nature of variations, and by the plaintiff's having to wait for parts, scope work which would have been performed before the post-machining period had to be performed, as it was performed, within that period. **The plaintiff's case is** that it was working as efficiently as it could and that there is **no other explanation** for its having to do this scope work within the post-machining period. In my view the plaintiff has sufficiently particularised its case as to how the events relied upon were causative of delay. The plaintiff is not obliged to advance its case upon [the defendant's expert's] methodology. If the trial judge concludes that it is only by that methodology that the alleged delay could be proved then the plaintiff will simply fail to prove its case. But I can see no unfairness to the defendant which knows by these particulars, incorporating as they do [the plaintiff's expert's] report and the documents and evidence referred to in it, the boundaries of the case made against it."

[115] I do not consider that the present defendant has misunderstood the plaintiff's case in the same way as the defendant in *Lacaba* misunderstood its plaintiff's variation case. Also I note that, in articulating its case, Lacaba stated that it was impossible or impracticable to identify a connection between a causally significant event and a discrete amount of delay and that there was no other explanation for the delay. AE makes no such assertion in its pleadings. That is one of CMC's complaints about AE's pleading.

[116] As I understand AE's point, its complaint is that *one* act (that is, one direction) of CMC caused it to bring its resources to site, but they sat idle until various parts of the site were available for work. In other words, AE says that, properly understood, it is not alleging that multiple interacting events for which CMC was responsible caused its resources to be on standby. AE says it has then particularised what resources *were* able to be used and when in various schedules to the 2FASOC. It argued that its case, so pleaded, did not make a global claim.

[117] AE also argued that its case might be distinguished from *DM Drainage* because the contract in *DM Drainage* was a lump sum contract. AE submitted that *DM Drainage* concerned a delay and disruption claim, not a discrete standby claim in the context of a contract which remunerated the plaintiff on the basis of work performed under a schedule of rates.

[118] AE argued that it had pleaded that standby was caused by the defendant's failure to give "sufficient" access to allow "all" of AE's resources to be applied to the work, which

allowed it to be remunerated for being unable to work. This was a sufficient plea to perfect its cause of action.

[119] In support of this argument, AE referred me to *McGrath Corporation Pty Ltd v Global Construction Management (Qld) Pty Ltd & Anor* [2011] QSC 178 (Daubney J) in which his Honour rejected an argument that the claim as pleaded in that case was a global claim.

[120] McGrath (as principal) and Global (as Construction Manager) entered into a contract to construct a unit development. Global's duties included monitoring the work of trade contractors. McGrath engaged ITF Formwork to perform form working. ITF performed its contract poorly. McGrath sued Global and ITF for damages for breach of contract and negligence. McGrath alleged that Global had breached its contract in many ways, including by failing to adequately supervise and assess the work of ITF.

[121] His Honour found that Global had breached its contract in several ways including by failing to ensure timely identification of defects in ITF's work and failing to oversee defect rectification. His Honour also found that Global breached the common law duty it owed to exercise the reasonable care and skill of a reasonably competent project manager in respect of the identification and oversight of rectification of defective work by a trade contractor.

[122] Having found breach, his Honour then turned to the question whether those breaches were causative of loss, and the quantum of that loss. Among the losses claimed by McGrath were losses for delay in the completion of the project as a consequence of ITF's defective works.

[123] The project was not completed until 155 days after the date for completion. McGrath's case was that the breach by Global resulted in McGrath incurring all of the extra costs incurred for the 155 day period. Global's response was that there were numerous causes for the delay and McGrath's attempt to attribute to it *all* of the delay costs for the 155 days was fundamentally flawed.

[124] His Honour observed that the case, as pleaded and run at trial by McGrath, was that Global's breaches were responsible for the entirety of the delay costs for the whole of the 155 day period. Global submitted that such a case failed entirely at law, and on the evidence. Counsel for Global drew analogies between McGrath's case and global claims. His Honour stated that McGrath's case did not involve a global claim.

[125] His Honour said (my emphasis) –

> "[127] … This case does not involve a global claim, as that term is used in the cases. A global claim is one in which a plaintiff contends under a building contract claim that there are **multiple interacting events** for which the defendant is responsible and then, **rather than attempting to identify (if it were possible) the precise loss from each event, the plaintiff pursues a claim for the global loss which the plaintiff says was caused by all of the events for which the defendant is responsible**. **In the present case, what is really said is that whilst [McGrath] claims (and only claims) the whole of the delay cost over the entire period of delay, the evidence**

> **discloses that there were, in fact, numerous causes of delay and it is impossible, on the state of the evidence, to separate out the effects of those multiple causes of delay**."

[126] His Honour referred to the authorities upon which Global relied, which included Lord MacLean's authoritative commentary on causation and global claims in *Laing Management (Scotland) Ltd v John Doyle Construction Ltd* [2004] BLR 295.

[127] His Honour set out the following lengthy passage from that case, adding emphasis as follows –

> "[10] For a loss and expense claim under a construction contract to succeed, the contractor must aver and prove three matters: first, the existence of one or more events for which the employer is responsible; secondly, the existence of loss and expense suffered by the contractor; and thirdly, a causal link between the event or events and the loss and expense … Normally individual causal links must be demonstrated between each of the events for which the employer is responsible and particular items of loss and expense. Frequently, however, the loss and expense results from delay and disruption caused by a number of different events, in such a way that it is impossible to separate out the consequences of each of those events. In that event, the events for which the employer is responsible may interact with one another in such a way as to produce a cumulative effect. If, however, the contractor is able to demonstrate that all of the events on which he relies are in law the responsibility of the employer, it is not necessary for him to demonstrate causal links between individual events and particular heads of loss. In such a case, because all of the causative events are matters for which the employer is responsible, any loss and expense that is caused by those events and no others must necessarily be the responsibility of the employer. That is in essence the nature of a global claim. A common example occurs when a contractor contends that delay and disruption have resulted from a combination of the late provision of drawings and information and design changes instructed on the employer's behalf; in such a case all of the matters relied on are the legal responsibility of the employer. **Where, however, it appears that a significant cause of the delay and disruption has been a matter for which the employer is not responsible, a claim presented in this matter must necessarily fail. If, for example, the loss and expense has been caused in part by bad weather, for which neither party is responsible, or by inefficient working on the part of the contractor, which is his responsibility, such a claim must fail. In each case, of course, if the claim is to fail, the matter for which the employer is not responsible in law must play a significant part in the causation of the loss and expense. In some case it may be possible to separate out the effects of matters for which the employer is not responsible.**"

[128] His Honour continued (my emphasis) –

"[130] His Lordship then distinguished a global claim from a so-called 'total costs claim' and cited in respect of the proper approach to total costs claims the following from the passages from the judgment of Byrne J in the Supreme Court of Victoria in *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* [(1996)13 BCL 292]:

> 'The claim as pleaded … is a global claim, that is, the claimant does not seek to attribute any specific loss to a specific breach of contract, but is content to allege a composite loss as a result of all of the breaches alleged, or presumably as a result of such breaches as are ultimately proved. Such claim has been held to be permissible in the case where it is impractical to disentangle that part of the loss which it attributable to each head of claim, and this situation has not been brought about by delay or other conduct of the claimant …
>
> Further, this global claim is in fact a total cost claim. In its simplest manifestation a contractor, as the maker of such claim, alleges against a proprietor a number of breaches of contract and quantifies its global loss as the actual cost of the work less the expected cost …
>
> …
>
> The logical consequence implicit in this is that the proprietor's breaches caused that extra cost or cost overrun. This implication is valid only so long as, and to the extent that, the three propositions are proved and a further unstated one is accepted; the proprietor's breaches represent the **only causally significant factor** responsible for the difference between the expected cost and the actual cost. In such a case the causal nexus is inferred rather than demonstrated … [and] involves an allegation that the breaches of contract were the material cause of all of the contractor's cost overrun. This involves an assertion that, given that the breaches of contract caused some extra cost, they must have caused the whole of the extra cost because no other relevant cause was responsible any part of it.'

[131] Lord MacLean, delivering the judgment of the Court, expressed agreement with the statements by Byrne J and said:

> 'It is accordingly clear that if a global claim is to succeed, whether it is a total cost claim or not, the contractor must eliminate from the causes of his loss and expense all matters that are not the responsibility of the employer.'

[132] His Lordship then went on to refer to a number of mitigating considerations:

(a) It may be possible to identify a causal link between particular events for which the defendant is responsible and individual items of loss;

(b) The question of causation must be treated by the application of common sense to the logical principles of causation;

(c) Even if it cannot be said that the events for which the defendant is responsible are the dominant cause of the loss, it may be possible to apportion the loss between the causes for which the defendant is responsible and other causes. His Lordship said:

'In such a case it is obviously necessary that the event or events for which the employer is responsible should be a material cause of the loss. Provided that condition is met, however, we are of the opinion that apportionment of loss between the different causes is possible in an appropriate case. Such a procedure may be appropriate in a case where the causes of the loss are truly concurrent, in the sense that both operate together at the same time to produce a single consequence.'"

[129] Daubney J then looked at the evidence of the experts on the question of delay and other relevant evidence. Upon reviewing the evidence, his Honour was unable to accede to McGrath's submission that it ought to be found that the consequences of ITF's defective works were the sole or even the substantial cause of the entire delay of 155 days. It was though uncontroversial that the consequences of ITF's defective works caused a 55 day delay. His Honour continued –

"[164] … It was for [McGrath], however, to establish on the evidence, and not merely by assertion, that delay to the project beyond that 55 days was at least substantially caused by the ITF defective works. The evidence, however, discloses that there were multiple causes for the rest of the delay. The ITF defective works might have made some contribution to that further delay, but that is really a matter of speculation …"

[130] His Honour found that the period of delay to the project as a whole which McGrath had proved was caused by ITF's defective work, and therefore attributable to Global's breach of its obligations, was 55 days.

[131] AE submitted that I ought to take from *McGrath* the point that the question of causation ultimately was a matter for evidence and apportionment between the plaintiff and the defendant. But in *McGrath* the plaintiff acknowledged that there were *numerous other causes* of delay, the effect of which could not be separated from the effects of the defendant's conduct. That is not the present plaintiff's case.

[132] In *McGrath,* it was uncontroversial that the defendant's breaches caused the entire period of delay of 55 days – but the plaintiff was unable to eliminate other causes for the second period of delay. While the matter of the contribution of other causes to the delay beyond 55 days was resolved on the evidence, that approach was responsive to the way in which the case had been pleaded.

[133] AE also referred me to *Santos Ltd v Fluor Australia Pty Ltd* [2017] QSC 153 in which, it submitted, Flanagan J reached a similar conclusion. Further relying on *Santos*, AE urged me to adjourn CMC's application to strike out the relevant paragraphs of its pleading.

[134] Santos was a participant in the "GLNG Project", which was a project to extract coal seam gas from certain coal seam fields in the Surat Basin. Santos entered into a contract with Fluor under which Fluor was to engineer, procure and construct certain facilities.

[135] By claim, Santos sought the payment of approximately $1.4 billion as a debt due and owing under the contract. The strike out application concerned two parts of Santos' six part statement of claim (Parts C and D).

[136] Part C dealt with breaches of various subcontracts which Fluor had entered into for the purposes of the work to be undertaken pursuant to its contract with Santos. Santos alleged that Fluor incurred (and Santos paid to Fluor) certain costs that were "Excluded Costs" or were "not Actual Costs" under the contract.

[137] In Part D, Santos claimed that Fluor had breached the terms of the contract including by failing to deliver all of the design documents by the date required by the "EPC program".

[138] Fluor's primary complaint was that Santos had failed to plead a causative link between multiple alleged breaches and the alleged delay, loss and damage. Fluor submitted that many of the claims were "global" or "total cost" claims and that the statement of claim did not plead the material facts upon which Santos would rely at the hearing of the proceedings to prove causation. Fluor submitted that the statement of claim might be cured were Santos to plead that it was impossible or impracticable to identify what part of its loss was attributable to each head of its claim or relevant conduct on the part of Fluor. The consequence of so pleading, Fluor argued, was that unless the plaintiff proved that there were no other material causes of the delay, it failed.

[139] Flanagan J summarised Fluor's primary complaint as follows (citations omitted) –

> "[26] Fluor … seeks to have Santos either plead the causative link in respect of each of the 'multiple breaches' which are relied upon or alternatively put its case on the basis that its claims are variants of global claims. According to Fluor, if Santos is required to plead that it is impossible or impracticable to identify what part of its loss is attributable to each head of its claim or relevant conduct on the part of Fluor, this would also relieve Fluor of having to give extensive disclosure in relation to a project which extended over four years. Whether Fluor's primary complaint as to the pleading of causation is made out requires a detailed examination of the statement of claim and the claims which it makes."

[140] One of Santos' claims was a late access claim concerning "the Tenix subcontract". His Honour explained the position as follows –

> "[59] … Fluor was required to provide Tenix with non-exclusive access to such parts of the site as were required for the performance of the Tenix Work sufficient to enable Tenix to commence and undertake the Tenix Work in accordance with the subcontract and without delay. Paragraph 212 pleads that on 9 March 2013 Fluor notified Tenix that it approved the Revised Tenix schedule. Paragraph 213 pleads that during the period from February 2013 through to August 2014 Fluor did not provide Tenix with access to the Tenix site in accordance with the timetable set out in the Revised Tenix schedule … Paragraph 214 pleads that as a result of the matters pleaded in paragraph 213, during the period from 20 February 2013 to about 6 August 2014, the performance of the Tenix Work was delayed by 278 calendar days. Paragraph 216 pleads that as a result of this delay Tenix claimed from Fluor and Fluor paid to Tenix costs in the amount of [X] which would not have been incurred by Tenix and paid by Fluor but for the occurrence of the delay."

[141] The 278 days were not specified as critical delay. The best particulars Santos could provide were that (at [60]) –

> "1. Pursuant to the Revised Tenix Schedule, Tenix was to achieve completion of all of the Tenix Work by 13 November 2013 …
>
> 2. In order for Tenix to achieve completion … by 30 [sic] November 2013, it required access to the Tenix Site to be provided progressively in accordance with the Revised Tenix Schedule and in any event on or before 1 November 2013.
>
> 3. The latest date that (Fluor) provided access to Tenix for the Tenix Work was 6 August 2014 being 278 days later than the latest date required by the Revised Tenix Schedule."

[142] Santos submitted that there was a sufficient logical connection between Fluor delaying access and delay to completion.

[143] Fluor also complained that in respect of 11 of the alleged breaches, the delay in providing access was said to have occurred prior to November 2013. The pleading and particulars failed to address how these earlier alleged delays were causative.

[144] His Honour accepted that whilst Santos could not presently identify whether the whole of the 278 days was critical delay and how pre-1 November 2013 delays to access affected the analysis, a sufficient causal connection was pleaded. In refusing to strike out the claim, finding that a causal connection had been pleaded sufficiently, His Honour said (citations omitted) –

> "[61] … As orally submitted by Senior Counsel for Santos:
>
> > 'If you can't get access until 278 days after you are supposed to have finished it, clearly that has caused some sort of delay. For the moment, it's said to be a delay of 278 days. …[A]nd not wishing to hide this, your Honour, when one looks into it more closely, there

> might be some other factors which impinge on that 278 days. I don't know that there are, but that's the sort of thing that programmers look at. But for the moment you can say, 'Here's a breach. Clearly enough it caused a delay. It looks like it caused a critical delay." So causation is established. The fact is pleaded.'
>
> [62] I accept this submission. The present difficulties identified by Fluor in the Tenix Late Access Claim should not result in the relevant paragraphs being struck out. It is not a sufficiently clear case of a failure to plead the material facts which are said to give rise to a causal connection."

[145] I note that the delay alleged in the Tenix subcontract claim was a single period of delay. In the present case, on the state of the pleadings, it may be inferred that the separate access delays affected particular resources differently and caused different periods of delay.

[146] Fluor also complained about the global nature of the Gathering Lines Delay Claim. In that claim, Santos pleaded that – from August 2012 until July 2014 – Fluor –[10]

- did not provide CDJV (one of Fluor's Subcontractors) with access to parts of the CDJV Site where CDJV Gathering Lines Work was to be undertaken in a manner sufficient to enable CDJV to complete the CDJV Gathering Lines Work in accordance with Schedule 10E and, further or alternatively, without delay. The particulars provided referred to various documents which recorded numerous failures on the part of Fluor to provide access to specified ROWs or disruptions to access associated with environmental and cultural heritage approvals;

- did not provide to CDJV Free Issue Materials that were required for the performance of the CDJV Gathering Lines Work in a manner sufficient to enable CDJV to complete the CDJV Gathering Lines Work in accordance with Schedule 10E and, further or alternatively, without delay. The particulars provided detailed reports and correspondence which concerned issues relating to delay to the construction of pipelines caused by the late or non-delivery of materials. Multiple failures on the part of Fluor to provide CDJV with Free Issue Material were particularised;

- the performance of the CDJV Gathering Lines Work was delayed by approximately 280 days, which was pleaded as a result of the matters stated in the two bullets points above. Santos acknowledged that it could not "presently" particularise the number of days of critical delay that were caused by Fluor's breaches out of the total critical delay suffered by CDJV between August 2012 and August 2014 to the progress of the CDJV Gathering Lines Work. The particulars suggested that there might be other critical delays during the two year period which were either concurrent with or additional to the 280 days.

[147] Fluor submitted that the Gathering Lines Delay Claims were global claims, which did not plead or particularise the causal nexus between any alleged failure to provide access and/or failure to provide Free Issue Materials without delay or not in accordance with

---

[10] As set out in the judgment at [64] – [65].

Schedule 10E and the alleged delay of 280 days. Fluor submitted that the pleading identified multiple interacting breaches of the CDJV subcontract producing a single consequence in terms of additional costs or time.

[148] Santos accepted that the pleaded claim was *arguably* a global claim. It hoped to be able to disentangle it but it did not then have sufficient information to enable it to do so. It was able to show breaches of contract which caused delay likely to result in critical delay without being able to disentangle the precise effects of the different breaches.

[149] Santos argued that while it accepted that it had pleaded multiple breaches – it was not then in a position to establish the effect of particular breaches. It had though pleaded causation, proposed to provide further particulars and did not propose to run a global claim at trial. It submitted that it was not appropriate for his Honour to require Santos to plead that it was not possible to disentangle its claim because Santos could not make that plea honestly.

[150] His Honour ultimately accepted Santos' submissions that it was undesirable at the relevant stage of proceedings to require Santos to plead that it could not disentangle its claim. His Honour adjourned the application to strike out this part of the claim to a date to be fixed. His Honour said (footnotes omitted, my emphasis) –

> "[70] Santos submits that a claim in relation to delay caused by more than one type of breach is 'a familiar and unremarkable category of case'. Santos further submits that its inability to state the precise scope of critical delay that was caused by the pleaded breaches 'is both **readily explicable**, and does not render the pleading embarrassing or otherwise defective'. In relation to most of the claims concerning subcontracts Santos emphasises that it was not a party to the subcontracts and accordingly was neither privy to, nor is conversant with, all events that occurred during the performance of these subcontracts. It follows that in those circumstances, it is **readily understandable that Santos may not presently be able to accurately identify the extent of the critical delay to the subcontractor's work that was caused by Fluor's breaches**. Santos refers to the following observation of Byrne J in *John Holland* for the proposition that the mere fact that, at the time of pleading, a plaintiff is unable to state the precise scope of the consequence which the plaintiff alleges was caused by the defendant's wrongful conduct, does not render the plaintiff's pleading embarrassing or otherwise liable to be struck out:
>
> > '… For present purposes, I assume that each of these facts has been established. This may be obvious but it is, none the less, worth stating, if only to underline that I am concerned with a pleading question: **to what extent it is necessary to set out in the statement of claim the causal link between these two asserted facts**. I am not concerned with the question, what loss, if any, flowed from the breach. Where a plaintiff establishes a breach of contract it will not be denied relief on the ground only that it is difficult to estimate the damages which flow from that breach. This being the case, it may be said that a statement of

> claim which is unable to be set out with … precision the amount of loss claimed ought not to be struck out. But even in such a case, the plaintiff must identify what is the loss alleged to have been suffered and which cannot be quantified and how it is that this loss was caused by the breach. The amount of loss claimed here is not the problem; it is the causal link between this and the breaches of contract.'
>
> [71] Fluor submits in relation to the above passage that the principle identified by Byrne J concerns the proper quantification of loss; not causation. Fluor submits that Santos should at this stage of the proceeding be required to plead that it is impossible or impracticable to identify what part of its loss is attributable to each head of its claim or relevant conduct on the part of Fluor. The difficulty I have with this submission is that **Senior Counsel for Santos has unequivocally stated to the Court that Santos does not accept that it is either impossible or impractical to undertake this task.** I accept Santos' submission that, as a matter of proper case management, it is undesirable to require Santos to plead in the above terms at this stage of the proceedings. **If it ultimately eventuates that Santos is unable to plead the Gathering Lines Delay claims other than as global claims, then Fluor's application to strike out these paragraphs should be revisited.** The appropriate order in respect of the Gathering Lines Delay claims should therefore be that Fluor's strike out application in respect to [the relevant paragraphs] be adjourned to a date to be fixed."

[151] AE submitted that Flanagan J's approach in *Santos* was "sensible, appropriate and directly relevant" to the issues before me. AE submitted that it had more than adequately identified how it wished to run its case. There was still the need for export reports and further disclosure from both parties. A strike out on the "global claim" ground was, it submitted, "simply inappropriate" at this stage.

[152] I note that in *Santos*, Santos acknowledged the possibility that it might be required to plead its claim on global basis whereas AE does not make the same acknowledgment. Also, AE is not facing the "readily understandable" difficulty faced by Santos in identifying the relevant delay.

[153] Counsel for AE submitted that the three cases, *Lacaba, McGrath* and *Fluor*, established that –

- its case was pleaded appropriately, and CMC was on notice of the case it was called upon to answer; and
- whilst AE did not concede that its claim was "infected by any element of global or total costs" – even if it was, strikeout now, before expert and other factual evidence had been obtained, would be premature. There were likely to be significant amendments to come.

[154] CMC replied by submitting that the link between the Standbys and the Access delay in the present case were matters of fact – not something requiring expert evidence.

[155] CMC argued that each access delay "could logically have impacted only the use of certain plant and personnel planned to be used in that area, not all on site". The task, it submitted, should not be onerous. Only three access delays were pleaded. AE should know, and be able to identify, where it planned to utilise each item of plant and personnel which was affected by the delay. It was factually impossible that all of the access delays caused all of the plant and personnel to be on standby as particularised in Schedule A because of the different times at which the access delays were said to have occurred. CMC also noted the way in which paragraph 35A had been pleaded and the way in which it causally linked a particular access delay to the standby of particular plant.

[156] Alternatively, CMC submitted that if AE could not "untangle the web" then it was required to say so. CMC invited me to note that such a plea had been made in *Lacaba.*

[157] AE submitted that it was for CMC, and not for AE, to plead any conduct of AE's said to be responsible for the standby, given AE's plea that the delays were "entirely a consequence" of matters for which CMC was responsible. It also asserted that the question whether each item of plant, equipment or personnel was or was not working was a matter for evidence; as was the question of when the resources arrived on site and when each work area was released.

[158] AE took me to *Watts v Rake* (1960) 108 CLR 158 in which Dixon CJ discussed the onus on a defendant in a claim for damages for personal injury. AE relied upon this case and others in support of its contention that it was for CMC to plead and meet an evidential onus to prove that the plant, equipment and personnel, in respect of which AE claimed Standby, were in fact used, or that it was AE's fault that they were not being used.

[159] In *Watts v Rake*, His Honour said (at 159) –

> "The law of course places upon a plaintiff who sues in tort for unliquidated damages the burden of satisfying the tribunal of fact of the damages he has suffered both special and general and of the quantification in money that should be adopted in the sum awarded. That is the legal burden of proof which rests upon him throughout. Only in one respect is the burden of proof upon the defendant and this is when he sets up matter in mitigation of damages. If it appears satisfactorily that damage in a particular form or to a particular degree has been suffered by the plaintiff as a result of the wrong but the defendant maintains that the plaintiff might have avoided or mitigated that consequence by adopting some course which it was reasonable for him to take, it seems clear enough that the law places upon the defendant the burden of proof upon the question whether by the course suggested the damage could have so been mitigated and upon the reasonableness of pursuing that course."

[160] AE submitted that, similarly, if CMC wished to contest AE's entitlement to damages, it should do so in its own pleadings. In further support of that submission, AE referred to *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Limited* (2002) 210 CLR 109 and *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 196 ALR 257.

[161] *I & L Securities* concerned misleading and deceptive conduct in trade or commerce under the *Trade Practices Act* 1974 (Cth).

[162] I & L relied upon a negligent over-valuation of property to lend money to a property owner who defaulted on his mortgage repayments. The primary judge found that the financier had contributed to its own loss, to some degree, by failing to take reasonable care to protect its own interests. At first instance, the primary judge assessed the financier's negligence at one-third and awarded damages to the financier of two-thirds of the amount claimed. The financier appealed to the Court of Appeal. At issue on the appeal was whether the financier's loss was indivisible. I & L's appeal was dismissed. The appellant financier successfully appealed to the High Court: the loss was indivisible. It was in this context that Kirby J, in dissent, made the statement to which AE took me – that is the statement that the respondent acknowledged that whilst a party such as the appellant bore the ultimate burden of demonstrating what loss or damage had been sustained, once a contravention was shown, a forensic burden at least was born by a party (such as itself) to demonstrate that there was some other independent cause of loss or damage.

[163] In that case however, the majority of the High Court held that it was not possible to identify part of the loss or damage suffered by the appellant which was attributable to a separate cause for which the respondent could not be held legally responsible. I did not find that sentence of Kirby J's, in that authority, of assistance in this case.

[164] The issue in *Placer* was whether the Full Court erred in concluding that the primary judge used the wrong method for calculating damages. Placer entered into a schedule of rates contract with Thiess under which they would operate a gold mine as a joint venture. Thiess was to open its books to Placer and disclose the way it derived its rates for carrying out various mining operations. The parties would agree upon those costs, and Placer would pay Thiess an amount based on those costs plus an agreed profit margin of 5%.

[165] Placer cancelled the contract in June 1995. In September 1995, Thiess brought an action in the Supreme Court of Western Australia alleging that Placer wrongfully terminated the contract. Placer counterclaimed, alleging that it had overpaid Thiess because, in breach of contract, Thiess had deliberately inflated its cost estimates. Thiess failed in its claim for wrongful termination of the contract. Placer succeeded in its counterclaim. The trial judge awarded it damages in the sum of $4.853 million. Thiess appealed. The Full Court held that while Thiess had breached its contract, the trial judge's method of calculation was wrong. Placer successfully appealed to the High Court, which found that the trial judge's conclusion was open on the evidence. AE relied on the following paragraph from the judgment of Callinan J (citations omitted) –

> "[83] … Legitimate gains from 'efficiencies' were as much a matter for proof by the respondent as gains from productivity. I do not accept that the estimates, gains and losses made during the terms of the contracts, and nett positions of the parties were not live issues. Whether, and the extent to which the respondent was entitled to damages or to claim a set-off was a matter for it to make out. Counsel for the appellant submitted in the Full Court that on the evidence the respondent made no productivity gains other than those found by the trial judge. The Full Court said that the merits of the submission depended upon 'credibility issues not resolved by the trial judge'. Their Honours do not state what these issues were. It is significant that no detailed quantification of gains was attempted at any level by

> the respondent. That it seems to me was a matter entirely of choice, and a consequence no doubt of the respondent's determined stance that it did not have to justify each item or the totality of its charges. Another way of viewing the respondent's submissions in the Full Court and in this Court is as a plea in the nature of a plea in mitigation of damages. The onus in this regard lies upon the party seeking the reduction. Even though this is a case in contract, an analogy may be drawn between it and *Watts v Rake* in which it was held that it was for the tortfeasor to identify and effectively isolate in the case of pre-existing and subsequently occurring damage, damage for which it was not responsible."

[166] I note Callinan J's analogy between the claims in contract and tort, upon which AE relies.

[167] Further, AE argued that its claim was a debt claim and the burden of proof was reversed in the case of a debt claim. Once the entitlement to payment was established, it was for the defendant to rebut it.

[168] In response to this argument, CMC invited me to look at that which was pleaded in paragraphs 45(a) and (b) – namely, an entitlement to be paid and a claim for damages. It was not therein pleaded that a debt had accrued (although that plea was made elsewhere). CMC invited me to compare paragraph 45 with paragraph 55 – in which a debt was claimed.[11]

[169] CMC further submitted that, debt or otherwise, causation had to be shown. Simply alleging that a debt was claimed begged the question whether and how the entitlement arose under the contract.

Conclusion

[170] In reaching a conclusion about this complaint I have reminded myself of the purposes of pleading as outlined above. There is no set of special principles for construction contracts when it comes to the question of causation.

[171] In my view, there is an element of global causation pleaded in AE's Access Delay Claims, even if it is not intended to suggest that there was any interaction between the three (or four) different delays alleged to have caused the Standbys and even if the separate Access Delays flowed from the one direction to mobilise.

[172] Paragraph 36 does not plead one cause of the delayed use of AE's resources (such as the direction to mobilise) – it pleads, as the cause, three access delays and the requirement to excavate rocky fill. Indeed, the global nature of the claim is exemplified by the use of the phrase "in whole or in part" in paragraph 36 (which is discussed below).

[173] I consider it necessary for AE to identify, in relation to each item of stood-by plant, the Access Delay which it asserts caused the plant to be stood-by or, if it cannot do so, to plead that it is either impossible or impracticable to undertake that task.

---

[11] Paragraph 55 states: "Pursuant to the matters pleaded in paragraphs 52 to 54 hereof, upon the issue of the "*Certificate of Practical Completion"*, the defendant became indebted to the plaintiff in respect to any unpaid amount upon the Weather Claim".

[174] I do not consider establishing those links to be a matter requiring expert evidence nor do I consider it premature to require AE to so plead having regard to the nature of the claim.

[175] It may be that, once causation is pleaded in the way that I have indicated, the onus shifts to CMC to plead that the plant et cetera was in fact being used, or that its standby was not caused by the Defendant's Delay. Whether that is so or not will depend on the terms of the pleading.

[176] I order that paragraphs 36 – 38 of the 2FASOC be struck out, with leave to re-plead.

Paragraph 36, Schedule A1 and the new particulars

[177] CMC complained about the pleading of a primary and an alternative claim in paragraph 36 of the 2FASOC – in its use of the phrase "in whole or in part" – which caused prejudice to CMC as a consequence of AE failing to identify the causal relationship between each delay event and the resulting standby. CMC argued that the material facts identifying the alternative claim (the "in part" part) was not pleaded. The new particulars to 36(b) and 36(e) did not assist. They were confusing, objectively ambiguous, irrelevant and contradictory. By way of an example of their irrelevance, CMC observed that the particulars in Schedule A1 included dates upon which there was "impeded" access (an allegation different from that pleaded) which were before the dates pleaded in paragraphs 34 and 35.

[178] CMC complained about other inconsistencies between the expressions used in the particulars and elsewhere in the 2FASOC. For example, the particulars in 36(c), which stated that AE would have been able to "efficiently utilise" all plant, equipment and personnel to meet its contractual obligations were it not for the Defendant's Delays were different from allegations made elsewhere that the plant, equipment and personnel could not be used at all (because they were stood-by).

[179] CMC further complained that the new particulars in paragraph 36(d) and Schedule A2 were irrelevant. CMC argued that AE's claim was made on the basis that plant and personnel were said to have been placed on standby as a result of CMC's conduct and therefore the extent to which AE did utilise its plant was irrelevant.

[180] CMC submitted that the particulars of paragraph 36 should be struck out or that I should order that they identify which Access Delay caused which plant and personnel to have been placed on standby on each day.

[181] AE submitted that the expression "in whole or in part" was intended to convey that not all of the plaintiff's plant equipment and personnel were on standby all of the time.

[182] AE submitted that there was nothing exceptional about the way in which it had set out Schedule A to its 2FASOC ("Hours Standby for Delay").

[183] As to the complaint by CMC that Schedule A1, "Ongoing Access Standby/Delay/Disruption",[12] included dates before AE started on site, AE said CMC

[12] In AE's Further and Better Particulars of the Further Amended Statement of Claim.

could ignore those dates because the dates in respect of which standby was claimed were identified in Schedule 1.

[184] Counsel for AE explained the way in which Schedule A2 "Utilisation"[13] was to be interpreted, referring to the legend at the top which indicated, he said, "why things came off standby" – that is, it indicated *where* certain plant was used. He said the other schedules were to be read in the same way. They responded to the way in which AE had pleaded its case – not to the way in which CMC said that it ought to have pleaded its case.

Conclusion

[185] Having determined that there is an element of global causation in the claim as pleaded that must be addressed, and having struck out paragraphs 36 – 38, with leave to re-plead, the particulars to those paragraphs will also fall.

[186] Having said that, in order to assist the further conduct of the case, I note that I do not agree with CMC that the new particulars in paragraph 36(d) and Schedule A2 are irrelevant in stating the extent to which AE did utilise its plant. AE has adjusted its claim to take account of the way in which it was able to use its otherwise stood-by plant. The extent to which the plant was utilised elsewhere is, in my view, a relevant component of AE's case. It is not irrelevant.

Paragraph 40

[187] As part and parcel of its global claim complaint, CMC complained about paragraph 40.

[188] Paragraph 40, and paragraph 40A of the 2FASOC, which immediately follows it, state –

> "40 But for the Defendant's Delays, in whole or in part, the plaintiff would have completed the Work by 20 March 2012.
>
> 40A As a consequence of the Defendant's Delays, the plaintiff working efficiently and without other delays or events requiring standby, with the plant, equipment and personnel designated in the Schedule of Rates, would have completed the Work by on or about 31 May 2012 or such other date as may be determined by the Court upon the evidence [the **Delayed Completion Date].**"

[189] CMC's complaint was that paragraph 40 pleaded a primary and alternative claim, in its use of the phrase "in whole or in part", in circumstances where the plaintiff had failed to identify the "part" and CMC was required to intuit the *part* of the Defendant's Delays to which AE refers in that paragraph.

[190] Additionally, CMC said that in order for it to respond to the allegations, or for it to brief experts, the causal nexus had to be stated. It said its global claim complaint about paragraph 40 "flowed through" to the claims for contractual entitlements and damages in paragraphs 41 to 44 and from the earlier paragraphs about access delays.

---

[13] In AE's Further and Better Particulars of the Further Amended Statement of Claim.

[191] In its rule 445 response to CMC's complaint, AE said that the words "in whole or in part" indicated that "each increment of the Defendant's Delays prevented the plaintiff from completing the Work by 20 March 2012". CMC submitted that that was a different allegation to that which was pleaded – that is, that "part" of the Defendant's Delays prevented the plaintiff from completing the Work by 20 March 2012. If there was an identifiable "increment", or it was said that each increment of the Defendant's Delays prevented the plaintiff from completing the Work by 20 March 2012, then those identifiable increments had to be pleaded. It if were not pleaded in that way, the defendant would be taken by surprise at trial. It could not instruct an expert for the purpose of an alleged delay impact analysis because it could not identify for the expert which part or parts (or increment or increments) were relied upon by the plaintiff.

[192] CMC referred to Bryne J's "caution" in *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd & Anor*[14] that "the court should be assiduous in pressing the plaintiff to set out that nexus with sufficient particularity to enable the defendant to know exactly what was the case it was required to meet and to direct its discovery and its attention generally to that case".

[193] CMC submitted that it was fundamental to procedural fairness that AE be required to plead with precision the "part" upon which it relied, and the necessary facts demonstrating the causal nexus between the part of the Defendant's Delays and the resulting standbys claimed to have occurred as a result thereof. It noted that AE had not pleaded that the relevant "part" or "parts" would be identified by expert reports.

[194] AE's response to this complaint was, in effect, that section 40A dealt with it.

[195] In AE's written submissions, it asserted that CMC's complaint did not have "integrity" but CMC could have complained that the plaintiff had failed to indicate the date it said it would have completed the Scope of Works were it not for the Defendant's Delays. AE asserted that paragraph 40A remedied that defect. It conveyed that AE asserted that if it was unable to work on day 1, then the work was pushed back by a day, as in *Santos*. Such a pleading was proper. It may be that not all of the standbys claimed are accepted at trial – but the pleading simply asserted that the Defendant's Delays caused AE's delay.

[196] In reply, CMC said that the nub of its complaint had not been addressed because the plaintiff had not identified – other than via submissions – what the "part" was. It was ambiguous. Although CMC were informed that "in part" referred to any one of the delay events, there were delays at different parts of the site at different times. Until the detail was pleaded, no programming expert could be instructed or briefed.

---

[14] (1996) 8 VR 681 at 683, citations omitted.

Conclusion

[197] I agree that paragraph 40, in its reference to the Defendant's Delays "in part" requires the clarification sought by CMC for the reasons it gave. The ambiguity is not cured by paragraph 40A.

[198] I order that paragraph 40 of the 2FASOC be struck out, with leave to re-plead it.

Paragraph 44

[199] CMC complained, as before, that this paragraph failed to plead the causal link between the Defendant's Delays and the damages claimed.

[200] Paragraph 44 asserted that, pursuant to certain previous paragraphs of the 2FASOC, the Defendant's Delays were a breach of the subcontract pursuant to which the plaintiff incurred loss and damage in the amount of approximately $673,000.

[201] It particularised the plaintiff's loss and damage as follows –

(a) By reason of the Defendant's Delays and the Consequential Delays, the defendant's breaches as pleaded caused the plaintiff to provide an additional 170 days of supervision and travel for supervision personnel calculated between 20 March 2012 and 6 September 2012;

(b) By reasons of the Defendant's Delays, and the Consequential Delays, the defendant's breaches as pleaded caused the plaintiff to suffer loss and damage:

i. Supervision and overheads in the sum of [X] for the periods of time and at the rates or costs identified in Schedule G of the 25 February 2019 F & B Particulars.

ii. Costs of flights and associated travel for the relevant period in the sum of [X] identified in Schedule G …

iii. Labour to operate its plant and equipment in the sum of [X] for the durations identified in Schedule G … at the rate of [y] per hour, calculated as set out in the email and attachments from Fitzgerald to Vance to Fitzgerald dated 23 August 2011 at 3.46 pm or in the alternative an amount to be calculated from the financial records of the plaintiff.

iv. Labour to operate its plant and equipment in the sum of [X] for the durations identified in Schedule H … (referable to the Consequential Delays and or in the alternative the Wet Weather delays pleaded in paragraph 41(a) and Schedule B hereof) at the rate of [y] per hour, calculated as set out in the email and attachments from Fitzgerald to Vance to Fitzgerald dated 23 August 2011 at 3.46 pm or in the alternative in an amount to be calculated from the financial records of the plaintiff.

v. The hours calculated for labour in Schedules G and H … represent the labour not able to be utilised for the Project, at times when the plant and equipment particularised in Schedules A and B were on standby.

(c) The plaintiff claims for loss and damage are referrable to labour, recurring overheads (supervision) and travel.

[202] It may be noted that paragraph 44 does not refer to the Consequential Delays but its particulars do. Nor does paragraph 44 refer back to paragraph 41 which defines the Consequential Delays. CMC argued that the particulars had no connection to the pleaded allegation. CMC submitted that the words "and the Consequential Delays" in paragraphs 44(a) and 44(b) ought to be struck out.

[203] The annotation to schedule G stated –

> "The hours above represent the total hours of labour to operate the plaintiff's plant and machinery placed on standby during those weeks. Those hours are calculated by subtracting the total hours of utilisation for the plant and equipment on the relevant dates (see Schedules A2 above) from the gross labour hours for each day (see "Gross Labour Hours On Site" schedule below)."

[204] CMC complained that Schedule G did not identify a causal nexus – it did not state that there were particular labour hours lost on a particular day due to an access delay. Rather, lost hours were claimed weekly or globally. Also, the particulars in their present form were less informative than they were previously. AE said in correspondence that it would provide further and better particulars of the operators claimed to have been placed on standby each day and the plant they were operating. That had not occurred. Instead, the claims for labour were particularised as weekly operator hours – that is, more generally than they had been. Previously, the particulars of the weekly operator hours had been provided on a daily basis.

[205] CMC submitted that AE should be ordered to provide proper particulars about which operator was on standby on each day. The defendant had otherwise no way of identifying – even from disclosed documents – which operator (it was claimed) was placed on standby in relation to which item of plant, on a particular day. Without that information, CMC would be taken by surprise at trial.

[206] AE submitted that the interaction between the delay to the progress of construction caused by the standby and the consequential delays claimed were a matter for expert evidence.

[207] AE explained that for each item of plant there was an operator. There was no more than one operator per unit of plant. Operators were not limited to operating only one item of plant.

[208] On the evidence, most of the operators working for AE could operate more than one item of plant. Thus, AE contended, the *identity* of a driver of a particular plant on a particular day was irrelevant. There was a one-to-one relationship. If the plant could not operate – its driver could not operate. The defendant's request was – AE contended – unnecessary and oppressive.

Conclusion

[209] To the extent that CMC seeks the names of the operators of each item of plant, I agree that this is a complaint about a failure to plead evidence.

[210] However, consistently with my approach to CMC's global claim complaint, AE is required to plead the causal link between the Access Delays and the Consequential Delays.

[211] AE is also required to achieve consistency between paragraph 44 (which does not include reference to paragraph 41) and its particulars in (a) and (b) which refer to the Consequential Delays as defined in paragraph 41.

[212] It follows that I order that paragraph 44 be struck out, with leave to re-plead.

[213] That is the last of the paragraphs said to be relevant to CMC's global claim complaint.

Paragraph 41(a) and paragraph 53

[214] Paragraph 41(a) asserts that the plaintiff's performance of the work was further disrupted by inclement weather and particulars follow. It is contained within the section of the 2FASOC entitled "Damages for Breach of Contract – Failure to Provide Access".

[215] Paragraph 53 asserts that the plaintiff's performance of the Work was disrupted by inclement weather and particulars follow. It is contained within the section of the 2FASOC entitled "Monies Recoverable for Weather Delays (Weather Claim)".

[216] In each case the first five particulars are the same, namely –

> (iii) or (a)[15] Sufficient rain occurred on the dates indicated in Schedule B hereto [*or for paragraph 53, Schedule C hereto*] to preclude the plant and equipment therein costed on the Standby Rates operating for the durations therein listed.
>
> (iv) or (b) The Work most affected by precipitation was the immediate road access to and across the reclamation bunds, other excavation and fill areas and the bunds themselves which were all constructed from clay material or general fill sourced from the GPN Borrow Source and the OLC Cut.
>
> (v) or (c) The aforesaid clay material turned into a slippery surface upon even minor precipitation and such surface was not a safe surface upon which to operate wheeled plant and, further and in the alternative, the operation of Contract plant and equipment would have caused immediate degradation to the road and fill surface.
>
> (vi) or (d) In the premises, what constituted sufficient rain at any point in time was properly referable to the overall site conditions at the time of the rain and the subsequent weather conditions and the extent to which drying occurred.
>
> (vii) or (e) The plaintiff could only safely operate or operate without degradation to complete conforming work, the plant and equipment provided in Schedule B1 [*or for paragraph 53, Schedule C1*] … for the durations, work and at the locations identified therein.

[217] Reading Schedule B to the 2FASOC reasonably, in conjunction with paragraph 41 read as a whole: the columns in the table in Schedule B represent each day on which it is asserted by the plaintiff that its plant was vulnerable to standby because of "weather". I

[15] Roman numerals in paragraph 41; letters of the alphabet in paragraph 53.

have used the phrase "vulnerable to standby" as a shorthand way to describe AE's pleaded case which acknowledges that on some days, for some hours, certain of its plant could be used notwithstanding the weather.

[218] There is a row for each item of the plaintiff's plant.

[219] Each cell of the table states the hours on which a particular item of plant was stood-by "for weather" – ranging from 0 to 10. So, for example, Schedule B indicates that on 28 April, Dozer Cat D6R was on standby for six hours.

[220] Schedule B1 is a table providing further and better particulars of the standby of plant. It too has a column for each day on which it is said that the plaintiff's plant was vulnerable to standby because of weather and a row for each item of plant.

[221] In Schedule B1, the column for each day is subdivided into a column for "Hours" and a column for "Location". This table is entitled "Wet Weather Utilisation" and it shows which items of plant were, despite "the weather", used, including where on site and for what duration. So, for example, Schedule B1 shows that on 28 April, Dozer Cat D6R was used for four hours at "F02/F03". A legend to the table explains that F02 was the "Overland Conveyor Place and Compact Fill" and F03 was "Reclamation Bund Place and Compact Fill".

[222] Thus, read together, Schedules B and B1 convey the way in which each item of plant was "utilised" (or not) when "weather" interfered with AE's work. For example, on 28 April, Dozer Cat D6R was stood down for six hours and worked for four hours placing and compacting fill.

[223] Schedule C, and Schedule C1, read reasonably, and in conjunction with paragraph 53, may be interpreted similarly.

Complaint that rainfall in millimetres has not been pleaded

[224] CMC complained that the amount of rain (in millimetres) said to have disrupted the plaintiff's work was not identified. CMC submitted that details of the millimetres was a "usual particular". CMC submitted that to plead the effect without stating with precision the factual cause rendered the particulars "objectively ambiguous". CMC submitted that there was no good reason why the amount of rain which fell each day was not pleaded. It was a necessary fact required to be identified so that the plaintiff was not taken by surprise at trial.

[225] AE submitted that the particulars in paragraphs 41(a) (iii) – (vii) clearly articulated that the quantity of rain that fell on any particular day was not a determining factor in its case. CMC's request for particulars of the amount of rain per day was improper. It was the condition of the site that mattered. For example, after three days of torrential rain, only a miniscule amount of rain would be required to shut the site down. AE submitted that it was "untenable" for the defendant to suggest that it would be caught by surprise by the facts as pleaded, which identified the rain-affected work days.

Conclusion re rainfall in millimetres

[226] I agree with the arguments made by AE. I do not consider it necessary for AE to plead the rain which fell on particular days in millimetres to avoid CMC being taken by

surprise. I consider the particulars in this regard disclose the case with sufficient clarity. I do not consider the particulars to be "objectively ambiguous" in this respect.

Complaints otherwise

[227] Apart from the complaint about the absence of pleading rainfall in millimetres, CMC submitted that the particulars were otherwise defective and ought to be struck out. It complained that –

- AE had not properly particularised the parts of the site affected nor where the equipment, allegedly precluded from being used, was to be used on those dates;
    - CMC submitted that, without that particularity, there was no causal nexus between "sufficient rain" and the alleged effect, namely that plant was not able to be used.
- there was inherent ambiguity in the use of the phrase "most affected" (in the second particular);
    - CMC submitted that that was ambiguous when the claim was that work could not be carried out at all – "not to greater or lesser extents".
- there was ambiguity in the reference to "other excavation and fill areas", which were not identified.

[228] CMC submitted that the contract identified the specific areas on the site where work was to be performed. It was not difficult or onerous for the plaintiff to plead –

- the areas of the site actually affected by the alleged inclement weather – not just the areas "most affected" and not in a general way; and
- where each item of plant was intended to be used on those days – to establish the causal nexus between the rain and the inability of the plant to be used.

[229] CMC referred to AE's response to its complaint in correspondence about these particulars. AE said in that correspondence that the areas of the site affected were "the parts each item for which standby is claimed were working at that time and in the alternative was the whole of the site". CMC noted that that was not pleaded. If it was intended to identify parts of the site by reference to the plant working it, then that should be particularised.

[230] AE responded by pointing out that it had, by way of paragraph 41(a)(i) and Schedule B, identified each item of plant and equipment affected by "precipitation and its consequences". By way of paragraph 41(a)(v) and Schedule B1, AE had identified each item of plant and equipment and the area within which each *could* be used on days otherwise affected by precipitation and its consequences.

[231] AE submitted that it was implicit that all other areas of the site, other than those identified in Schedule B, could not be worked on. Also, the Works were, for the most part, clay (that is the GPN borrow pit and OLC cut, the haul roads and the fill being placed in the Reclamation Bunds). Wet clay was slippery. It was unsurprising that inclement weather could operate to preclude the Work. AE asserted that if CMC

contended to the contrary – then it was for it to plead those days and the plant which it says were able to work at any time the plaintiff contends they were unable to, due to inclement weather. AE submitted that CMC's complaint was oppressive: it had been provided with proper notice of the case it was to meet.

[232] CMC complained further that the particulars in Schedule B1 and Schedule C1 purported to show what plant *could* work on those days when wet weather was alleged to have forced certain plant to be placed on standby. Those particulars, it submitted, were irrelevant to the allegation of what plant *were prevented from being utilised* on the dates due to inclement weather. Because they were irrelevant, CMC submitted that they ought to be struck out.

Conclusion as to ambiguity in paragraphs 41(a) and 53

[233] I do not consider the particulars in Schedules B1 and C1 to be irrelevant – they complement the particulars contained in Schedules B and C, and are to be read (respectively) together. Read together, they provide a comprehensive picture of the status of the plaintiff's plant (utilised or not, and, if utilised, then where utilised) on each relevant day.

[234] While there may be generality, or inelegance in expression, in some of the paragraphs of the particulars, especially if each paragraph is read in isolation, in my view particulars (iii)(a) – (vii)(e), read together, convey with sufficient clarity that, because of the nature of the site, the volume of "sufficient rain" – as in millimetres of rainfall on a particular day – which was such as to "preclude" the plaintiff's plant from "operating" depended on the overall site conditions at the time rain fell ("at the time of the rain and the subsequent weather conditions") and the extent to which drying occurred (that is, had previously occurred). The particulars also convey, with sufficient clarity, that the plaintiff alleged that "sufficient rain" meant that it could not operate its plant for the whole of, or part of, the days detailed in the schedules.

[235] As to CMC's submission that AE ought to state *where* each item of stood-by plant was meant to be working when it was stood-by, I note that in correspondence, AE informed CMC that the areas of the site affected were "the parts each item for which standby is claimed were working at the time and in the alternative was the whole of the site". While that expression might be a bit clumsy, it may be assumed that AE intends to assert that the parts of the site affected by sufficient rain such to require items of plant to be stood down were the locations at which the items of plant stood by were working at the time; or alternatively, the whole of the site. I consider that the particulars ought to include that explanation.

[236] I therefore order that the <u>first seven particulars of paragraphs 41(a) and 53 be amended</u> to include details about the part of the site relevantly affected by sufficient rain.

Conclusion re additional particulars (viii), (ix) and (x) of paragraph 41(a)

[237] Paragraph 41(a) as it was drafted in the FASOC was amended (as per the 2FASOC). In addition to the particulars (iii) – (vii) above, AE added the following particulars –

> "(viii) On some, or all occurrences of rain on the Site, the servants or agents of the defendant directed the plaintiff to cease work in whole or in part.

(ix) In respect of the aforesaid, on some occurrences of rain on the Site, the servants and agents of the defendant would identify exclusions of the *'cease work'* directions.

(x) The plaintiff will supply further particulars of this allegation when it has completed its investigation."

[238] CMC complained about these added particulars. It submitted that the allegations, about directions, could not be pleaded without particulars and the way it was pleaded was ambiguous. These were new allegations relevant to an important part of its defence: the plaintiff was only entitled to standby costs when it was *directed* to standby.

[239] I agree that the particulars as pleaded are not sufficient to inform the defendant of the case it has to meet as to the directions it is said to have given. I note the plaintiff's indication that it will provide further particulars when it has completed its investigation. The preferable way to deal with this matter is by way of a timetable – rather than the striking out of these particulars.

Paragraph 60

[240] Paragraph 60(c) states –

"The Contract relevantly provided: … (c) That the measurement of the fill volumes under the Reclamation Bunds C Area was to be adjusted for settlement over and above the measured quantity of material placed as calculated by the difference between the pre-existing ground surface and the finished surface of the reclamation bunds."

[241] The particulars of that assertion included, at (iv), that –

"The quantity for fill in the Schedule of Rates includes an allowance of approximately 11% additional volume of fill than measured from the Contract drawings, from which the plaintiff seeks the inference that settlement was to be allowed for in the volume measurement of fill to be placed."

[242] CMC referred to rule 150 which relevantly provides –

"(1) Without limiting rule 149, the following matters must be specifically pleaded –

(a) breach of contract …;

(b) every type of damage claimed including, but not limited to, special and exemplary damages;

…

(2) Also, any fact from which any of the matters mentioned in subrule (1) is claimed to be an inference must be specifically pleaded."

[243] CMC complained that AE had purported to plead a specific contractual requirement, but had not identified where it was found or the words which were alleged to have that effect in the Schedule of Rates. Nothing in the Schedule of Rates referred to quantities for fill including an allowance for settlement. CMC complained that AE's reply in correspondence was that the percentage of settlement was derived from the "WICET judgment" – but that was not what was stated in particular (iv). I note that in *CMC v WICET*, Flanagan J found that there was an allowance for settlement in the head contract.

[244] In its written reply to this complaint, AE submitted that its pleading was not ambiguous: the answer was "on the face" of its pleading.

[245] Particular (iv) asserted that –

- the volume of fill measured from the Contract drawings is a lesser volume [than] indicated in the Schedule of Rates;
- the difference between the two volumes is 11%.

[246] AE said that paragraph 60(c) alleged that the volume of fill placed was to be measured by calculating the difference between the preconstruction surface and the completed surface profile with an allowance for settlement. AE said that the inference it pleaded, to be drawn from paragraph 60(c) and 60(c)(i) – (iii), was that the difference between the volume as measured from the drawings without adjustment for settlement, and the volume in the Scope of Works, was the effect of settlement.

[247] AE further submitted that the pleading was consistent with the evidence led and the assertions made by CMC in *CMC v WICET*.

[248] AE submitted that both parties knew what they were dealing with – in the sense that the fill was to be placed upon highly compressible natural marine sediment, which had been taken into account in the calculation of the Schedule of Rates.

[249] Counsel for AE took me to paragraphs [991] – [997] of Flanagan J's judgment to make good his point that part of the contractual mechanism for settlement was to adjust for volume based on the difference between pre-and post-construction surface measurements.

[250] In those paragraphs, Flanagan J said (footnotes omitted) –

> "*Cell 15 – Filling Reclamation Bunds Area C – Item 89*
>
> [991] This item concerns the appropriate quantity calculation for fill that was placed in the area of the Reclamation C Bunds. The parties agree that CMC has been paid $1,579,039.80 in respect of this item. WICET alleges that CMC is only entitled to $1,421,276.81 for this item. CMC should therefore repay WICET $157,762.99. WICET assesses the alleged overpayment by reference to the quantity of fill identified by Xcel [WICET's audit surveyor]. The total filling volume identified by Xcel is 289,465.746 $m^{3.}$

[992] CMC asserts that the volume identified by Xcel is incorrect because it does not allow for settlement of the bunds which took place. Aurecon Hatch's design for the bunds included an allowance of 10% of fill volume for settlement of the bunds. Once that 10% fill volume allowance is applied to Xcel's figure, the resultant volume calculation is 318,412.321 m^3, which is less than a 1% difference with CMC's claimed volume.

[993] CMC's expert surveyor, Mr Sippel, in his report at [4.10] accepted that the intent of the Aurecon Hatch document was that an allowance of 10% for settlement was made. Mr Sippel opined that it would follow that a similar allowance should be reasonably applied to the Xcel calculation of general fill. This allowance for settlement of 10% was agreed to by both surveying experts in the joint expert report.

[994] WICET submits, however, that an allowance for settlement of 10% ought not be made. WICET relies on a contractual document entitled 'On-Site Civil Works – Supplementary Technical Specification' which states as follows:

> '8.19.8 Allowance for settlement
>
> It is expected that all filled earthworks areas will settle with time during the construction period. In particular, fill earthworks within Tidal Areas will be subject to significant settlement due to consolidation of the underlying soft soils.
>
> …
>
> Within Tidal Areas it is expected that the level of the existing ground surface prior to filling will settle with time during construction, and will be somewhat lower at the time final finished earthworks levels are achieved (including after surcharge fill is removed where applicable). As such, the calculation of quantities for fill within Tidal Areas shall include an adjustment to the level of the surveyed "prepared existing ground surface". The magnitude of the quantity adjustment shall be based on the results of relevant settlement plate monitoring records. Beneath fill batter areas, the magnitude of the quantity adjustment shall be calculated as half the magnitude of the estimated settlement at full batter height. The magnitude of the quantity adjustment shall be reasonably agreed with the Principal/Superintendent prior to claim.
>
> The Contractor shall make necessary allowance for settlement within the Standard Work Item 3301, which is for all general filling works. No separate or additional payment shall be made for allowance for settlement.'

[995] By reference to the last paragraph of this specification, WICET submits that CMC was obliged to make allowance for settlement in its

rate, and is not entitled to additional payment for settlement. I do not accept this submission. The second paragraph of the specification contains the following words:

> 'As such, the calculation of quantities for fill within Tidal Areas shall include an adjustment to the level of the surveyed "prepared existing ground surface".'

[996] I accept CMC's submission that when paragraphs 2 and 3 of the specification are read together the specification contemplates a calculation of quantities making an adjustment for settlement. There is, however, no specific allowance, apart from the calculation of quantities pursuant to paragraph 2, for settlement.

[997] It follows that no adjustment should be made to the amount already paid by WICET to CMC. Even though Mr Sippel's calculation would suggest that CMC should repay WICET an amount of $15,635.30, there is only a 1% difference in CMC's claimed volume and Mr Sippel's calculation. In those circumstances, I accept that CMC's claim as originally made was reasonable."

[251] AE submitted that the inference was open from the judgment in *CMC v WICET* that the 11% (10 +1) claimed by CMC was consistent with the plaintiff's pleading at 60(c)(iv). Counsel for AE submitted that CMC's proposition was extraordinary when it had used that figure in another trial and secured a considerable amount (in excess of $1.4 million) on the basis of that figure.

[252] Counsel for AE also took me to paragraph 5 of the FADCC which stated –

> "The defendant admits the allegations contained in paragraph 9(d) of the Amended Statement of Claim, but further says that the Contract also included the terms and conditions of the Head Contract to the extent that they related to the Contract.
>
> **Particulars**
>
> Clause 1.2 of the Formal Instrument of Agreement on its proper construction."

[253] He submitted that the plaintiff was entitled to plead its case in the way it had pleaded it and no further particulars were required to explain what was said at (iv).

Conclusion

[254] Whether or not CMC used that same figure (or approximately that figure) in its quantity calculation for fill placed in the Reclamation C Bunds Area in its claim against WICET, the question is whether the particulars sufficiently convey the facts from which the inference ("that settlement was to be allowed for in the volume measurement of fill to be placed") may be drawn.

[255] The facts from which the inference is said to be available are the facts, as pleaded in particular (iv), that the fill quantity in the Schedule of Rates *is 11% greater* than the fill

measured from the Contract drawings. AE does not plead that there is a term of the Contract explicitly to that effect – rather it pleads that that inference may be drawn from the stated fact that such an allowance may be detected when one compares the fill quantity in the Schedule of Rates with the fill as per the Contract drawings. Further, that particular is to be read in conjunction with particulars (i), (ii) and especially (iii), which at [8] refers to section 8.19.8 of the contractual document, "On-Site Civil Works".

[256] It may be that the stated facts do not in fact give rise to the inference which AE asserts they do – but that is not the question for me.

[257] I consider that paragraph 60(c)(iv) is adequately pleaded. It is not to be struck out.

Paragraph 96 (within the Rocky Fill claim)

[258] CMC complained about paragraph 96 which asserted that, by various oral directions, the defendant required the plaintiff to excavate material "which did not meet the definition of General Fill", which material the plaintiff defined as "Rocky Fill".

[259] Paragraph 96 states –

> "As a part of S129, and by way of oral directions, the defendant required the plaintiff to excavate materials from the GPN Borrow Pit and the OLC Cut which did not meet the definition of General Fill [the **Rocky Fill**].
>
> Particulars
>
> (a) The material contained particle sizes in excess of 200 mm.
>
> (b) The oral directions were given at various times following 3 April 2012 until the completion of the Bunds as particularised below insofar as they can be.
>
> (c) On or about 10 April 2012, at a site meeting attended by Fitzgerald, Morgan, Henrick and Schultz, oral directions were given by the servants or agents of the defendant to the plaintiff.
>
> (d) The plaintiff says the oral directions were delivered by the defendant's servants or agents under a pattern of conduct following the delivery of S129 wherein during the Work some, or all, of the defendant's servants or agents on behalf of the defendant, at various time which are unable to be further particularised, directed the plaintiff to excavate the Rocky Fill and place it in the Bunds.
>
> (e) The oral directions were variously given by:
>
> (i) Grey.
>
> (ii) Barry.
>
> (iii) Schultz.

(iv) Sleader.

(v) Greg Hendrick [**Hendrick**].

(f) The oral directions were variously given to:

(i) Fitzgerald.

(ii) Alexanderson.

(iii) Terry Morgan [**Morgan**].

(iv) Shannon Sharp [**Sharp**].

(g) The plaintiff is unable to further particularise the allegation until the defendant has completed disclosure."

[260] CMC complained that the particulars provided were –

- too vague and ambiguous (especially in paragraph 96(e));
- exceedingly general;
- confusing; and
- failed to "articulate with precision" the case the defendant had to answer with respect to the oral directions.

[261] As to the assertion by AE in paragraph 96(g) that it could not give further particulars until there had been disclosure, CMC asked, rhetorically, how disclosure of *documents* would disclose *oral* directions and further, on what basis was the assertion then made.

[262] CMC referred me to paragraphs 28 and 29 of the FASOC/2FASOC as examples of "proper particulars" of oral directions. It sought an order for particulars of the directions, and if none were provided, a striking out of the paragraph. CMC complained that the plaintiff had made no attempt to identify the content or effect of the various oral directions alleged to have been given.

[263] AE was content to rely on its written submissions in response to this complaint. Those submissions noted that there was no complaint about paragraph 100, although the heading in CMC's written submissions referred to paragraphs 96 and 100.[16]

[264] As to the complaint about paragraph 96, AE submitted that paragraphs 95, 96(a) and 96(c) were sufficient particulars of paragraph 96: the defendant was on sufficient notice of the case it had to meet.

Conclusion

[16] Paragraph 100 harks back to "The Rocky Fill Directions". The Rocky Fill Directions are defined in paragraph 94, about which there is no complaint. Indeed, the particulars of the Rocky Fill Directions are plainly adequate.

[265] In my view paragraph 96(g) of the 2FASOC contains an acknowledgement by AE that further particulars of the directions are required.

[266] Regardless of that acknowledgment, I consider that the paragraph is not sufficiently particularised. While paragraph 96(c) is of reasonable particularity, it does not assist in the defendant's understanding of the phrase "pattern of conduct" which appears in (d).

[267] However I am not convinced that evidence of oral directions might not be found in documents. The preferable way to deal with this complaint is by way of a timetable for the delivery of particulars.

Paragraphs 101 and 104

[268] These paragraphs provide as follows –

> "101. The '*reasonable rate*' for placing and compacting Rocky Fill was:
>
> (a) $5.71 per m^3 [the **Reasonable Rate**]; and
>
> (b) Reasonable direct additional plant and equipment consumables and maintenance costs associated with the placement of Rocky Fill as opposed to General Fill.
>
> Particulars
>
> (i) Tyre damage.
>
> (ii) Ground Engaging Tools [**GET**] wear.
>
> (iii) Compactor pedestal cap wear.
>
> (iv) Dozer undercarriage wear.
>
> …
>
> 104. The reasonable payment under the Contract [the **Rocky Fill Reasonable Payment**] for the placement of Rocky Fill was $513,047.
>
> Particulars
>
> (a) The volume of Rocky Fill was in the order of 127.540 m^3 as pleaded in paragraph 100 hereof.
>
> (b) The unpaid or unclaimed amount of the Reasonable Rate was $2.10 per m^3.
>
> (c) The costs associated with tyre damage were in the order of $26,948.
>
> (d) The costs associated with wear, in excess of usage for General Fill, to GET is in the order of $115,263.

(e) The costs associated with wear, in excess of usage for General Fill, to compactor pedestal caps is in the order of $26.714.

(f) The costs associated with wear, in excess of usage for General Fill, to dozer undercarriages is in the order of $87,767."

[269] CMC's complaint is that the basis of the calculation of the "additional costs" had not been provided – that is, the additional costs referred to at 104(d), (e) and (f).

[270] CMC referred to rule 155(2)(c). Rule 155 states –

"(1) If damages are claimed in a pleading, the pleading must state the nature and amount of the damages claimed.

(2) Without limiting rule 150(1)(b), a party claiming general damages must include the following particulars in the party's pleading –

(a) the nature of the loss or damage suffered;

(b) the exact circumstances in which the loss or damage was suffered;

(c) the basis on which the amount claimed has been worked out or estimated.

(3) If practicable, the party must also plead each type of general damages and state the nature of the damages claimed for each type.

(4) In addition, a party claiming damages must specifically plead any matter relating to the assessment of damages that, if not pleaded, may take an opposing party by surprise."

[271] CMC also referred to rule 158(1) which states that –

"If a party claims damages including money the party has paid or is liable to pay, the pleading must contain particulars of the payment or liability."

[272] CMC sought an order that the plaintiff provide the particulars of the calculation of the additional costs it pleaded.

[273] AE argued that this complaint by CMC was "otiose" by reason of the deemed admission made by CMC in paragraph 113(a) of the FADCC. Paragraph 113(a) states –

"The defendant denies the allegation at paragraph 101(a) of the Amended Statement of Claim in relation to the reasonable rate for the rocky fill, as:

(a) There is no entitlement to this amount by the plaintiff on a proper construction of the Contract."

[274] Developing its deemed admission argument, AE submitted that it had pleaded that –

- where there was no rate in the Schedule of Rates for work required of it, a "reasonable rate" applied (paragraph 89 2FASOC);

- or, where CMC directed AE to perform work for which there was no rate in the Schedule of Rates, the Contract required CMC to direct a variation and the work was to be valued, in the absence of agreement, at a "reasonable rate" (paragraph 90 2FASOC);

- CMC directed AE to place and compact rocky fill for which there was no rate in the Schedule of Rates (paragraphs 96 and 97 2FASOC); and

- the "reasonable rate" for rocky fill was $5.71 per m^3 (paragraph 101(a) of the 2FASOC).

[275] AE argued that while CMC denied AE's *entitlement* to be paid a reasonable rate for the Rocky Fill, it had not denied the *quantum* of the reasonable rate. Therefore, it argued, the rate was no longer "in issue" upon the application of rule 166.

[276] Rule 166 relevantly states –

> "(1) An allegation of fact made by a party in a pleading is taken to be admitted by an opposite party required to plead to the pleading unless –
>
> (a) the allegation is denied or stated to be not admitted by the opposite party in a pleading; or
>
> (b) rule 168 applies."

[277] CMC submitted that rule 166 did not apply because it was limited to an allegation of fact. The allegation (in 101(a) 2FASOC) was one of law, or alternatively of mixed fact and law. CMC referred me to *Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Ltd* [2008] QCA 100 and *In Roma Pty Ltd v Adams & Anor* [2012] QCA 347.

[278] *Arnold Electrical* was an application for leave to appeal from a decision of the District Court upholding the decision of a Magistrate to dismiss the defendant's counterclaim.

[279] An issue which arose in the counterclaim was whether the plaintiff had incorrectly calculated its invoices with reference to the "construction" rate rather than the lesser "service" rate. At first instance, the Magistrate dismissed the counterclaim because he was not persuaded on the evidence that apprentices should have been paid at the lesser rate. At [35], Fraser JA explained that the defendant's counsel attempted to overcome the evidential difficulty by relying on a deemed admission. His Honour said (citations omitted) –

> "… It was contended that the plaintiff's pleaded explanation for its denial of the defendant's allegation that it overpaid the plaintiff (that it was not true) was insufficient. These submissions must be rejected. The rule is concerned with allegations of facts in pleadings. The allegation of an overpayment asserted a conclusion based on various matters that were not pleaded. The defendant's counterclaim did not allege any of the facts (as to the nature of the work done by the apprentices and the terms of the award) required to support the conclusion (which was also not pleaded) that the service rate was applicable. Rule 166 cannot be called in aid of a claimant who fails to plead or prove the material facts required to support the claim."

[280] My understanding of CMC's argument was that it relied upon *Arnold Electrical* to make the point that rule 166 concerned allegations of fact – rather than for the principle contained in the final sentence above.

[281] In *In Roma,* one of the grounds of appeal was that the primary judge erred in holding that there was an implied admission when the matters alleged were questions of law or mixed fact and law. The primary judge was found to be correct – the relevant matter alleged was one of fact. The Chief Justice (de Jersey CJ) said –

> "[25] The consequence of nonadmission in those circumstances, set out in r 166(5), depends upon the allegation being an allegation of fact.
>
> [26] Mr Dunning SC, who appeared for the appellant, submitted that because the construction of a deed (a matter of law) bears on the intent with which the deed was executed, whether it was delivered was a mixed question of law and fact …
>
> [27] Whether a deed is delivered is a question of fact … The matter involved, in determining whether a deed has been delivered, is the intent of the executing party, and that is a question of fact.
>
> [28] His Honour therefore rightly held that the appellant was deemed to have admitted In Roma was bound by the deed, having signed and sealed it (matters not in issue) and having delivered it (the deemed admission)."

[282] The relevant paragraph of the reply stated –

> "The Defendants do not admit the allegations of fact contained in paragraph 6A, 6B, 6C, both numbered paragraphs 6D, and paragraph 6E and paragraph 6B of the Further Amended Statement of Claim and with respect to the allegations contained in paragraph 6A, 6B, 6C, both numbered paragraphs 6D and paragraph 6E, the Defendants say that is this Honourable Court finds that the First Defendant granted a charge to the Plaintiff's as alleged, then the Defendants say that the Plaintiffs released the First Defendant from the charge as alleged in paragraph 6 hereof."

[283] The allegations in paragraph 6 were to the effect that the plaintiff's solicitors had sent the charge document to the first defendant's solicitors (Mullins Lawyers) by email; Mullins Lawyers sent it by email to the second defendant to execute on behalf of the first defendant; the first defendant executed the charge; the second defendant sent copies of the executed documents to Mullins Lawyers by facsimile; the charge was signed, sealed and delivered by the first defendant upon execution by the first defendant, whereupon the first defendant was bound by its terms.

Conclusion

[284] I note the distinction between the pleading in the FADCC responding to the allegation in paragraph 89 of the 2FASOC and the pleading in response to paragraph 101(a) of the 2FASOC.

[285] Paragraph 89 of the 2FASOC alleges that, by operation of law or to give the Contract business efficacy, a term was implied into the Contract that, if the Schedule of Rates did not provide a rate for a particular type of work, then the defendant was entitled to be paid at a "reasonable rate" for that work.

[286] The response to that assertion, at paragraph 101 of the FADCC, is, essentially, that no such term was implied into the contract. Paragraph 101 of the FADCC states –

> "As to paragraph 89 …, the defendant:
>
> (a) denies the allegation contained therein because the allegation is incorrect on a proper construction of the Contract as pleaded above in paragraph 6; and
>
> (b) denies that there is any such term implied into the Contract, as the executed Contract constitutes the entire agreement between the parties as provided in clause 6 of the Formal Instrument of Agreement.
>
> Particulars
>
> The defendant repeats and relies upon the particulars subjoined to paragraph 6 above."

[287] Reading the defendant's pleadings as a whole, CMC's response to paragraph 101(a) of the 2FASOC, which asserts that the "reasonable rate" included a price per metre cubed,[17] was that there was no "entitlement to the amount" on a proper construction of the Contract (my emphasis). Thus, the defendant takes issue with –

- the implication of the condition (as per paragraph 101 FADCC – it is incorrect on the proper construction of the contract, which contained the entire agreement);

and

- the rate (as per paragraph 113 of the FADCC).

[288] And further, the defendant has explained the reason for its nonadmission: the amount is not payable on a proper construction of the Contract. In my view, rule 166 does not assist AE.

[289] Regardless, rule 155(2)(c) is clear and in my view AE must comply with it before any question of deemed admissions arises.

[290] I note that AE has indicated in its written submissions that were I to require compliance with that rule, it would plead to the effect that the "reasonable rate" had been calculated by reference to arm's-length market rate for that work.

[291] With respect to paragraphs 101 and 104, I direct AE to comply with rule 155(2)(c).

Alleged "improper" particulars where document simply referred to

---

[17] Which was added to certain other costs as per 101(b).

[292] In its written submissions, CMC complained that AE had referred to documents in many paragraphs of its FASOC without identifying the part of the document upon which it relied for the effect for which it contended. CMC referred to *Bloeman v Atkinson.*

[293] I note AE's complaint that there has been non-compliance with Part 8, Chapter 11 of the UCPR in CMC's making these complaints.

[294] AE submitted that, by way of amendment of the FASOC, it had referred to the specific parts of the relevant documents upon the defendant's request (as per this application). It asserted that it was "perfectly reasonable" for it not to have indicated the particular passage relied upon in a document common to the parties were it not asked to do so. Once asked (I assume as per CMC's written submissions on this application) – it did so. That raised a question of costs. AE added that if the matters were not addressed by way of the amendments now appearing in the 2FASOC, they were dealt with in its written submissions.

[295] CMC did not press every complaint it made about documents in its written submissions (at paragraph 120) – implicitly acknowledging that to a significant extent its complaints had been addressed. It did however maintain its complaints about the following paragraphs of the 2FASOC –

- 10(m)(iii), (iv) and (v); and
- 32(c), (d), (h), (i) and (j).

Paragraph 10

[296] As to paragraph 10, CMC complained that the nominated particulars did not support the allegation in the paragraph of "a direction".

[297] I note that this is a different complaint to the one made in written submissions – which concerned AE's failing to identify the relevant part of a document upon which it relied.

[298] CMC acknowledged that particular 10(m)(iv) did support the allegation of a direction, but complained that the nominated paragraphs did not.

[299] The allegation in particular 10(m) is that –

> "Pursuant to a direction given by Vance in or around October 2011, the plaintiff was to complete Work in accordance with the Construction Contract."

[300] Mr Vance was CMC's project manager.

Conclusion

[301] In my view, reasonably interpreted by CMC, the particulars which follow paragraph 10(m) provide support for every aspect of its allegation.

[302] Particulars (i) to (v) elaborate upon the reference in 10(m) to "Work in accordance with the Construction Contract" – which informed the content of the direction. And

particular (vi) particularises the circumstances in which the direction was given (without reference to its content).

[303] I do not order the striking out of paragraphs 10(m)(iii), (iv) and (v).

Paragraph 32

[304] Paragraph 32 of the 2FASOC states –

> "The defendant knew that the plaintiff was mobilising plant, equipment and personnel at the defendant's instruction which could not be utilised at the time of mobilisation and would be on standby pending the availability of the work areas for the Project."

[305] Lengthy particulars follow.

[306] CMC's complaint about the particulars provided in 32(c), (d), (h), (i) and (j) was that although they identified parts of documents, they did not refer to the effect of those parts. CMC complained that the impugned particulars did not convey *how* it was said that the defendant had the knowledge asserted in paragraph 32.

[307] During oral submissions, counsel for CMC acknowledged that the effect of paragraph 32 might be that AE is asserting that the defendant's knowledge was to be inferred from the content of the particulars– but he said that, if AE was relying upon knowledge by inference, then that ought to be spelt out.

Conclusion

[308] In my view, reasonably interpreted, the particulars which follow paragraph 32 provide the facts from which it is asserted that it may be inferred that the defendant knew that the plaintiff was mobilising plant et cetera which could not be utilised at the time of mobilisation.

[309] I do not order the striking out of the particulars of paragraph 32.

PART B: CMC's application for a variation of Brown J's order

Overview of application

[310] On 26 September 2018, Brown J ordered CMC to provide certain particulars to AE, which AE had requested, by 15 October 2018.

[311] CMC responded to that order by providing particulars in response to some of AE's requests and, in the case of others, by asserting that the requests were embarrassing or not proper requests for particulars.

[312] On 16 November 2018, CMC applied for an order varying or setting aside Brown J's order so that it required, by 15 October 2018, a *response* to AE's request for particulars, and not the particulars themselves.[18]

[313] My understanding is that CMC has applied to vary the order so that it cannot be said to be in breach of it, and thus avoid the potential consequences of a breach of the order in its present form under rule 374.

---

[18] No point was taken about the retrospective effect of such an order were it to be made.

Context for CMC's application to vary paragraph 3 of the order made by Brown J

[314] AE made a request for particulars of CMC's defence and counterclaim on 29 June 2018.

[315] That request was accompanied by a "rule 444 letter" which asserted that CMC's particulars of the allegations as pleaded in the defence and counterclaim were insufficient. AE asserted that if the particulars it sought were not provided by 20 July 2018, it was entitled to orders which struck out the offending paragraphs of the defence and counterclaim; struck out the inadequate particulars; and judgment (under rules 292 or 658).

[316] CMC's "rule 445 reply" was provided on 6 July 2018. In it, CMC said it was surprised by AE's complaints because it told AE (on 30 May 2018 and 8 June 2018) that it was taking longer than usual to prepare its defence and that it had asked AE to permit an extension of time within which it might do so, which AE had refused.

[317] It stated that things were taking longer than expected because the allegations made in the Amended Statement of Claim were (then)[19] almost seven years old, and many concerned oral conversations with its ex-employees. It said (my emphasis) –

> "1.5 The reality is that your client's decision to refuse to grant our client an extension of 28 days to source the appropriate information and file its defence meant that our client did not have as much time as it needed to investigate the allegations.
>
> 1.6 Our client is seeking assistance from the relevant employees with knowledge of the matters in dispute. We note that 2 of these ex-employees live in North Queensland and are required to travel for work with their current employers, so that their availability is limited.
>
> 1.7 In the circumstances, once the relevant instructions are obtained our client proposes review [sic] and if necessary amend its pleadings, and **to respond to the requested particulars**."

[318] On 9 July 2018, AE wrote again to CMC noting that CMC had not "specifie[d]" the two employees which were causing the delay; nor had it indicated when it expected to receive "relevant instructions" nor had it made any commitment as to when it would amend its pleadings.

[319] On 16 July 2018, AE filed an application for a variety of orders: *first*, summary judgment in relation to a certain part of its claim; *in the alternative*, the striking out of paragraphs 14 to 35 of the defence; and *further and in the alternative*, the adjournment of its application for summary judgment and an order that the matter be placed on the "Commercial List" (intended to be a reference to the Supervised Case List). It may be noted that there was no application concerning particulars.

[320] On 1 August 2018, the day before the application was heard, Mr Frigo (solicitor for AE) sent an e-mail to Mr Brackin (solicitor for CMC) about proposed case management directions (my emphasis) –

---

[19] In June/July 2018.

"Dear Dale,

We refer to the plaintiff's application filed 16 July 2018, and the supporting affidavit of the undersigned, that has **essentially sought**, inter alia, **that the proceedings be case managed under supervision and appropriate directions be given accordingly**.

Therefore we kindly advise that should the Court be inclined to grant the plaintiff's request for placement of the proceeding on the Supervised Case List, we have prepared the *enclosed* draft **directions** for which we shall provide to the Court at the hearing.

Kind Regards

Ronald Frigo LLB (Hons)

Solicitor."

[321] The draft directions sought (among other things) the provision of the particulars requested by AE by 16 August 2018 (my emphasis) –

"Pleadings and Particulars

4. The defendant is **to provide the particulars requested by the plaintiff**:

a) in its request for particulars of the defence and counterclaim dated 29 June 2018; and

b) in the reply and answer;

by on or before 16 August 2018."

[322] AE's application was heard by Douglas J on 2 August 2018.

[323] At the hearing, in response to Mr Codd's complaint that the counterclaim did not plead any material facts in support of a certain allegation his Honour said "Well you can see[k] further particulars, couldn't you, of the allegation in paragraph 12?" The exchange continued (my emphasis) –[20]

"MR CODD: Yes. And, your Honour, further particulars have been sought.

HIS HONOUR: Yes.

MR CODD: The letter under rule 444 was presented. There was a response that came back. I understand my learned friend doesn't cavil at the suggestion that the matter should be placed under court supervision.

HIS HONOUR: Yes.

---

[20] Transcript 1 – 19 l 20 – 1 – 20.

MR CODD: I have a set of draft directions **which would allow time** ….

…

MR CODD: … there's also an **indication that the defendant was going to provide further amended pleadings and particulars when they could access witnesses**. **But there's no date.** And despite having – a date being requested – and this is, I think, in excess of a month ago, or around a month ago – **the defendant's simply not indicated when it's going to do anything**.

HIS HONOUR: Okay. Are there other particular criticisms of the defence?

MR CODD: The main issue is – the main criticisms, or all the criticisms are set out in the request for particulars and in the body of the reply and answer. So in the body of the reply and answer, I've dealt with each of the complaints, where it's said the pleading is deficient. And they largely turn on the proposition that the defendant simply has failed to identify what debts - - -

HIS HONOUR: What's that document number again?

…

HIS HONOUR: And you say these particulars are not sufficient?

MR CODD: No, your Honour. Sorry, no particulars have been provided other than what's in the pleading. But in my submission, they're not sufficient.

…"

[324] It may be noted that although Mr Codd said that the defendant indicated that it would provide particulars (and further amended pleadings) once it had spoken to witnesses, CMC's correspondence of 6 July 2018 communicated to AE that it needed more time to provide a response to the request for particulars, rather than the particulars themselves.

[325] It may be further noted that Mr Codd's primary criticism was the absence of any indication by CMC as to *when* it would do certain things. That concern is consistent with AE's desire that the matter be managed on the Supervised Case List.

[326] His Honour then returned to the substance of the strike out application and heard from counsel for CMC, who, as well as responding to the summary judgment application, said that CMC would like 28 days to amend its defence and counterclaim.

[327] Mr Codd handed up to his Honour a "set of draft directions" which had been "circulated" as the basis for "supervised case list directions". Those draft directions provided the basis of the orders made by his Honour.

[328] After dismissing the application for summary judgment with costs, his Honour ordered that the proceedings be placed on the Supervised Case List. His Honour also made an order in terms of paragraph 4 of the draft directions.

[329] On 16 August 2018, CMC's solicitors wrote to AE's solicitors, referring to his Honour's order that CMC "provide its response" to AE's request for particulars, rather than the particulars themselves. It may be noted that CMC incorrectly described the effect of his Honour's order.

[330] AE asserted, by letter on 5 September 2018, that –

- CMC failed to comply with paragraph 5 of his Honour's order by failing to provide the particulars requested by 16 August 2018; and
- CMC failed to comply with paragraph 6 of his Honour's order by failing to file an amended defence and counterclaim by 30 August 2018.

[331] AE said that if CMC did not comply with those orders, it would seek judgment under rule 374. AE required a response to its letter by 10 September 2018.

[332] On 10 September 2018, the solicitors for CMC explained that there had been a change of counsel; the defence and counterclaim would be forthcoming as soon as possible; and that (my emphasis) –

> "The plaintiff's request for further and better particulars will be addressed in the defence and counterclaim."

[333] On 26 September 2018, Brown J conducted a directions hearing in the matter. Mr Codd informed her Honour that the parties were largely in agreement about the orders her Honour ought to make. He said that the parties wished to bring the matter back to a timetable which was "sensible" and that the dates in the draft order he provided to her Honour had been "agreed in consultation" with CMC's counsel.

[334] CMC's (new) counsel appreciated that the order proposed was in terms of CMC providing *particulars* in response to AE's request, rather than *a response* to the request. Thus the issue was apparent to CMC at least by that date. Counsel said (my emphasis) –

> "MR TRIM: …
>
> Can I say one last thing … [about] the order that the defendant's to provide the particulars rather than might otherwise be – provide a response to a request for particulars. We are hopeful that we are giving all of the particulars but I need to flag, **for the sake of transparency to the court and I've discussed this with my learned friend, that it's possible that we may need to vary that order slightly at some point between now and the 15th.** We're hopeful we won't have to do that. **But I don't want it to be said that I hadn't made that abundantly clear in open court. So there's 100-odd requests and it may be that some form of them we just can't answer**. But we're hopeful that won't be the case. And - - -

> HER HONOUR: Can't answer at the moment or are you saying they're not a proper request.
>
> MR TRIM: **I think that it's can't answer at the moment but we're not certain.** We're still making inquiries, your Honour. I mean the order was what it was."

[335] Her Honour made an order which included, in paragraph 3, the following –

> "The defendant is to provide the particulars requested by the plaintiff: (a) in its request for particulars of the defence and counterclaim dated 29 June 2018; and (b) in the reply and answer, by on or before 15 October 2018."

[336] In accordance with another paragraph of the order made by her Honour, CMC filed and served its Amended Defence and Counterclaim on 28 September 2018, with additions to the original Defence and Counterclaim underlined. New particulars of several of the paragraphs of the Amended Defence and Counterclaim were provided – but of those, many included a statement to the effect that the defendant could not "presently" particularise or further particularise an allegation and that particulars or further particulars would be provided upon the completion of "interlocutory steps".

[337] On 15 October 2018, CMC's solicitors wrote to AE's solicitors enclosing "Further and Better Particulars" and explaining that they were proceeding on the basis that her Honour's order intended that CMC respond to the request by its stated date –

> "Incidentally we are proceeding on the basis that the order was not intending to require our client to answer invalid requests for particulars, such as a requests [sic] for evidence.
>
> We assume that you would not suggest otherwise, but if you disagree, the Defendant will apply for leave to vary the order to provide that only a "response" to a request for particulars is required where appropriate."

[338] The Further and Better Particulars responded to the request for particulars by way of –

- indicating that the particulars requested were provided in the Amended Defence;
- providing the particulars sought; or
- CMC's asserting that certain requests were confusing or embarrassing, or invalid, because they were requests for evidence.

[339] In the case of requests which CMC contended were requests for evidence, the defendant stated "In any event the Defendant intends to provide further particulars following the completion of interlocutory steps, including expert evidence. If necessary, the Defendant will apply for leave to vary the earlier orders to provide that only a "response" to this request for particulars is required (rather than the particulars)".

[340] On 22 October 2018, in rule 444 correspondence, AE maintained its complaint that CMC was in breach of Brown J's order.

[341] That letter also complained that "neither before Justice Douglas on 2 August 2018 or Justice Brown on 26 September [2018] did the defendant signal to the Court, as it does to the plaintiff now, that it would apply for leave to vary the order of either Justice Douglas or Justice Brown due to the alleged invalidity of the request".

[342] I note that the effect of CMC's correspondence was not that it would apply for leave to vary the relevant order "due to the alleged invalidity of the request" but rather on the basis that the order was (so it asserted) intended only to provide a date by which CMC was to *respond* to the request for particulars, not provide them. (In later correspondence,[21] AE conceded that it had erred in asserting that CMC's counsel said nothing about varying the order before Brown J.)

[343] AE said that it required compliance with Brown J's order, or it would apply for judgment under rule 374. It required a response to its letter by 25 October 2018, which was the day before the next review before Brown J.

[344] On 25 October 2018, CMC's lawyers wrote to AE's lawyers noting that the application (before Douglas J) sought no order in respect of particulars and arguing that the orders made by Douglas J were, in essence, "timetabling" directions. It stated that there was no substantive consideration of the validity of the particulars sought and that it would apply to the court for leave to vary the order to provide that only a response to the request for particulars was required. It said that it would "canvass the issue" before Brown J the next day.

[345] The matter was reviewed by Brown J on 26 October 2018. The matter was not canvassed beyond the parties agreeing to an order requiring CMC to file and serve its application to vary her Honour's order by a certain date.

CMC's submissions

[346] CMC submitted that the order made by Douglas J, and repeated by Brown J, was an order made for the purposes of case management. Neither court considered the validity of the plaintiff's request for particulars nor whether the particulars sought ought to be provided after the completion of disclosure and the provision of expert reports.

[347] CMC had responded to the request for particulars and in so doing had disputed the validity of certain of the requests. The real issue was therefore the propriety of some of the requests for particulars. That was the issue which ought to be determined – rather than allowing "the unintended consequences of enlivening a potential application for contempt or other consequences by reason of a failure to comply with an Order pursuant to rule 374 where the defendant bona fide disputes that certain requests for particulars are proper".

[348] CMC argued that if the order were construed "in its absolute terms", CMC would be compelled to provide "evidence" or to answer "embarrassing requests" and would be "precluded from disputing whether any of the requests were proper requests for particulars or should be provided before expert reports were available".

[349] In applying to vary the order, CMC relied upon the slip rule (rule 388); rule 667(2)(d); or the inherent jurisdiction of the Court.

---

[21] Dated 30 October 2018.

[350] Relevantly, the rules provide as follows –

> "**388** (1) This rule applies if –
>
> (a) there is a clerical mistake in an order or certificate of the court or an error in a record of an order or a certificate of the court; and
>
> (b) the mistake or error resulted from an accidental slip or omission.
>
> (2) The court, on application by a party or on its own initiative, may at any time correct the mistake or error.
>
> (3) The other rules in this part do not apply to a correction made under this order.
>
> **667** (1) …
>
> (2) The court may set aside an order at any time if –
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) the order does not reflect the court's intention at the time the order was made; …"

[351] CMC submitted that a judgment based on a plain misunderstanding of the position met the language of the slip rule, referring to *Queensland Pork P/L v Lott* [2003] QCA 271 at [19].

[352] CMC submitted that the discretion in 667(2)(d) was supplemented by the inherent jurisdiction of the court to ensure that orders made reflected the intention of the court and did not have unintended consequences which would work an injustice on one of the parties, referring to *Newmont Yandal Operations Pty Ltd v The J Aron Corporation* (2007) 70 NSWLR 411 at [75] – [80], cited with approval in *Rapid Roofing P/L & Anor and the Goldman Sachs Group Inc & Ors v Natalise P/L (as trustee for the St Ange Family Trust) & Anor* [2008] QCA 237 at [7] and *Frith v Schubert & Anor* [2010] QSC 444 at [10] – [15].

[353] Queensland Pork (QP) obtained summary judgment against Ms Lott in respect of pigs supplied to her for which it had not been paid. The primary judge made an order in QP's favour for $59,861.93 on 21 November 2002. His Honour mistakenly believed that the parties had agreed upon that figure. Having been made aware that there was no such agreement, his Honour considered the matter again on 12 December 2002 and gave judgment for QP in the sum of $74,130.17 – determining the amount by reference to the evidence placed before him.

[354] On appeal, Ms Lott argued that his Honour had no power to alter his original judgment under the slip rule (rule 388), under rule 667(2) or in the court's inherent jurisdiction. That argument was rejected. Cullinane J, with whom McMurdo P and Jones J agreed, said –

> "[19] It is said that His Honour's first judgment was the result of a deliberate decision and not inadvertence. Given that His Honour's judgment was based upon a plain misunderstanding of what the position was, I think this meets the language of the slip rule found in Rule 388(1)(b), namely 'mistake or error (which) resulted from an accidental slip or omission'. Furthermore I think that the contention of senior counsel for the respondent that the matter falls within Rule 667(2)(d) is also correct. This permits a court to set aside an order if the order does not reflect the court's intention at the time the order was made. Here is seems clear that His Honour at all times intended that judgment would be entered for the respondent in the sum for which the respondent had made out an entitlement after taking into account the credit and off-sets to which I have referred and was under the mistaken belief that the parties had agreed upon what that entitlement was and for reasons which cannot be now known arrived at the figure for which judgment was first pronounced.
>
> [20] I also think that in these circumstances the court would have an inherent power to correct the judgment …"

[355] The *Rapid Roofing* decision concerned an application by the defendants for a variation of a costs order on the basis that the court had made a "slip" when it ordered the plaintiff to pay 75% of the defendant's costs of *the trial* rather than its costs of *the action*. The defendant argued that there was no reason to think the court did not intend the defendant to receive (75% of) the costs incurred by them in the course of the four years during which the action progressed to trial, as well as the costs of the trial. The plaintiff did not dispute that the court may, under rule 667(2)(d) and its inherent jurisdiction, correct errors in costs orders, but argued that the defendant's application was not for the correction of a "slip" but rather for the correction of "a conscious and deliberate order", in which case the discretion conferred by rule 667(2)(d) was not enlivened.

[356] In *Rapid Roofing* there had been a delay of 18 months between the pronouncement of the costs order and the application to correct it. Keane JA, with whom the other members of the court agreed, was critical of the delay. It made the task of determining whether there had been a slip "unduly difficult" and also, the delay itself provided good reason to exercise the discretion adversely to the defendants.

[357] As to the first difficulty, Keane JA said (citations omitted) –

> "[15] … the discretion to make an order of the kind sought by the defendants does not arise unless the Court can be satisfied that [the] proposed alteration is not 'a matter upon which a real difference of opinion might exist'.

> [16] In this case, there are arguable reasons for the limited benefit of the order in question to the defendants …"

[358] One of those reasons included the defendants' delay in bringing the case to trial. The defendants submitted that they could have satisfied the court that the delay was not their fault. His Honour said – that explanation not having been given in the context of the costs argument – at best for the defendants, the costs order made was "less than fully informed" but it was not a slip. His Honour was not satisfied that the costs order made was not on the basis of a deliberate and conscious decision. In any event, the delay in seeking reconsideration of the costs order was such that his Honour would not have been disposed to exercise the discretion conferred by rule 667(2)(d) in favour of the defendants.

[359] CMC argued that Brown J's order was not a "conscious and deliberate order". To vary it in the way sought by CMC would allow "the proper course" to follow, namely the consideration by the court of the propriety of the request for particulars.

AE's submissions

[360] AE submitted that in the face of CMC's consent to the order before Douglas J it could not be said that there was an error in the record. The correction claimed had to be a matter about which no real difference of opinion could exist. It was not enough to show that the Court was less than fully informed, or that there was a misunderstanding of the extent of the issue at the time the order was made. It relied, for that submission, on *Atlantic 3-Financial (Aust) Pty Ltd & Anor v Marler & Anor* [2003] QSC 197 at [15].

[361] *Atlantic 3-Financial* concerned a solicitor's lien.

[362] On an application by former clients of a solicitors' firm, Helman J ordered that the firm deliver to the applicants –

> "all files and documents that they held in their possession which were the property of the applicants excluding all files in relation to which bills have been rendered on or before 11 April 2003."

[363] The solicitors' firm applied to correct or vary that order, relying on rules 388 and 667(2)(d), so that it read –

> "all of the files and documents … set out in the affidavit of [X] by 11 April 2003."

[364] His Honour's original order and the reasons for it were delivered ex tempore. In his reasons, his Honour referred to 54 bills which were outstanding which concerned 54 files.[22] That number was based on an assessment of the files in the affidavit of X. His Honour explained at the application to vary (my emphasis) –

> "[13] On its face the … order … is not ambiguous, save possibly in one respect to which I shall refer. The reference to 'all files and documents that [the respondents] hold in their possession which are

[22] There were in fact 50 bills (for 50 files) outstanding – but that was not the matter which the respondents sought to have corrected.

the property of the applicants' is not I think ambiguous, and that order was, after all, **made on an originating application that asked for** an order that the respondents deliver up 'all files and documents that the respondent holds in its possession which are the property of the first and second applicants forthwith'. The exception of 'files in relation to which bills have been rendered' could possibly be regarded as ambiguous in the following way. It could be thought to refer not only to those files in relation to which itemized bills had been rendered, i.e., some of the fifty,[23] but also to those in relation to which no itemized bills had been rendered but in respect of which short-form bills had been rendered. That the latter category of bills was not intended to be the subject of the exception is made clear by the way in which the exception came to be inserted: … it was introduced at the suggestion of … the solicitor for the applicants, and was quite clearly intended to apply only to those bills of the fifty in relation to which itemized bills had been rendered.

[14] At the hearing no amendment of the first order was suggested, and no difficulty in interpreting it was raised, on behalf of the respondents, but the difficulty of interpretation has been raised since. It is said on behalf of the respondents that the course of the submissions before me … [indicated] that the order was confined to dealing with the fifty-four files. It appears clear to me that that is not so, and that the question of the fifty-four files arose only in the context of the difficulty that the respondents faced in rendering itemized bills as requested by the applicants. **As the issues for my determination were presented to me at the hearing** the enforcement of the general lien the respondents might have in respect of files in relation to which short-form bills had been rendered was not included. The respondents resisted the application on only two grounds: the first that was dealt with in the first paragraph of my reasons [an issue as to whether the lien had been abandoned], and the second that a reasonable time had not elapsed after the applicants' request for the rendering of itemized bills. The focus of the discussion of the fifty-four files was merely on the difficulty faced by the respondents in preparing the called-for itemized bills.

[15] To succeed in their application … the respondents must show that there was a clerical mistake in an order, or an error in a record of an order, resulting from an accidental slip or omission so that the clear intention of the judgment was not expressed (rule 388(1)); *Rose v Terry Hewat Commercial Diving Pty Ltd*, *SC* (Qd)*,* Demack J …) or that the orders made should be set aside because they do not reflect the court's intention at the time they were … made (rule 667(2)(d)). I am not persuaded that the respondents are entitled to the relief sought on either ground. If there was a **misunderstanding of the extent of the issues before me**, and if there was a consequential error in the order, that error can be corrected by the Court of Appeal, but in my view there is no error of the kind contemplated in either rule that

[23] As noted in the footnote above, there were in fact 50 bills (for 50 files) outstanding.

> permits or calls for my intervention. **Neither rule permits or requires a judge to sit on appeal from his or her own decision** – nor would such a course be desirable, for obvious reasons."

[365] Further, AE submitted, CMC's delay in making a prompt application for the court's reconsideration of the error militated against the court accepting an invitation to reconsider the order (*cf Rapid Roofing*).

[366] AE urged me to take the approach taken by Jackson J in *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 276 and to dismiss CMC's application and grant the relief sought by the plaintiff.

[367] *Parbery* concerned applications by 22 defendants to vacate certain orders made by Bond J and to replace them with directions as to the future conduct of proceedings. The defendants applied to set aside an order that they complete disclosure by 24 September 2018 and an order that they file and serve expert reports by 10 December 2018. They also applied for variations to other orders. The sole ground upon which the applications were brought was that the defendants were unable to comply with the order for disclosure – and could do no better than disclosure by the end of January 2019. The plaintiffs opposed the applications on the basis that the defendants' inability or incapacity to comply with the existing orders was self-induced, and consequent upon their deliberate failure to comply with their obligations under the UCPR and orders of the court, and that the opinion evidence about the time it would take to carry out disclosure was based on inadequate information.

[368] After explaining modern procedural law, and reciting the history of the defendants' response to the case managements orders made, his Honour listed the factors which were important in his consideration of the application, namely that (my emphasis) –

> "[98] (a) the defendants [had] not proved that they made a timeous plan or attempted to prepare their own case before the question of disclosure was first dealt with before Bond J on 19 April 2018;
>
> (b) notwithstanding the directions made on 19 April 2018 towards the preparation of a Document Plan for disclosure, based on reasonable times and steps, **the defendants steadfastly refused to engage in that process** up to 3 August 2018, when Bond J made the orders for their disclosure by 24 September 2018;
>
> (c) only in late July and August 2018 did the defendants first engage a consultant to do the work of assisting them in collecting, collating and preparing their documents for disclosure;
>
> (d) the defendants' **abject failure to attempt to disclose in accordance with the procedural timetable** for doing so is the cause of both their failure to comply with the disclosure order and any ability to do so within a reasonable time;
>
> (e) even so, the defendants will have organised and be able to disclose their documents by end January 2019, on the basis of whatever arrangements they have now put in place; and

(f) although the defendants **seek an indulgence** by orders to vacate orders they have not complied with and to rely upon opinions as to what they can achieve in preparing their cases going forward, **they have not disclosed anything except the most limited information as to the extent of their preparations in the past and to date**. There is no basis for an inference that the defendants' present non-compliance comes about after reasonable or conscientious efforts by them to comply with their overarching obligations under UCPR r 5."

[369] His Honour dismissed, in substance, the applications. His Honour instead made orders, generally in accordance with the revised steps contained in a draft order submitted by the plaintiffs. Those orders gave the defendants a "perhaps undeserved" opportunity to comply with extended times. His Honour ordered costs against the defendants on an indemnity basis for the following reasons (my emphasis) –

> "[108] The fact is the defendants **outright refused to comply** with those orders at any point up until the order for disclosure itself was ultimately made. In my view, that initial process of non-cooperation was significant in making these applications necessary and causing a significant loss of time and effort, both of the parties and of the court in having to deal with them. In the circumstances, in my view, it is appropriate that in each case, the application should be at the cost of the applicant defendants and that the costs should be assessed on the indemnity basis."

[370] *Parbery* makes no reference to the slip rule or rule 667(2)(d). Regardless, CMC has not behaved with anything like the defiance of the defendants in that matter.

[371] AE further argued that –

(a) the defendant's contention that the plaintiff's request for particulars was invalid was "misconceived";

(b) the parts of the defence, in respect of which the defendant has "refused to provide particulars" should be struck out;

(c) alternatively, the Court ought not to exercise a discretion in favour of the relief sought when the defendant had twice breached the orders it now seeks to vary, which were made without the defendant objecting to them; and

(d) the defendant's conduct was inconsistent with rule 5 of the *Uniform Civil Procedure Rules* 1999 [UCPR].

Discussion and conclusion

[372] The evidence presented on this application does not enable me to say anything about the reason why the draft order proposed by AE referred to the provision of particulars and not to the provision of a response to particulars, particularly in the light of CMC's correspondence of 29 June 2018. I am not able to say –

- whether the intention of the draft order was to reflect CMC's stance, as stated in correspondence, that it would provide a *response* to the request for particulars after consulting two ex-employees – but it was drafted incorrectly; or

- whether CMC's correspondence was misunderstood by the solicitor to whom it was addressed, or counsel – and the draft order reflected that misunderstanding; or

- whether AE – convinced that there was nothing improper in its request for particulars – intended the court to make such an order and anticipated that CMC would consent to such an order.

[373] It is without question that the draft directions were provided to his Honour on the basis that they suggested a timetable for procedural steps.

[374] Whilst his Honour was told that AE considered CMC's particulars insufficient, his Honour was not asked to, nor did he, consider the sufficiency of the particulars which had been provided or the validity of CMC's request for particulars.

[375] I infer from the transcript that his Honour did not turn his mind to the effect of the draft "supervised case list directions" before making an order in their terms.

[376] Similarly, at the directions hearing on 26 September 2018, the draft order was presented as one which dealt with the parties' concern to bring the matter back to a timetable that was "sensible". Brown J was not asked to turn her mind to its effect on CMC's obligation to provide particulars.

[377] It is disappointing that those representing CMC did not properly consider the draft directions, or appreciate their effect, before consenting to them. Having said that, it is perhaps not surprising (although it is not good enough) that CMC assumed[24] that it had consented to an order requiring it to *respond* to the request for particulars by a certain date given that there had been no argument before Douglas J (or Brown J) about the validity of the request for particulars or the appropriateness of CMC's response to it.

[378] In my view, it is very relevant to the determination of this application that it is an application to vary an order which was presented in draft as one of a number of supervised case list directions against the background of –

- a misstatement by counsel for AE about what CMC had indicated that it would do; and

- a complaint about there being no timetable for the things that CMC indicated it would do.

[379] The only submissions made by counsel for CMC about the draft order was about one of the dates proposed in it. I infer that he did not appreciate, or overlooked, the effect of the order sought by AE.

[380] In my view, Douglas J may be taken to have been mistaken as to the position of the parties. Not only did counsel for CMC fail to appreciate, or overlook, the effect of the

---

[24] See CMC's letter dated 16 August 2018.

draft order but he also did not correct Mr Codd's statement to his Honour about what CMC had indicated it would do (*cf Queensland Pork*). I consider his Honour's intention to have been to make timetabling directions, about which the parties agreed, to commence the court's supervision of the case.

[381] There was nothing conscious or deliberate in his Honour's making an order requiring the provision of particulars by a certain date. This was not a matter in which his Honour made an order in the terms of an originating application after the determination of the issues presented to him at the hearing of that application (*cf Rapid Roofing* and *Atlantic 3-Financial).*

[382] CMC does not seem to have realised its mistake until after 16 August 2018 – perhaps not until it received AE's correspondence dated 5 September 2018. It was certainly aware of it by 26 September 2018.

[383] CMC attempted to deal with the issue by way of correspondence dated 15 October 2018 which, in effect, sought AE's agreement to treat the order as requiring a response to the request for particulars, not the particulars themselves. When it was clear that AE was not prepared to treat the order in that way, CMC applied to vary the order.

[384] CMC's attempt to deal with the issue by way of correspondence first is understandable. I do not consider there to have been undue delay in its seeking to vary the order which would cause me to refuse the relief sought.

[385] I consider it appropriate to vary the order in the way sought by CMC. I consider that the varied order sought by CMC reflects the court's original intention.

PART C: AE's application

[386] AE's application concerned –

- alleged defects in the defence, warranting strike out under rule 171 (paragraph 1);
- alleged defects in the defence and counterclaim because of the inadequacy of the particulars, warranting strike out under rule 171 or an order that particulars be provided (paragraphs 2 and 3);
- the disclosure of certain documents and issues about the form in which certain documents were to be disclosed (paragraphs 4, 5 and 6); and
- the implied undertaking insofar as it applied to the *CMC v WICET* proceeding and other related matters (paragraphs 7, 8 and 9).

The implied undertaking (paragraphs 7, 8 and 9)

[387] I dealt with the part of AE's application which concerned the implied undertaking and related matters at the hearing. On 17 April 2019, I made an order relieving the plaintiff from the implied undertaking, to the extent to which it applied,[25] so that it might use documents from other related proceedings.

[25] If indeed it applied at all.

Disclosure (paragraphs 4 and 5)

[388] The plaintiff's application sought disclosure of documents described as follows –

- all pleadings, transcripts and materials relevant to the matter in issue in the proceedings, filed in proceeding BS6050/13 in the Brisbane Registry of the Supreme Court of Queensland (paragraph 5); and
- the documents set out in the "Schedule of Non-Disclosed Documents" exhibited to the affidavit of Ronald Frigo, sworn 15 November 2018 (paragraph 4).

[389] On 17 April 2019, I made the following order –

> Inspection of the Court records
>
> 2 The plaintiff is given leave to inspect and take copies of, either in paper or electronic form as convenient:
>
> (a) all documents, exhibits and the Court Book (including any addendum thereto) in proceeding BS6050/13 in the Brisbane Registry of the Supreme Court of Queensland;
>
> (b) all documents on the Court File in proceeding BS6050/13 in the Brisbane Registry of the Supreme Court of Queensland; and
>
> (c) any written submissions in appeals 4068 and 4286 of 2018 in the Brisbane Registry of the Supreme Court of Queensland.

[390] The transcript was not a document which would be accessible to AE through the civil registry or the Court of Appeal registry.

[391] AE sought an order that CMC disclose the transcript to it. The matter was left on the basis that the plaintiff would identify for the defendant particular days of the transcript it said ought to be disclosed.[26] However, the extent to which the *Recording of Evidence Act* 1962 (Qld) limits CMC's ability to disclose the transcript to AE will need to be considered.

[392] Notwithstanding the breadth of the order I made allowing AE access to the *CMC v WICET* documents, AE maintained that I ought to determine the relevance of the documents and, if relevant, order CMC to disclose them, because otherwise it would have to pay to copy them from court files.

[393] As is well known, the test for determining the scope of disclosure is whether a document is directly relevant to an allegation in issue in the proceeding – that is, whether the document tends to prove or disprove an allegation in issue. Also, Practice Direction 18 of 2018 requires practitioners to adopt a proportionate and efficient approach to disclosure. It requires the parties to focus on undertaking reasonable searches, with a view to locating and exchanging documents which are necessary to resolve the matter promptly and with a minimum of expense. It requires the parties to

---

[26] See Transcript 2 – 73.

concentrate on critical documents which are likely to have a decisive effect on the resolution of the matter.

[394] I have approached the question of disclosure having regard to those matters.

Legal issues

[395] Before I consider whether to make orders for disclosure of certain documents, I will address two matters of law that were raised in AE's written submissions. The first concerned the relevance of the expert reports from the *CMC v WICET* litigation. The second concerned CMC's entitlement to withhold the disclosure of irrelevant parts of otherwise disclosable documents.

Disclosing expert reports

[396] CMC gave the following as one of its reasons for not disclosing the expert reports from the *CMC v WICET* litigation –

> "The expert reports generally are not relevant as statements or assumptions of fact in an expert report are not proof of those underlying facts. As such, the reports are not directly relevant in tending to prove or disprove any allegation of fact concerning access delays: *Beavan v Wagner* [2017] QCA 246 at [4]; *Bromley Investments Pty Ltd v Elkington* [2002] QSC 427 at [50]."

[397] AE submitted that CMC had wrongly stated the position: it said expert reports were admissible if they were "properly formed". AE did not elaborate on what it meant by "properly formed".

[398] *Beavan v Wagner* concerned a claim for damages for personal injury. One of the questions raised on appeal was whether an ergonomist's report of the plaintiff's statement about the manual handling training he had received was evidence of the truth of that statement. While it may not have been strictly necessary to answer that question, because of its significance, Fraser JA added some remarks to McMeekin J's analysis of the issue. His Honour said (footnotes omitted) –

> [3] As McMeekin J has mentioned, in *Robert Bax & Associates v Cavenham Pty Ltd* Muir JA articulated the principle that, 'generally speaking at least, a party who fails to object to inadmissible hearsay evidence contained in a document which is admissible as original evidence will have waived its right to limit the use to which the evidence may be put'. Whilst I respectfully agree with the decision in that case, I share McMeekin J's doubt whether such a principle generally applies in relation to statements in expert reports of asserted facts upon which the expert's opinion is based.
>
> [4] There may be cases in which an expert's statement of another person's assertion of a fact is admissible as original evidence of that fact (see, for example, *Gordon v R*, concerning some statements made to a psychiatrist), but such cases are exceptional. In most cases, an expert's statement of a fact asserted by another person is not admissible evidence of the truth of that fact. The common law position in this respect is succinctly summarised in the High Court's restatement in *Gordon v R* of the principle expressed in *Ramsay v Watson*: '… statements made to an expert witness are admissible if they are the foundation, or part of the foundation, of the expert opinion to which he testifies but that if such statements, being hearsay, are not confirmed in evidence, the expert testimony based on them is of little or no value'. Other than in exceptional cases, that authoritative statement seems to require the conclusion that whilst an expert's statement of a fact forming a basis of the expert's opinion is admissible, it is not to be treated as evidence of the truth of that fact …

[399] *Bromley Investments* makes a similar point: the assumptions of fact which form the basis of an expert's opinion must be proved other than by the evidence of the expert.

[400] AE submitted that CMC's reliance on *Beavan* was "disingenuous" because it did not deal with the question whether the expert opinion was directly relevant to an allegation in issue in the proceeding.

[401] As a general proposition, it is difficult to understand how the *opinion* of an expert in *CMC v WICET* would be directly relevant to an allegation in issue in the present proceedings unless the factual assumptions made by the *CMC v WICET* expert were based on the evidence to be led in support of the claim or defence in the present matter only (and nothing else). Unless that were so, it is difficult to understand how the opinion of a *CMC v WICET* expert could tend to prove or disprove an issue in the present proceedings.

[402] I appreciate that AE says that the delays to CMC's work "by necessity" caused delay to AE's work – but that does not mean that an expert's report containing the expert's *opinion* about the delays to CMC's work *necessarily* tends to prove or disprove an issue in the present proceedings.

[403] AE also submitted that the defendant had ignored rule 395 in resisting disclosure of the expert reports. Rule 395 states –

> "A party may, with leave of the court, rely on evidence given or an affidavit filed in another proceeding or in an earlier stage of the same proceeding."

[404] Rule 395 is concerned with evidence at trial. It appears in Part 1 (General) of Chapter 11 (Evidence) of the *Uniform Civil Procedure Rules*. It has no bearing on the question whether expert reports are directly relevant in a disclosure sense.

[405] Regardless, AE has access to the expert reports relied on in the *CMC v WICET* litigation and, as will emerge below, I do not need to consider this point further.

The disclosure of irrelevant parts of documents

[406] In resisting disclosure of certain parts of certain documents, the defendant submitted that if part of a document was relevant and discoverable, but another part was not, then it was not required to disclose the parts of the documents which were not discoverable. For that submission, it relied upon *Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water Supply Joint Board* [2004] QSC 329 at [23] and *Curlex Manufacturing Pty Ltd v Carlingford Australia General Insurance Limited* [1987] 2 Qd R 335.

[407] AE submitted that the defendant's submission was "not supported by a comprehensive reading of the decision in *Curlex*". It argued that *Curlex* was concerned with a discoverable document which included parts over which legal professional privilege was claimed. The plaintiff submitted, "That is a unique and particular circumstance not in issue in this proceeding". While that may be so, I assume[27] that CMC intended to

[27] It will be remembered that I was required to deal with this issue on the basis of written submissions, and was occasionally left to make assumptions.

rely upon broader statements made by McPherson J (as his Honour then was) in *Curlex*, as applied by Douglas J in *Mitchell Contractors*.

[408] *Curlex* involved a claim upon an insurance policy after a fire. The defendant engaged accountants to assess the value of the plaintiff's insurance claim. The defendant disclosed, in its affidavit of documents, pages 1 – 5 of the accountant's draft report and objected to the production of pages 6 – 11 of it.

[409] It was conceded that the defendant was entitled to the benefit of legal professional privilege over pages 6 – 11. However, the plaintiff argued that privilege was waived because the report had been disclosed. The primary judge held that the objection to production was well taken and that the privilege had not been waived. The plaintiff appealed from that decision, arguing that a party may be held to have waived its claim of privilege if it discloses part of a document, the subject matter of which is "the same as" that with respect to which it claims privilege.

[410] McPherson J, with whom Andrews CJ and Demack J agreed, held that no such principle existed in relation to discovery of documents or the production or inspection of documents forming part of the process of discovery.

[411] In reaching that conclusion, his Honour considered the history of discovery and the practice with respect to objections to production of parts of documents. I assume that CMC places reliance upon this discussion. This discussion was not limited to cases in which the objection to disclosure was based on a claim of privilege.

[412] His Honour began by setting out the position of a defendant to a suit in Chancery – namely that it was required to set out in its answer all material documents in full. Later, a defendant was permitted to describe the documents in its possession or power and then the plaintiff would apply to the court for production or inspection of the documents.

[413] Before the *Judicature Act*, objections to producing documents were made by the defendant upon the application by the plaintiff for an order for production. His Honour explained (at 337, my emphasis) –

> "… The objection might be to production of the whole document, or it might be to production of only part of it **founded on a variety of grounds, such as irrelevance; its relation only to the defendant's own case; or legal professional privilege** … If the objection was to production of only part of a document, the practice was for the defendant to seek liberty to seal up those parts of the document the production of which was objected to …"

[414] His Honour then considered the right to discovery at common law. The power to order discovery was vested in the common law courts in 1854. His Honour said (at 338 - 339, my emphasis) –

> "An aspect of the Chancery practice adopted by the common law courts was that of permitting the party producing a document to claim upon a sufficient affidavit **to seal up those parts of it that he objected on some proper ground to producing**. See *Forshaw v Lewis* (1855) 10 Ex. 712, 716 per

> Parke B. Thereafter there are many decisions recognising or applying the rule that sealing up of parts of documents was permissible …
>
> As a result the practice of sealing up the parts of documents to which the objection to produce was taken prevailed both at common law and in equity. It continued to be followed after the *Judicature Act* … The practice of sealing up, or nowadays, covering up parts of documents continues, in my experience, to be adopted in Queensland …
>
> The point to be gathered from this digression is that **for at least 150 years it has been possible to resist <u>on some proper ground</u> production of parts of discoverable documents, and to do so entirely without reference to the question whether the part in respect of which non-production was claimed was of 'the same subject matter' as another part as to which production was not resisted.** Of the many cases referred to here, not one – until in 1981 *Great Atlantic Insurance Co v Home Insurance Co.* is reached – suggests that the right of a party to object to production of parts of a discovered document depends on their being concerned with 'entirely different subject matters or different incidents', so as in effect to be capable of division into two separate memoranda … The whole history and practice of sealing up parts of documents is against the existence of such a limitation. …"

[415] It will again be noted that the above discussion was not limited to objections to production on the basis of privilege.

[416] In *Great Atlantic Insurance Company v Home Insurance Company* [1981] 1 WLR 529, Lord Templeman said at 536 –

> "In my judgment, the simplest, safest and most straightforward rule is that if a document is privileged then privilege must be asserted, if at all, to the whole document unless the document deals with separate subject matters so that the document can in effect be divided into two separate and distinct documents each of which is complete."

[417] In *Curlex*, McPherson J could not accept that such a practice was conducive to the policy that underlies discovery, or consistent with the kind of complete candour that is traditionally associated with the duty of full disclosure in affidavits of documents. His Honour said (at 339) –

> "If [that practice was] accepted, it would in this instance mean that the defendant would, in order to protect the portion of the draft report in respect of which privilege is claimed, have been bound to claim privilege in respect of the whole of the draft report of the accountants. I cannot see what benefit would have resulted to the plaintiff from following such a course, quite apart from the serious difficulties of assessment both for practitioners and the courts inherent in the adoption of 'some different subject matters as the criterion for deciding whether privilege may be claimed, or has been waived, as to part of a document in the course of discovery."

[418] His Honour held that in so far as the decision in *Great Atlantic* could be said to apply to production *in the course of discovery*, it was not to be followed in Queensland.

[419] His Honour did not, however, question the correctness of *Great Atlantic* in the context in which it was decided. That context did not involve any question of the waiver of privilege in discovery – but rather whether privilege had been waived during the plaintiff's opening, in which counsel read, and relied upon, two paragraphs of a document, without knowing that there was more of the document over which a claim of privilege was later made.

[420] In his written submissions, responding to CMC's position, counsel for AE said –

> "4. The defendant relies extensively upon the cases of *Mitchell Contractors* … and *Curlex* … to support the proposition that it can cherry pick the parts of a document which it is obliged to disclosed (sic). That submission is not supported by a comprehensive reading of the decision in *Curlex* which is binding upon this Court.
>
> 5. McPherson J, with whom Andrews CJ and Demack J agreed, was addressing whether parts of a document could attract legal professional privilege while other parts were obliged to be disclosed. That is a unique and particular circumstance not in issue in this proceeding. At pages 340 to 342 McPherson J relevantly held:
>
> '*The decision which, with respect, appears plainly to be correct, was concerned with the principle that a party cannot ordinarily claim at trial to use part of a document in support of its case, while at the same time also claiming to conceal the remainder of it from his opponent …*
>
> *…*
>
> *Both cases involved documents containing a mixture of matter that was discoverable and liable to production with matter that was not. In Carew v. White the objection to production failed not because the subject matters were the same – they were different – but because, assuming it was impossible in a practical sense to segregate or isolate the two subjects, the objection to produce went only to relevance. In Churton v. Frewen the objected succeeded not because the two subjects were different – they were the same – but because the objection was founded on legal professional privilege.*
>
> 6. The defendant has made no claim of legal professional privilege in relation to the expert reports and logically it could not do so.
>
> 7. The best the defendant has articulated its position is to suggest that parts of the document for which disclosure is sought might not be relevant to any matter in issue and so the defendant should be relieved of the obligation to disclose those parts, based on the authorities cited.
>
> 8. The proposition is absurd. First, it is unsupported by the authorities relied upon by the defendant and indeed contrary to those authorities. Second, as is clear from the binding decision in *Curlex*, an absence of

> relevance in part of a document is not a proper ground upon which to engage in partial disclosure of the document. Third, absent the defendant having identified an authority which actually supports the position it presses for, the Court is properly bound to follow *Curlex*."

[421] It is important to consider the quote from *Curlex*, upon which Mr Codd relies, in context. The quote in full context follows, with the portion quoted by Mr Codd in bold (pages 340 – 342) –

> "I have confined the foregoing remarks to discovery because I do not mean to question the correctness of the decision in *Great Atlantic* … in the context in which it was decided. It was not a case involving any question of waiver of privilege on discovery. It arose out of an interlocutory appeal taken in the course of trial of an action. In opening the plaintiff's case at trial, counsel had read from and relied upon two paragraphs of a document, as to the balance of which a claim of legal professional privilege was later asserted. He had done so without knowing that there was more of the document than the part that he read out. Notwithstanding this error, the plaintiff was held to have waived its claim to privilege as to the balance of the document. **The decision, which, with respect, appears plainly to be correct, was concerned with the principle that a party cannot ordinarily claim at trial to use part of a document in support of its case, while at the same time also claiming to conceal the remainder of it from his opponent** … The basis of the rule is … 'the possibility … that any use of part of a document may be unfair or misleading' … A similar principle also underlies another rule of trial practice, which enables counsel to call for, inspect, and cross-examine upon a document used by a witness to refresh his memory, and to do so without being required to put it into evidence, provided that in doing so he does not go beyond those portions of the document resorted to by the witness … In both instances the document is being 'used' in support of a litigant's case. In contrast, the fact of a document being discovered does not mean that it will be 'used' at trial, discoverability and admissibility in evidence being distinct questions …
>
> It nevertheless remains true that in *Great Atlantic* the Court of Appeal considered that support for the approach it took was to be found in a decision involving questions of discovery… [His Honour discussed the case of *Churton v Frewen* in which Kindersley VC did not require a document to be produced, with the privileged parts sealed up, not because a waiver of privilege would follow, but because "it would hardly be possible to seal up and effectually protect from inspection those parts which constitute the report, and which it is admitted there is no right to see".] … Had there been no such risk, it seems likely that production would have been ordered, with liberty to seal up the privileged parts, whether they dealt with the same or a different subject matter. The decision is no more than an illustration of the rule that a document or part of a document not itself the subject of privilege may be protected from production because of what it reveals about some other document or part that does attract a claim of privilege …
>
> An even earlier case which may be both compared and contrasted with *Churton v Frewen*, is *Carew v White* (1842) … in which Lord Langdale

> M.R. reluctantly ordered production of diaries containing business entries material to the partnership litigation notwithstanding that they also contained entries concerning private and family matters which were not relevant to any issues. He did so because the defendant having 'mixed his private affairs with the partnership transactions, it is his duty to separate them, and if he cannot, he must necessarily suffer the inconvenience arising from his own act'. The learned Master of the Rolls did, however, add that the defendant was entitled to 'the usual order for sealing up those parts not relating to the partnership transactions, and he may, if he can, avail himself of this qualification'.
>
> **Both cases involved documents containing a mixture of matter that was discoverable and liable to production with matter that was not. In *Carew v White* the objection to production failed not because the subject matters were the same – they were different – but because, assuming it was impossible in a practical sense to segregate or isolate the two subjects, the objection to produce went only to relevance. In *Churton v Frewen* the objection succeeded not because the two subjects were different – they were the same – but because the objection was founded on legal professional privilege.**
>
> In the present case the material the subject of the claim for privilege (pages 6 to 11 of the report) is capable of isolation from the remainder of the report (pages 1 to 5 and the schedule). It was therefore possible for the defendant … to claim privilege from production of a described part (pages 6 to 11) of the report. Had that not been possible, or had it been impracticable to seal up parts of the document, it may, on the authority of *Churton v Frewen*, have been open to the defendant to claim privilege from production in respect of the whole of the report. Failure to do so involved no waiver of privilege on the part of the defendant. To that, the question whether the subject matter of pages 1 to 5 of the report was the same as, or different from, that of pages 6 to 11, was and is in my view quite irrelevant.
>
> The learned judge was therefore correct in refusing to order production of the whole document …"

[422] Thus, the "correct" decision to which McPherson J referred was the decision in *Great Atlantic* about the waiver of privilege at trial.

[423] The second part of the extract quoted by Mr Codd does not include the references to the likelihood that, in the case of *Churton v Frewen*, production was likely to be ordered, with liberty to seal up the privileged parts of the document, *if* it were *possible* to seal up and protect from inspection those parts of the document which there was no right to see. Nor does it include the reference to the order made by the Master of the Rolls in *Carew v White* that the defendant in that case was entitled to the "usual order" for sealing up part of the report not relating to the partnership truncations.

[424] In *Mitchell Contractors* Douglas J cited *Curlex* as authority for the proposition that it is appropriate to disclose only the relevant parts of documents.

[425] As I understand AE's argument, it is that Douglas J was wrong to treat *Curlex* as authority for that proposition.

[426] I note that *Curlex* is referred to as authority for that proposition in *Zukerman on Australian Civil Procedure*[28] in which the learned authors state at page 570 –

> **"15.64** It is now a well-established practice in litigation that where a party is ordered to produce material that contains relevant and irrelevant information, it may redact or mask the irrelevant or privileged portions of the document for the purposes of production."

[427] The footnote to that sentence refers to several cases, including *Curlex.*

[428] Having regard to relevant authorities,[29] I accept that the defendant has correctly stated the law. However the authorities confirm that the question of disclosure is separate from the question of redaction or masking; and refer to the caution with which redactions must be approached.[30]

The disclosure of documents which AE can access otherwise

[429] Some of the documents which AE requires CMC to produce are documents to which AE already has access as a result of my earlier order. As noted, regardless, AE asks me to order CMC to disclose them.

[430] The issue of the direct relevance of all of the outstanding documents, especially the expert opinions prepared for the purpose of the *CMC v WICET* litigation, is intensely contested.

[431] CMC's right to withhold disclosure of parts of documents it considers irrelevant, relying on *Curlex*, is intensely contested. Although I accept that CMC may ultimately be entitled to withhold irrelevant parts of its documents from disclosure, AE challenges CMC's assertion that the parts withheld are irrelevant.

[432] Mr Codd urged me to call for and read every disputed document before ruling upon its relevance.

[433] The factual overlap between the issues in *CMC v WICET* and the present proceedings does not of itself establish an objective likelihood that the expert opinions are directly relevant and that there has been non-compliance with the duty to disclose.

[434] It is not appropriate for the court to undertake the exercise of calling for, reading and analysing every expert report against the allegations in the pleadings, to ascertain whether they are of direct relevance. AE now has access to these reports (and other disputed documents from the *CMC v WICET* litigation). It may identify matters in them which satisfy the relevant test, in which case it may revisit the question of disclosure.

---

[28] Zuckerman, Wilkins, Adamopoulos, Higgins, Hooper, Vial, 2018, Lexis Nexis, Australia.

[29] Including *Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd (No 2)* [2009] WASC 69 in which the Chief Justice considered the different approaches of England and Wales, the Australian State Courts and the Federal Court of Australia to the discovery of extracts of documents, rather than whole documents, on the grounds of irrelevance and legal professional privilege.

[30] For example *Telstra Corporation v Australis Media Holdings Ltd* (NSWSC, unreported, 10 February 1997, McLelland CJ in Eq) cited in *Menkens v Wintour* [2007] 2 Qd R 40.

[435] For completeness, I note that AE claimed that it is entitled to the disclosure of some documents because their disclosure might raise the possibility of –

- an abuse of process;
- the drawing of a *Jones v Dunkel* inference;
- revealing something which goes to a the credit of a witness (yet to be identified); or
- previous admissions.

[436] AE is unable to point to anything which establishes these matters. In my view, to seek disclosure of a document on these speculative bases is inconsistent with the approach to disclosure required by the rules and the practice direction. And of course, regardless, the plaintiff has access to the documents otherwise.

[437] I do not order disclosure of the documents contained in items 1 – 14 of revised Schedule C, which documents AE has access to these documents.

The disclosure of documents which AE may not be able to access otherwise

[438] It was not immediately apparent to me from the written submissions which, if any, of the documents in item numbers 15 onwards in revised Schedule C – Schedule of Non-Disclosed Documents were otherwise available to the plaintiff as a result of my earlier order. For that reason, I considered them one by one.

[439] **Item 15:** These are the pre-start sheets for October 2011 – October 2012, some of which have been disclosed.

[440] AE suggests, in effect, that the defendant's solicitor has not properly engaged in the process of disclosure and that there are more pre-start sheets to be disclosed. In its written submissions, AE states –

> "6. The plaintiff acknowledges that the defendant, by their solicitors and Ms Reading's affidavit affirmed 3 April 2019 (the day before the hearing), gives a summary of the searches undertaken in February and March 2019 (notwithstanding the application sought this disclosure in November 2018) and the witnesses opinion that the defendant has disclosed all the Daily Pre-Starts in its possession or control.
>
> 7. A proper reading of Ms Reading's affidavit makes it clear that neither she, and nor would it appear anyone else on behalf of the defendant, has engaged in an exercise of inspecting each and every document held by the defendant. Her affidavit does not depose with certainty to the non-existence of further Daily Prestarts. Ms Reading seems to have attacked the question of disclosure by looking at the external labels on boxes rather than inspecting the content of the boxes and by relying on Thomson Geer to conduct further searches of their records of digitised documents.

8. It follows that there may yet remain documents the defendant ought properly to disclose and the plaintiff relies upon the ongoing obligation imposed by r. 211 of the UCPR that the defendant perform this function comprehensively unless relieved by way of order of the Court."

[441] CMC complained that the matters asserted about Ms Reading – including that she had failed to adhere to her disclosure obligations, including by not reading the contents of certain boxes – were without basis. They were not put to her at the hearing, even though AE asked for her attendance. I note that similar accusations were made by Mr Codd at the hearing which were objected to by Mr Campbell and then withdrawn.

[442] I note the content of Ms Reading's affidavit of 3 April 2019 – especially paragraph 45 – which provides direct and indirect evidence of Ms Reading inspecting the contents of the boxes.

[443] I consider that Ms Reading has provided, in her 3 April 2019 affidavit, a full explanation of the disclosure steps which have been taken. I have no reason to doubt that the defendant, and its solicitors, will continue to abide by their disclosure obligations.

[444] I note that pre-start sheets are requested for ANZAC Day and Labour Day of 2012 and I am confident that CMC is now aware of that request.

[445] **Item 16:** This was a request for correspondence between CMC and WICET about delayed access. CMC said that it had disclosed all relevant correspondence "to the best of its knowledge". In response, AE made the same, unfounded statements about Ms Reading as above. As before, I have no reason to doubt that the defendant and its solicitors will continue to abide by their disclosure obligations.

[446] **Item 16(a):** This was a request for correspondence concerning Variation 141 to the CMC/WICET contract. CMC said that it had disclosed all relevant correspondence in relation to Variation 141, excluding irrelevant appendices. AE challenged CMC's right to withhold disclosure of irrelevant material. I consider that CMC has such a right. However on the written arguments do not provide a basis for a conclusion that the appendices are relevant.

[447] **Item 16(b):** This was a request for a record of a meeting between CMC and WICET on 7 September 2011. The defendant has been unable to locate a record of a meeting between CMC and WICET on 7 September 2011 – but it has been able to locate minutes of a meeting held on 7 October 2011. I do not require the solicitor for the defendant to provide "a fulsome affidavit" to this effect as AE submitted I ought to do. I do not order the disclosure of a record of a meeting on 7 September 2011. I have no reason to doubt that the defendant will abide by its obligation of disclosure.

[448] **Item 16(l):** This document is an exhibit in the *CMC v WICET* proceedings and therefore otherwise available to AE. I do not order its disclosure. If having accessed it, AE considers it necessary to revisit the question of disclosure it may do so.

[449] **Item 16(z):** This document is an exhibit in the *CMC v WICET* proceedings and therefore otherwise available to AE. I do not order its disclosure. If having accessed it, AE considers it necessary to revisit the question of disclosure it may do so.

[450] **Item 16(dd):** This document is described as "Notification WP to CMC Rail Receival on hold – 14th March 2012".

[451] AE submitted that the document was directly relevant to the issue whether the plaintiff was provided with sufficient access to the site in that, if CMC was notified that the Rail Receival area was on hold, then that was relevant to the allegation that CMC failed to provide AE with sufficient access to the area.

[452] The "Reference Source" of the document is said to be paragraphs [409], [778] and [985] of *CMC v WICET*.

[453] There is no notification document (or any document at all) referred to in paragraph [409].

[454] Paragraph [409] concerns an allegation that, on 13 March 2012, Worley Parsons (for WICET) instructed CMC to cease the Rail Receival piling work as WICET was uncertain about the Main Road specifications which CMC should follow with respect to piling work and who was to inspect the pile sockets. The instruction was referred to in the pleadings as the "March Rail Receival Instruction". CMC pleaded that it was unable to carry out Rail Receival piling work between 14 March 2012 and 27 March 2012 because of the March Rail Receival Instruction.

[455] As per [409], the particulars of the allegation that Worley Parsons *instructed* CMC to cease the work are a *conversation* between Mr Vance and Mr Knowles on 13 March 2012. I have read the Eighth Further Amended Statement of Claim. It confirms that it was asserted that the instruction was given orally.

[456] Paragraph [778] refers to a letter from Worley Parsons to CMC dated 14 March 2012, which granted a three day extension of time for the Clearing Permit Delays. On its face, that does not appear to be connected to the instruction to CMC to cease Rail Receival piling work.

[457] Paragraph [985] states, "The variation arose because on 14 March 2012 CMC received a notification from Worley Parsons that the drawings for the Rail Receival Sediment and Storage Basins were placed on hold".

[458] Thus, the document sought is the document referred to in paragraph [985].

[459] In resisting its disclosure, CMC said –

> "The document referred to in paragraph [985] is a notification from WP to the defendant that drawings from the rail receival sediment and storage basins were placed on hold, not "rail receival on hold" as described by the plaintiff."

[460] It is likely that document 16(dd) is the notification referred to in [985] despite the different wording used.

[461] I accept AE's argument that CMC's being notified that the area was on hold is relevant to the issue of CMC's providing AE with sufficient access to the site. Therefore, *if* the notification was in the form of a document, *and* that document is in CMC's possession or under its control, then I order that it be disclosed.

[462] **Item 16(jj):** This is a request for "CMC Weekly Project Team Meeting correspondence". The plaintiff acknowledges that the defendant has made substantial disclosure of this correspondence. However "Project Team Meetings" 1 and 2 remain outstanding. I have no reason to doubt that the defendant will continue to abide by its disclosure obligations and disclose those documents if they are in its possession or under its control. I make no order for their disclosure.

[463] **Item 16(kk):** The plaintiff seeks disclosure of the *whole* of the "CMC delay analysis report dated 23rd November 2012". The Reference Source for the document is said to be paragraph [99] of the BCIPA decision dated 18 February 2013. The plaintiff complained that certain appendices were not included.

[464] CMC submits that it has not provided appendices which detail the defendant's own internal costs, rather than costs associated with subcontractors, because they are not relevant.

[465] AE submits that the defendant's submission is "misconceived"; "The defendant's calculation of its own costs for delay will be based on the period of delay, including the access delays which is relevant to this proceeding".

[466] I assume that the delay analysis report will elsewhere disclose the period of delay, including access delays. Beyond that, I do not consider it likely that the defendant's costs will be directly relevant in the present matter

[467] AE also submitted that the defendant's internal costs for delay were relevant "at least in part" to those claimed from AE in BK 08 of the Counterclaim, "being the costs incurred by the defendant for the alleged late completion of the Work". I do not understand what AE means by the suggestion that the appendices are relevant "at least in part" – what part or to what extent?

[468] I acknowledge that AE's recent submissions about direct relevance are informed by CMC's statement that the appendices to the document contains details of its own internal costings. But CMC has not had an opportunity to make submissions in response to AE's relevance arguments.

[469] It is not appropriate for me to reach a conclusion about the direct relevance of certain of the appendices of the delay analysis report in the absence of CMC having an opportunity to respond. The question of its disclosure is to be deferred until the next review of this matter at which time the Supervised Case List Judge may determine how it ought to be dealt with.

[470] **Item 16(ll):** This is a request for correspondence about CMC's claims for additional costs dated 23 November 2013. CMC has not had an opportunity to respond to AE's recent submissions asserting direct relevance to paragraph 22 of the Counterclaim.

[471] For the same reason as above, the question of disclosure of this item is to be deferred until the next review of this matter.

[472] **Item 16(mm):** This document is the "Response to PPR analysis of delay dated 26th December 2012". Its Reference Source is paragraph [99] of the first adjudication decision in *CMC v WICET* dated 18 February 2013. It is said to be relevant to whether CMC provided AE with sufficient access to the site.

[473] CMC resists its disclosure because, it says, it is not relevant to the question of sufficient access.

[474] CMC continued: "It is a delay analysis report in reply which deals with questions concerning the appropriate method of programming analysis against the head contract program, which concerned a much larger scope of works as detailed in paragraph [5] of [*CMC v WICET*]". AE submitted that it did not matter that the report concerned a larger scope of works: the question was whether it "touches upon" the access delays asserted by AE.

[475] The test of relevance is not whether the document "touches upon" the access delays asserted in the present matter. I have considered the rule and the practice direction. I note that the document is a report *in reply* which deals with *methods of programming analysis*. AE has not persuaded me of its direct relevance. I do not order its disclosure

[476] **Item 16(nn):** This document, a payment claim, is an exhibit in *CMC v WICET* to which AE has access. I do not order its disclosure.

[477] **Item 16(oo):** This is another complaint about the defendant not disclosing part of a document. The written submissions do not persuade me of the relevance of the material which has not been disclosed.

[478] **Item 16(pp):** These documents, CMC Valuations of Earthworks Claims, are exhibits in *CMC v WICET* to which AE has access. I do not order their disclosure.

[479] **Item 17:** The plaintiff seeks "all correspondence between CMC and WP (WICET) in relation to inclement weather including but not limited to extensions of time for wet weather". As I understand the written submissions, there may be further disclosure of documents of this type. I do not order their disclosure. I have no reason to doubt that the defendant will comply with its obligations of disclosure.

[480] **Items 18, 19, 20, and 21:** These documents are described as follows –

> "*With reference to the Supplementary Specification Clause 7.1 –*
>
> *A copy of the approved 'construction procedure detailing proposed survey methods, equipment and reporting'* [item 18]
>
> *A copy of the Registration/Licence details and terms of engagement of Surveyor Robert Tough, Peter Curties, Roy Wisee and Hutch Engineering Surveys Pty Ltd* [item 19]
>
> *Where the terms of Survey Robert Tough Registration/Licence requires – A copy of the Supervising Surveyors Registration/Licence Details* [item 20]
>
> *A copy of Registration/Licence details and terms of engagement of Surveyor Dave Armstrong (Xcel) (used by CMC to 'independently' verify quantities*

> *and has provided 'certification') (Although now saying not independent by WICET Surveyor)* [item 21]"

[481] The plaintiff submits that these documents are directly relevant to paragraph 60 of the 2FASOC and paragraph 74 of the FADCC. It also suggests that items 18 and 19 are relevant to "quantities".

[482] Paragraph 60 of the 2FASOC concerns the terms of the contract and at (c) asserts, as a term of the contract, that "the measurement of the fill volumes under the Reclamation Bunds C Area was to be adjusted for settlement over and above the measured quantity of material placed as calculated by the difference between the pre-existing ground surface and the finished surface of the reclamation bunds". One of the particulars of that paragraph refers to the "Onsite Civil Works – Supplementary Technical Spec WICET" and a sub-paragraph of that particular refers to paragraph 7.1 of that spec –

> "(5) In section 7.1, that all survey work was to be carried out by the defendant by a '*qualified, registered and licenced Surveyor*'."

[483] Paragraph 74 of the FADCC states "As to paragraph 60(c) of the Amended Statement of Claim the defendant denies the allegations contained therein because such allegations are not correct on a proper construction of the contract".

[484] Relying on those paragraphs, the plaintiff asserts that "Compliance with clause 7.1 is an issue in the current proceedings". In my view, such an issue is not created by those paragraphs. The point asserted by AE in paragraph 60 is that, on the basis of *inter alia* the documents listed in the particulars, including clause 7.1 of the spec, it may be inferred that the measurement for fill volumes was to be adjusted for settlement. It does not suggest that CMC has breached clause 7.1 nor does it raise any issue about the survey methods or the qualifications, registration of licence of the surveyors.

[485] Having regard to the rules and the practice direction, I do not order disclosure of these documents.

[486] **Item 22 (a), (b) and (c):** This item concerns the "Survey related information as detailed Tough Statutory Declaration (CMC.002.0389)".

[487] CMC says that it has provided all relevant survey information "to [its] knowledge". AE asserts that other survey information is also disclosable. I have no reason to doubt that the defendant will continue to abide by its obligations of disclosure should other directly relevant survey information come to light.

[488] As I understand AE's written submissions, it also asks for an order which would require CMC to assist it to determine whether the information which has been disclosed is complete. It asks CMC to help it "locate and identify" certain documents by reference to the electronic disclosure number. It refers to rule 217(6).

[489] The court expects the defendant to comply with rule 217(6) (and rule 217(3)) but I do not intend to make an order requiring it to do so. I make the same observation with respect to **items 23, 24, 25, 27, 28, 29, 30, 31, and 32.** The parties may raise compliance with rule 217(6), if the assistance is still required, at the next review of this matter.

[490] **Item 26:** AE seeks a copy of the CMC-WICET Final Payment Claim. It submits that the claim will verify the quantities claimed for earthworks completed by it. CMC said that the document is not relevant because it concerns a significantly larger scope of work than the work subcontracted to the plaintiff. Further, even if sections concerning the work done by the plaintiff were relevant, the claim is presented in a way which does not allow for the separation or extraction of sections which may relate to work subcontracted to the plaintiff.

[491] Because of the presentation of the document, and bearing in mind the rules and the practice direction, I will not order its disclosure.

[492] **Item 32(a):** This item is a letter from CMC to WICET dated 6 December 2011 in relation to the Acceleration of the Works and Additional Screening Capacity.

[493] AE submits that it is relevant to the entitlement to standby.

[494] It is said to be relevant having regard to paragraphs [10] – [16] of the Counterclaim, in particular paragraphs 13(b) and (c) and 14, and Schedule A.

[495] These paragraphs concern CMC's Counterclaim based on its challenge to an adjudication decision which required CMC to pay to AE about $1.2 million plus interest. CMC asserted that that amount exceeded AE's "true entitlement" under the contract and sought an order for a refund of the excess. It pleaded in its Counterclaim –

> "13 Contrary to the determination of the Adjudicator …:
>
> (a) The Plaintiff had no entitlement to any extra payment in relation to variation 3 being the construction of hall (sic) roads …
>
> **Particulars**
>
> Particulars of the overpayment are contained in Schedule A to the Counterclaim.
>
> (b) The Plaintiff had no entitlement for variation 12 for additional screen capacity (as opposed to the $216,274 allowed by the Adjudicator) and says that in the premises, the Defendant overpaid the Plaintiff a total of $3142,314 in respect to this claim.
>
> **Particulars**
>
> Particulars of the overpayment are contained in Schedule A to the Counterclaim.
>
> (c) The Plaintiff had no entitlement to payment in relation to variation 13, alleged acceleration (as opposed to the $351,570 allowed by the Adjudicator), and says that in the premises, the Defendant has overpaid the Plaintiff a total of $376,182, in relation to this claim.
>
> **Particulars**

Particulars of the overpayment are contained in Schedule A to the Counterclaim.

(d) The Plaintiff had no entitlement to any payment in relation to variation 33, for the construction of a drainage blanket …

Particulars

Particulars of the overpayment are contained in Schedule A to the Counterclaim.

14. In the Premises as a result of the Adjudication Decision … the Defendant has paid the Plaintiff substantial amounts over and (sic) the Plaintiff's entitlements in accordance with the Contract."

[496] AE submits that paragraph 13(b) alleges that the plaintiff has no entitlement to payment for variation 12 for additional screen capacity. It submits that the document is therefore "plainly relevant to an issue on the pleadings".

[497] The defendant says that the document is a *proposal* from the defendant *to WICET* and is not directly relevant to an issue raised in its counterclaim. On the strength of that description of the document, it is difficult to understand how it tends to prove or disprove the defendant's assertion that AE is not entitled to payment for additional screen capacity. I am not persuaded of the objective likelihood of its relevance.

[498] **Item 32(b):** This is a letter from CMC to WICET dated 20 July 2012 said to be relevant to the entitlement to standbys and standby days. As I understand the written submissions, this letter is a covering letter, sent with certain documents, which themselves have been disclosed. CMC says that the covering letter is not relevant. AE says that the covering letter is a relevant document because it is necessary to "understand the context in which the documents were provided".

[499] It is unlikely that a covering letter is directly relevant although equally it might assist in AE's understand of the material sent with it. However, and more significantly, the written submissions tell me nothing about the actual documents which have been disclosed, which were sent under cover of this letter, so as to allow me to reach any conclusion about the likely direct relevance of it.

The form in which the documents are to be disclosed (paragraph 6)

[500] AE sought an order that the defendant update its disclosure to convert all emails electronically disclosed into "full text searchable, multi-page PDF files" by December 2018.

[501] I note the requirements of paragraph 7 of Practice Direction 18 of 2018.

[502] The court expects the defendant (and the plaintiff) to comply with the practice direction. However I will not, at this stage, make an order requiring the defendant to do so.

The application to strike out paragraphs of the defence (paragraph 1)

Whether the defence was properly pleaded and particularised?

[503] AE's first complaint was that the defendant had failed to properly plead and particularise its defence. Its complaints about particular paragraphs were detailed in schedule B to AE's Outline of Submissions.[31]

[504] Schedule B referred to 30 paragraphs or sub-paragraphs of the FADCC. AE submitted that the impugned paragraphs ought to be struck out for one (or more) of the following reasons –

(a) the defendant's abuse of process, in pleading traverses which should have been, by now, amended to denials or admissions;

(b) the defendant's reasons for its traversing an allegation were either unfounded, and an abuse of process, or not sustainable;

(c) the defendant's failing to particularise or relevantly particularise was an abuse of process;

(d) the particulars provided did not support the matter pleaded; or

(e) the denials were an abuse because they were based on matters which were not responsive to the allegations pleaded by the plaintiff.

[505] AE argued that CMC had more than six months to properly articulate its defence, and yet it continued to indicate that its defence would be amended, or particulars would be provided, after disclosure and interlocutory steps. Disclosure had been completed. As to interlocutory steps, CMC did not say what they were; when they would take place; or how they would inform its defence. This approach was inconsistent with rule 5 and engaged the question of abuse by demonstrating a failure to plead.

[506] Also, CMC's suggestion that it could not complete the pleading process until it obtained expert reports was problematic because, AE submitted, "the particulars and facts which should be pleaded would be those necessary to instruct the experts, and are not matters upon which opinion evidence would be admissible or be relevant".

[507] AE suggested that the defendant could seek leave to plead like allegations in the future.

CMC's response generally

[508] CMC submitted that any complaint that it engaged in an abuse of process by "dragging the chain" in the preparation of its defence unfairly ignored the fact that the events in question occurred in late 2011 and early 2012, but the plaintiff did not effectively start its action until April of 2018. That caused difficulty for the defendant in tracking down relevant witnesses or otherwise obtaining information to respond to a factually intensive claim. Its delay was far from excessive or unreasonable.

[509] At paragraph 266 – 27 of its written submissions, CMC said –

---

[31] Document 44.

> "Further, it is usual for parties to commercial litigation, particularly concerning factually intensive disputes that occurred a significant period of time ago, to amend pleadings following the completion of disclosure and, where relevant, expert evidence as the issues in dispute become clearer from the evidence and are able to be identified by amendment and further particulars. This process is entirely consistent with the principles for the proper conduct of commercial litigation required by Rule 5.
>
> The plaintiff relies upon the decision of Jackson J in *QNI Resources Pty Ltd v Sino Iron Pty Ltd* [[2016] QSC 62 at [63] – [65]] … The broader observations by his Honour either side of the passage relied on by the plaintiff are apposite, wherein his Honour reinforced that the court should be slow to act under r 171 in a manner which would undermine the procedure for summary judgment and should exercise restraint where the perceived inadequacies are ones that may be repaired."

[510] I will discuss *QNI Resources* below.

[511] CMC submitted that AE's application to strike out certain of the paragraphs of its defence was either –

- unsustainable – in the case of paragraphs of the FADCC responding to paragraphs of the FASOC/2FASOC that had been struck out (by me); or
- premature – in the case of paragraphs of the FADCC responding to paragraphs of the Amended Statement of Claim which had been further amended since the complaint was made: CMC ought to be allowed time to respond to materially altered allegations.

AE's reply to CMC's general response

[512] AE submitted that the court should not defer consideration of its strike out application because of the amendments incorporated into the 2FASOC.

[513] It submitted that, with the exception of paragraph 40A, the amendments made to its FASOC (to create the 2FASOC) were in response to CMC's complaint that the particulars provided in the FASOC referred to documents without referring to the terms of the documents upon which AE relied. AE said that, without conceding that further particulars were required, it provided them and in any event, CMC was not required to plead to them.

[514] AE submitted that CMC's suggestion that the FASOC was "materially amended" was a gross overstatement. Further it submitted that –

> "14. In the absence of the defendant identifying the nature of the amendments to the defence and counterclaim it contends will be required, what the defendant is doing is asking the Court to impermissibly speculate upon what the defendant might plead.
>
> 15. In order to make good such complaints and permit the Court to exercise its power judicially, the defendant would need to have articulated its responses to the amendments in the 2FASOC and

> demonstrate why those responses were not able to be pleaded to the FASOC. If the defendant did actively respond to the amendments to the particulars or allegations of fact, whether or not the response was truly caused by the amendment would be a question the Court could then determine. Absent the specifics of the defendant's amendment, the Court simply has no proper basis upon which to determine this additional application by the defendant.
>
> …
>
> 18. The court ought not afford the defendant the benefit of avoiding having to address the deficiencies in its pleadings raised in the plaintiff's application when the defendant has not provided any basis upon which the court, acting judicially, could exercise a discretion and, in circumstances in which, the complaint was first articulated at the hearing."

CMC's further response to AE's reply

[515] In reply to those submissions, CMC said, among other things, that –

- CMC did not have to identify the nature of the amendments it would make to its defence in response to amendments to the ASOC and the FASOC. It would be enough to dismiss an application to strike out a paragraph of the defence if CMC had not had a chance to amend that paragraph in response to the plaintiff's amended pleading (or if the plaintiff's paragraph itself was defective): this was a matter of logic and procedural fairness; and

- AE's particulars were to inform CMC of the basis of its pleaded allegation – without which CMC was hindered in its response to the allegation: it was a "hollow protest" for the plaintiff to contend that the extensive amendments were "immaterial"; not made in response to CMC's complaints; and should be disregarded by the court.

Approach to application to strike out paragraphs of the defence

[516] Generally, I have dealt with the application to strike out paragraphs of the defence with regard to the approach discussed by Jackson J in *QNI Resources*, which emphasises restraint when pleadings may be improved via interlocutory processes.

[517] His Honour said (citations and footnotes omitted, my emphasis) –

> [65] There are a number of particular contexts where the inadequacy of a pleading may lead to a decision to strike it out. The procedural requirements for an adequate pleading are not a technical barrier to justice. On the contrary, the challenge that an inadequately particularised pleading represents to the basic requirement of procedural fairness was recently reaffirmed by the Court of Appeal in *Harvey v Henzell*. In that case, in response to an argument that faults in the particularity of a pleading are not fatal to a claim and that a

statement of claim should not be struck out under r 171 for lack of particularity, the Court said:

> "[I]n the later decision of *Banque Commerciale SA (In liq) v Akhil Holdings Ltd*, the High Court held that:
>
> 'The function of pleadings is to state with sufficient clarity the case that must be met. In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness.'" (footnotes omitted)

[66] **To say this is not to forget the restraint that a court should have before summarily terminating a proceeding for inadequacies that may be repaired.** That restraint need not be as firm where the perceived inadequacy is one that will not change at trial and where the legal standards against which it must be measured are not themselves in a state of development or flux.

Abuse of process

[67] It must be kept in mind that the present ground of the application is based on the absence of sufficient pleaded facts, no more and no less. The problem identified by the defendants is solely that facts required to support the claimed inferences of unconscionable facts do not appear.

[68] **In some cases, the question is whether facts required to be pleaded or particularised in support of the alleged material fact may be obtained by interlocutory processes such as disclosure by a party, interrogation, third party document production, or perhaps by calling relevant witnesses who will not provide the facts to the plaintiffs without being required to do so under compulsion of law.** However, the plaintiffs do not apply for any of those orders so as to be able to plead any other relevant fact from which the unconscionable facts could be inferred. It is not suggested by the plaintiffs that they can improve the pleading.

[518] With respect to the issue of superseded complaints, I do not consider it necessary for CMC to identify how it suggests it would respond to an amended paragraph of the plaintiff's pleading before determining whether a complaint about a paragraph of the defence had been superseded. The nature of any amendment will inform my decision to treat AE's complaint about a particular paragraph of the FADCC as superseded or not.

CMC's response to AE's suggestion that CMC had failed to amend a pleaded nonadmission in a timely way

[519] The applicable rule is rule 166 which relevantly states –

Denials and nonadmissions

166 (1) An allegation of fact made by a party in a pleading is taken to be admitted by an opposite party required to plead to the pleading unless –

(a) the allegation is denied or stated to be not admitted by the opposite party in a pleading; or

(b) rule 168 applies.[32]

(2) …

(3) A party may plead a nonadmission only if –

(a) the party has made inquiries to find out whether the allegation is true or untrue;

(b) the inquiries for an allegation are reasonable having regard to the time limited for filing and serving the defence or other pleading in which the denial or nonadmission of the allegation is contained;

(c) the party remains uncertain as to the truth or falsity of the allegation.

(4) A party's denial or nonadmission of an allegation of fact must be accompanied by a direct explanation for the party's belief that the allegation is untrue or can not be admitted.

(5) If a party's denial or nonadmission of an allegation does not comply with subrule (4), the party is taken to have admitted the allegation.

(6) A party making a nonadmission remains obliged to make any further inquiries that may become reasonable and, if the results of the inquiries make possible the admission or denial of an allegation, to amend the pleading appropriately.

(7) A denial contained in the same paragraph as other denials is sufficient if it is a specific denial of the allegation in response to which it is pleaded.

[520] CMC submitted that the complaint by AE that it failed to amend a nonadmission in a timely way was unsupported by direct evidence of CMC's failing to comply with its obligation under the rules and therefore unsustainable.

---

[32] **Implied nonadmissions**

168 (1) Every allegation of fact made in the last pleading filed and served before the pleadings close is taken to be the subject of a nonadmission and rule 165(2) then applies.

(2) However, nothing in these rules prevents a party at any time admitting an allegation contained in a pleading.

[521] It referred me to *Aimtek Pty Ltd v Flightship Ground Effect Pte Ltd* [2014] QCA 294. An argument was made in that case that the respondent, who had pleaded nonadmissions, had had ample time to conduct investigations into the allegations and was in possession of a large volume of relevant records which dealt with the transactions alleged by the appellant. The appellant argued that the evidence proved that the respondent could not have made the reasonable enquiries required by rule 166(3).

[522] In dealing with that argument, Fraser JA said:

> [12] … It is not controversial that if a party pleads a nonadmission without complying with one or more of the requirements of r 166(3) the nonadmission will be amenable to being struck out, with the result that the relevant allegation will be deemed to have been admitted under r 166(1). However the appellant did not adduce direct evidence of any such non-compliance. Rather its contention was premised upon an inference that if the respondent had examined the available documents and made the necessary inquiries it could not have been left in the uncertain state of mind described in r 166(3)(c). That argument assumed that, inconsistently with the terms of the respondent's nonadmissions, the respondent should have believed that the documents and information which were or might have been supplied by the identified persons were reliable in so far as they purported to verify or contradict the appellant's allegations. The primary judge was not prepared to draw such an inference about the respondent's attitude to information derived from the identified sources, in each case making a finding to the effect that there was insufficient material to reach an informed view about the matter. There was no error in that conclusion.

[523] Counsel for CMC submitted that *Aimtek* was authority for the proposition that direct evidence of the defendant's non-compliance with its obligation to carry out further inquiries was required before paragraphs containing nonadmissions were struck out. I do not think the case goes that far. The point made in *Aimtek* was that the conclusion, that the defendant had been non-compliant, was not in fact an available inference on the material available – not that non-compliance might only be proved directly.

[524] Additionally, CMC submitted that it was not in breach of rule 166(6). It was aware of its obligations under that rule to amend non-admissions as appropriate, and would do so.

[525] Counsel for CMC also noted that one of the consequences of pleading a nonadmission was that the defendant was not permitted to give or call evidence of a fact not admitted. Counsel observed that the parties were a long way off trial, when the nonadmission rule "bit".

[526] CMC submitted that if I were to strike out a paragraph of its defence, then I ought to grant it leave to re-plead, so as to ensure that the issues in dispute for determination at trial are identified.

Whether the paragraphs of the FADCC, listed in Schedule B of the 2FASOC, should be struck out

[527] The defendant's detailed response to this part of AE's application was contained in Schedule B to its written submissions.[33]

Paragraph 45(a)

[528] Paragraph 45(a) responded to paragraph 30 of the ASOC.

[529] AE complained about paragraph 45(a), having regard to paragraphs 43, 44 and 45(b) of the FADCC. Those paragraphs stated –

> 43. As to paragraph 28 of the Amended Statement of Claim, the defendant denies the allegations contained therein as the allegations are untrue because Mr Vance of the defendant at no time gave any direction as alleged by the plaintiff.
>
> 44. As to paragraph 29 of the Amended Statement of Claim, the defendant denies the allegations contained therein as they are untrue because Mr Vance of the defendant did not give any instruction as alleged.
>
> 45. As to paragraph 30 of the Amended Statement of Claim, the defendant:
>
> (a) does not admit the allegations contained therein. Despite making reasonable enquiries, the defendant remains uncertain as to the truth or falsity of the allegations; and
>
> (b) says that insofar as ~~the defendant~~ Mr Vance did say something to the effect of mobilising gear, it was to tell ~~the plaintiff~~ Mr Alexanderson and Mr Fitzgerald of the Defendant that they wanted to keep things moving and were going to be late getting equipment to site.

[530] Paragraph 28 of the 2FASOC alleged that, on or about mid to late October 2011, Vance gave directions to Alexanderson to mobilise plant and equipment on the basis that any equipment so mobilised would be paid for at Standby Rates.

[531] Paragraph 29 alleged that on 28 October 2011, Vance gave Alexanderson an oral instruction to keep mobilising the plaintiff's plant.

[532] Paragraph 30 stated, "At a site meeting attended by Vance and Alexanderson on 1 December 2011, Vance said words to Alexanderson to the effect of: "*keep mobilising gear*".

[533] AE argued that the matters pleaded in paragraphs 43, 44 and 45(b) could only be pleaded upon instructions from Mr Vance, and if that were so, the only "viable" explanation for paragraph 45(a) was that either Mr Vance could not remember, or the denials in paragraphs 43 and 44 were incorrectly pleaded. AE submitted that the explanation pleaded was either not a direct explanation or was an abuse of process.

---

[33] Document 50.

[534] CMC pointed out that the allegations in paragraphs 43, 44 and 45 responded to different conversations (as they clearly do). As to paragraph 45 – CMC submitted that there was no inconsistency between 45(a) and (b). The conversation was said to have occurred over seven years ago. Mr Vance could recall it, but not whether it was in the terms alleged by the plaintiff. The paragraph should be read as a whole.

[535] I consider that, on a fair reading of paragraphs 45(a) and (b), CMC was asserting that it was uncertain as to the words used in the conversation (*cf* paragraph 30 of the 2FASOC) but Mr Vance said *something* to Mr Alexanderson and Mr Fitzgerald (of CMC) to the *effect* that they wanted to keep things moving and that they were going to be late getting equipment to the site.

[536] Paragraph 45(a) is not to be struck out.

Paragraph 46

[537] AE complained that the nonadmission in paragraph 46 was a totally unreasonable response to paragraph 31 of the ASOC.

[538] Paragraph 31 of the 2FASOC stated –

> In accordance with the matters pleaded and particularised in paragraphs 8, 10(g), 10(l), 10(m), 28, 29 and 30 hereof, the plaintiff commenced mobilisation of its plant, equipment and personnel for the Project.
>
> Particulars
>
> (a) The dates show (sic) against each item of plant in the column entitled *"Mob. Date"* in Schedule A hereto.

[539] Paragraph 46 of the FADCC –

> The defendant does not admit the allegations contained in paragraph 31 of the Amended Statement of Claim. The defendant has made reasonable inquiries and remains uncertain as to the truth or falsity of the allegations contained therein.

[540] AE tendered a document (Exhibit 1) which was a document disclosed by CMC for the purposes of the *CMC v WICET* litigation. Exhibit 1 is entitled "Schedule of Plant/Labour/Equipment used for Reclamation C Bunds". It lists 40 items of plant or vehicles and the date upon which each item of plant was mobilised. I note that although it is called a schedule of Plant/Labour/Equipment, there is no separate mention of the labour required to operate the plant or vehicles.

[541] AE submitted that having regard to that document, CMC could not tenably continue to traverse the allegation in the 2FASOC.

[542] I have compared Schedule A to the 2FASOC against Exhibit 1. Almost all of the plaint listed in Schedule A is listed in Exhibit 1. For some plant, Exhibit 1 asserts the same "Date Mobilised" as Schedule A (see, for example, plant numbered 402, SE001). For other plant, it asserts a different date (see, for example, plant numbered 101, 75).

[543] AE asked me to compare paragraphs 49(a), 50(a), 51(b) and 52(b) of the FADCC (which responded to paragraphs 33(b), 33(c), 34, and 35 of the 2FASOC) to certain paragraphs of the WICET decision.

[544] The relevant paragraphs of the pleadings are set out in the table below:

2FASOC	FADCC
33(b): The defendant failed to complete the construction of the first section of a haul road to enable access to the Site by the plaintiff by the access date, 15 October 2011. [Followed by particulars.]	49(a): [The defendant] does not admit the allegation that the defendant did not complete the first section of the haul road by 15 October 2011. The defendant has made reasonable enquiries and remains uncertain as to the truth or falsity of the allegation.
33(c): The defendant did not provide access to the GPN haul road to the plaintiff until 27th November 2011 and that access was limited to a single access point with incomplete berms on the GPN haul road as particularised in Schedule A1 to the 25 February 2019 F & B Particulars. [Schedule A1 was entitled "Ongoing Access Standby/Delay/Disruption".]	50(a): [The defendant] does not admit the allegation that the defendant did not complete the GPN haul road until 27 November 2011. The defendant has made reasonable enquiries and remains uncertain as to the truth or falsity of the allegation …
34: The defendant failed to give the plaintiff sufficient, timely or appropriate access to the OLC Cut area to avoid delay or disruption to the Work, namely: (a) The defendant failed to complete the Pyealy Creek haul road crossing by the access date, 17 November 2011, so as to provide access between the OLC Cut and the Reclamation Bunds C Area. [Followed by particulars.] (b) The defendant completed the Pyealy Creek haul road crossing on or about 16 December 2011 as access to the OLC Cut. (c) The defendant failed to complete the OLC haul road by the access date, 17 November 2011. (d) The defendant completed the OLC	51(b): [The defendant] does not admit the allegations contained in paragraphs 34(a) – (d) of the Amended Statement of Claim. Despite making reasonable enquiries the defendant remains uncertain as to the truth or falsity of the allegations.

haul road on or about 19 January 2012.	
35: The defendant failed to give the plaintiff sufficient, timely or appropriate access to the rail receival area to avoid delay or disruption to the Work, namely: (a) The access date for the rail receival area was 28 October 2011. [Followed by particulars.] (b) The defendant first provided the plaintiff access to the rail receival area on or about 4 February 2012, which the defendant then withdrew and did not provide ongoing access until on or about 28 March 2012. [Followed by particulars.]	52(b): [The defendant] does not admit the allegations contained in paragraph 35(a) and 35(b). The defendant has made reasonable enquiries and remains uncertain as to the truth or falsity of the allegation.

[545] The paragraphs of the WICET decision to which I was then taken follow (footnotes omitted, my emphasis):

> [142] Whilst Mr Vance accepted that the statement in the report concerning mobilisation was correct, his answer was qualified by his belief that CMC had enough "gear to start the works at the start". CMC's "Plant, Machinery and Light Vehicle Site Access Approval Form Register" shows that a subcontractor of CMC did not have a dozer on-Site until 3 November 2011. CMC's subcontractor's (AE Group's) "Schedule of Plant/Labour/Equipment used for Reclamation C Bunds" shows plant required for hauling (that is, dump trucks) being available from 28 October 2011. **These documents only evidence when CMC's subcontractors mobilised particular pieces of equipment to the Site.** They do not evidence CMC's own capacity to mobile the necessary plant and equipment to construct the haul road had WICET obtained a clearing permit that was not subject to the approval of a Species Management Plan or that required the identification of No Go Zones. Mr Vance's evidence was that CMC had the ability to have machinery on-Site so as to commence work earlier than the end of October 2011:
>
> > "Well, for a start, Alexanderson's original contract didn't include the haul roads. The original intent was to build the haul roads – haul roads, site access, whatever you want to call them, there's been a couple of bits of language used – but their contract included building the access roads around the borrow pit, whatever they needed to do in the area of the borrow pit they were going to work in, **but the access roads down to the bunds CMC were going to perform, and we had access to other plant from other plant hire contractors, as well as our own plant, in this period if the work** had become available. I – we

> never put real pressure on Alexanderson to change this because, clearly, we didn't have access to the site.
>
> …

[146] **CMC's pleaded case is that on 5 November 2011 it commenced clearing and grubbing activities for the purpose of constructing haul routes from the GPN Borrow Pit to the Reclamation C Bunds.** CMC pleads that the construction of the haul route from the GPN Borrow Pit should have taken seven calendar days. This is on the assumption made by Mr King in his expert report on the Earthworks Claim. **CMC alleges that because of two "No Go Zones" Directions given on 8 November 2011 and 18 November 2011 the construction of the haul road was delayed by 12 days. CMC's pleaded delay period is between 7 November 2011 and 23 November 2011.**

[147] **It is common ground that the haul road took 19 days in total to construct.** The assumption made by Mr King in his report on instructions, that the haul road should have only taken seven days, is not supported by the evidence. Mr Vance's evidence was as follows:

> "It's approximately half the length if we'd been able to access at access point B. So it would reasonable (sic) to assume that – about half the duration to build that haul road. That means our five days in our baseline program was probably a little bit optimistic. So nine – eight, nine days to do that would have been a reasonable sort of assumption to get access at point B, and you then could have started the bunds while you finished the haul road to point A on the drawings I was using earlier."

This is a general estimate made by Mr Vance.

…

Measurement of the Delay

The Pleaded Case

[234] **CMC by paragraph 137C of its eighth further amended statement of claim pleads that the effect of the Start Works Direction, Permit Direction and Limited Clearance Direction was to cause additional costs to CMC by restraining it from starting construction of the haul routes required for Team 1 and Team 2 to perform the bulk earthworks by 22 calendar days from 14 October 2011 to 4 November 2011.** From my findings above, I accept that the Permit Direction and the Limited Clearance Direction resulted in a delay of 22 days.

[235] **Paragraph 137I pleads that the No Go Zone Directions caused additional cost to CMC by delaying the construction of the haul route from the GPN Borrow Pit to the Reclamation C Bunds by**

12 calendar days between 7 November 2011 and 23 November 2011. I have found that the delay period was 8 rather than 12 days.

[546] Having regard to the way in which it pleaded its case in *CMC v WICET*, and the evidence upon which those pleas were made, AE submitted that CMC had had ample time to adequately plead to the allegation in paragraph 31. It had clearly agitated its case in another forum and yet – nine months after its first defence – had not incorporated into its pleadings information which it plainly had. AE submitted that CMC's failure to adequately plead was an abuse of process because it brought the court's process into disrepute. AE referred to rule 211 which sets out a party's duty of disclosure, and submitted that the documents held by CMC's former solicitors were disclosable. Whether CMC's current solicitors had an opportunity to consider them was irrelevant – the defendant was under an order to provide disclosure by a certain date, with which it had not complied. AE's point was that CMC had been "hiding behind the lapse of time and lack of direct access to witnesses and lack of direct knowledge about events, in circumstances where most of the events were the subject of litigation and judgment".

[547] CMC submitted that its nonadmission was properly pleaded. Whilst the plaintiff's particulars stated when each item of plant and equipment was mobilised, it did not say when each member of *personnel* was mobilised – inconsistent with the allegation in paragraph 31 of the 2FASOC.

[548] My understanding is that each item of equipment requires one operator. I do not consider this part of CMC's response to be persuasive.

[549] CMC also submitted that the allegation was not simply as to the dates upon which the plant was mobilised: it alleged that plant et cetera was mobilised pursuant to certain directions – which CMC denied. I consider that that approach to paragraph 31 is one which fails to read the pleading as a whole. And regardless, CMC could have made it plain in its response that, for example, it denied that AE mobilised its plant in response to directions to do so.

[550] CMC further argued that it was not required to plead to particulars. While that may be so, at some stage, and the sooner the better, CMC will have to make clear its position on the mobilisation dates.

[551] Lastly, CMC submitted that almost all of the mobilisation dates had been amended, as was revealed in Schedule A to the FASOC (which was marked up with the amendments). CMC submitted that AE's complaint had been overtaken by its amendments, to which CMC would now respond.

[552] I note that there have been amendments to Schedule A. For that reason, paragraph 46 is not to be struck out. It is appropriate to allow CMC time to respond to paragraph 31 of the 2FASOC to take account of the amended mobilisation dates and for it to make clear its position on the mobilisation dates.

Paragraph 47

[553] Paragraph 47 of the FADCC responds to paragraph 32 of the ASOC.

[554] Paragraph 32 of the 2FASOC states –

> The defendant knew that the plaintiff was mobilising plant, equipment and personnel at the defendant's instruction which could not be utilised at the time of mobilisation and would be on standby pending the availability of the work areas for the Project.

[555] Paragraph 32 is followed by lengthy particulars which include, among other things, documents from which that knowledge might be inferred. The amendments to the particulars are marked up in the FASOC and the 2FASOC.

[556] Paragraph 47 of the FADCC states –

> As to paragraph 32 of the Amended Statement of Claim, the defendant:
>
> (a) denies that the defendant knew that the plaintiff was mobilising plant, equipment and personnel as alleged;
>
> (b) denies the allegation that the plaintiff was mobilising plant at the defendant's instruction, because the defendant denies giving the plaintiff any such instructions as pleaded in paragraphs 43, 44 and 46 above; and
>
> (c) otherwise does not admit the allegations contained therein. The defendant has made reasonable enquiries and remains uncertain as to the truth or falsity of the allegations.

[557] AE submitted that the denial and the explanation cannot be maintained "in the face of the Schedule and the mobilisation records in the disclosure by the Parties".

[558] CMC submitted, in effect, that at the heart of the allegation in paragraph 32 of the 2FASOC was the defendant's knowledge: the mobilisation records were not relevant to that allegation. However, this submission was somewhat inconsistent with its next. CMC submitted that its paragraph 47 responded to an allegation in the ASOC which had been substantially amended by the plaintiff in response to CMC's rule 444 complaint. It submitted that the mobilisation dates in Schedule A had been "almost entirely" amended and that it would be required to respond to those amendments. "Almost entirely" is an overstatement but there have been a significant number of amendments to Schedule A.

[559] AE submitted that while the particulars had been amended since the ASOC, the allegation of fact had not been and CMC was not required to plead to particulars.

[560] When considered in the context of its particulars, I agree that the focus of paragraph 32 is on the defendant's knowledge. However CMC has, in effect, acknowledged that its response to that paragraph requires it to say something about mobilisation dates and suggests that it intends to re-plead to it, including by reference to its particulars.

[561] Paragraph 47 is not to be struck out. CMC must respond to paragraph 32 of the 2FASOC taking into account the amended particulars.

Paragraph 48

[562] Paragraph 48 of the FADCC responds to paragraph 33(a) of the ASOC.

[563] Paragraph 33(a) of the 2FASOC states –

> The defendant failed to give the plaintiff sufficient, timely or appropriate access to the GPN haul road to avoid delay or disruption to the Work, in that:
>
> (a) The first section of a haul road to be constructed by the defendant so as to enable access the Site (sic) by the plaintiff was that part from the GPN Borrow Area to the Reclamation Area C Bunds at about CH2750.

[564] Particulars followed.

[565] Paragraph 48 of the FADCC states –

> As to paragraph 33(a) of the Amended Statement of Claim, the defendant denies the allegations as they are untrue and says that the contractual obligation in clause 6.1.1. was only to give 'sufficient' access and ~~the defendant did not provide the plaintiff with sufficient access as alleged, because such allegation is untrue, as~~ the plaintiff was provided with sufficient access to perform the works in the premises particularised below.
>
> **Particulars**
>
> (i) Clause 8.3.1 of the General Conditions provides:
>
> "*The Subcontractor shall be deemed to have allowed for any delays and disruptions to the Subcontract Works as may reasonably be expected for the work environment concerned. Such delays and disruptions shall not entitle the Subcontractor to any adjustments to the Subcontract Sum or to any extension of time.* ***Extensions of time, but not any associated costs, may be allowed where the Subcontractor is or will be delayed in achieving Practical Completion by any of the following events:***
>
> *(a) Suspension of the Subcontract Works directed by CMC's Representative;*
>
> *(b) Suspension of the Subcontract Works as lawfully permitted by the Building and Construction Industry Payments Act 2004;*
>
> *(c) Variations approved by CMC's Representative; or*
>
> *(d) an act or omission of CMC, its officers, employees or agents."*
>
> (emphasis added)
>
> (ii) On its proper construction the above clause did not permit the plaintiff to claim an extension of time or delay costs.

(iii) The defendant repeats and relies upon paragraphs 3A to 13 above.

(iv) Further, the defendant says that clause 2.1.1 of the Contract required the plaintiff to fully inform itself of the site conditions prior to tendering for the works and to satisfy itself regarding conditions, contingencies and other circumstances which might effect (sic) the performance of the Subcontract Works. The clause provides that there shall be no increase of the sum to be paid to the plaintiff on account of its failure to be fully informed.

(v) On a proper construction of the above-mentioned clauses, and in the premises of the matters pleaded above, the obligation to provide sufficient access was subject to the plaintiff's ability to provide a fleet capable of carrying out the bulk earthworks and there was no contractual entitlement to any standby costs in the interim.

(vi) Further, and in any event, the defendant says that the Plaintiff did not mobilise until the end of October 2011 and did not have a fleet that could carry out the bulk earthworks onsite until or on about 18 November 2011.

(vii) The defendant cannot presently further particularise this allegation but intends to provide further particulars upon the completion of interlocutory steps (including disclosure).

[566] AE complained that –

- the particulars did not include particulars as to *how* sufficient access was provided;
- the denial was unresponsive to the allegation; and
- the defendant's failure to provide proper particulars, having regard to the time which had elapsed, required the paragraph to be struck out as an abuse of process.

[567] AE referred to paragraph 2 of its "Request for Particulars of the Defence and Counterclaim" dated 29 June 2018 which states:

> As to the allegations made in [certain paragraphs of the defence, including 48], provide particulars by reference to each access event;
>
> a) what access is said to have been provided by reference to each access event;
>
> b) where the access is said to have been provided (by location on the site) by reference to each access event;

c) what the access is said to have been provided for (by reference to the relevant work task) by reference to each access event;

d) who is said to have provided the access and the means of communication by reference to each access event;

e) to whom it is said the provision of access was communicated by reference to each access event;

f) when it is said each access was provided by reference to each access event; and

g) to the extent the communication of access was in writing, provide a copy of the same pursuant to the operation of r.222 of the UCPR.

[568] AE submitted that it made that request for particulars so that it could brief an expert for their opinion about sufficient access.

[569] It took me to paragraph 2 of CMC's response[34] which was to the effect that AE's request was a request for evidence but that CMC would provide particulars at the end of "interlocutory steps". Paragraph 2 states –

> As to paragraph 2 of the request … this is not a valid request for particulars as it is a request for evidence, and in any event will be provided following completion of interlocutory steps. If necessary, the Defendant will apply for leave to vary the earlier orders to provide that only a "response" to this request for particulars is required (rather than the particulars).[35]

[570] AE complained that it did not know what the reply meant. Also, AE had to brief its expert first. The request for particulars was 8 or 9 months old. Nothing was revealed which would answer the request in the two amended defences filed or the counterclaims. AE submitted that unless the defendant was ordered to provide the particulars, then there would be "several rounds of expert reports" required.

[571] CMC argued that paragraph 48 denied the allegation that it failed to provide "sufficient, timely or appropriate access to the GPN haul road to avoid delay or disruption to the Work". That obligation was different from the obligation pleaded in paragraph 26(b) of the 2FASOC to give "Sufficient Access".

[572] It had responded to the allegation that it was contractually obliged to provide Sufficient Access as defined (in paragraph 26(c) of the 2FASOC) in paragraph 37 of the FADCC. And in paragraph 36 of the FADCC there was a definitive statement about the contract's terms (in response to paragraph 26(b) of the 2FASOC).

[573] CMC submitted that its particulars of paragraph 48 were sufficient and that, as stated, further particulars would be provided. Just because the plaintiff did not think those paragraphs contained a complete answer did not mean that they ought to be struck out.

---

[34] Document 32, filed 16 October 2018.

[35] That is, the orders of Douglas J and Brown J about the provision of particulars, rather than a response, by a certain date.

[574] To understand that argument, I have set out those the relevant parts of those related paragraphs below:

2FASOC	FADCC
26. The contract relevantly provided that: (a) The defendant was to provide, and maintain during the Work, the plaintiff with sufficient access [**Sufficient Access**] to commence and undertake the Work by 19 October 2011 [the **Commencement Date**] until the "*Date of Practical Completion"*. Particulars (i) Clause 6.1.1 and 6.1.2 of the General Conditions. (ii) Item 6.1.1 of the Contract Particulars. (iii) Paragraphs 10(g), 10(l), 10(m), 11(a), 11(d), 11(e) and 11(f) hereof.	
(b) Sufficient Access, as a matter of construction of the Contract, was: (i) unimpeded, apart from reasonable construction traffic, access to all physical locations on the Subject Property upon which or over which the plaintiff was required to perform the Work or traverse to perform the Work; and (ii) reasonable trafficable travel paths over which the plaintiff was required to travel to perform the Work. Particulars followed.	36. The defendant denies the allegations contained in paragraph 26(b) … because such allegations do not reflect the terms of the Contract, and are contrary to clause 6.1.2 of the General Conditions. Particulars Access to the site is provided for at clause 6.1.2 of the General Conditions. "Access to the Site shall not be exclusive and the Subcontractor shall allow access to and at all times co-operate with the Principal, CMC and other contractors for the performance of the work concurrently with the Subcontract Works".
(c) The defendant was to maintain, after its initial provision of Sufficient Access, sufficient access for the plaintiff to perform the Work. Particulars followed.	37. As to paragraph 26(c) of the Amended Statement of Claim, the defendant: (a) … (b) in any event says that it provided the plaintiff with sufficient access to perform

	the works under the Contract in accordance with its terms; and otherwise denies the allegation at paragraph 26(c)(iii) because the executed Contract constituted the entire agreement between the parties as provided in clause 6 of the Formal Instrument of Agreement.

[575] Thus, the defendant admitted the allegation in paragraph 26(a), that it was required to provide AE with "sufficient access", but having regard to clause 6.1.2 denied the way in which the plaintiff asserted "sufficient access" was to be construed.

[576] In that context, I do not consider the denial in paragraph 48 to be unresponsive and I do not order it to be struck out.

[577] But the complaint about delayed access is one of the critical issues in the proceedings. The defendant must make its position on it clear.

[578] In its written submissions, CMC has acknowledged the importance of its providing particulars of when and where it says it gave sufficient access to AE (including by way of communication). However, CMC complains that AE's request for particulars is invalid because of its reference to "access events". The phrase "access event" is not used in an allegation nor is it an issue in the proceeding.

[579] There is some validity in CMC's complaint. However, I would consider a request for the when and where of sufficient access to be a valid request. Indeed, I consider it necessary for CMC to provide particulars of the access it said it provided to AE within a reasonable period of time. I also consider it necessary for CMC to provide particulars of how the fact that access was available was communicated within a reasonable period of time.

[580] I note that CMC stated that it would provide further particulars of sufficient access following disclosure and relevant interlocutory steps. If that is indeed still the position, CMC may raise its difficulty at the next review of this matter.

Paragraph 49

[581] Paragraph 49 responds to paragraph 33(b) of the ASOC.

[582] Paragraph 33(b) of the 2FASOC states –

> 33. The defendant failed to give the plaintiff sufficient, timely or appropriate access to the GPN haul road to avoid delay or disruption to the Work, in that:
>
> (a) …
>
> (b) The defendant failed to complete the construction of the first section of a haul road to enable access to the Site by the plaintiff by the access date, 15 October 2011.

[583] Particulars follow. I note that there has been no amendment of the paragraph and only limited amendment of the particulars.

[584] Paragraph 49 of the FADCC states –

> As to paragraph 33(b) of the Amended Statement of Claim, the defendant:
>
> (a) does not admit the allegation that the defendant did not complete the first section of the haul road by 15 October 2011. The defendant has made reasonable enquiries and remains uncertain as to the truth or falsity of the allegation; and
>
> (b) denies the allegation that the defendant did not provide the plaintiff with sufficient access to commence the works because it is untrue and the plaintiff was provided with sufficient access to perform the works.
>
> **Particulars**
>
> (i) The defendant repeats and relies upon the particulars set out in paragraph 48 above.
>
> (ii) The defendant cannot presently further particularise this allegation but intends to provide further particulars upon the completion of interlocutory steps (including disclosure).

[585] The critical allegation is that CMC did not complete construction of the haul road by 15 October 2011.

[586] AE complained about the adequacy of CMC's response and its explanation for its nonadmission in 49(a). The allegation is not complex. I consider CMC's response to that allegation inadequate – particularly in light of the allegations it made in *CMC v WICET* about its construction of haul routes and the Baseline Program.

[587] I do not accept CMC's submission that paragraph 33(b) has been amended to such an extent as to warrant my deferring consideration of the adequacy of its response. It is an overstatement on CMC's part to submit that the new particulars are "significant and material to the allegation". They refer to the relevant parts of documents which had already been included in the pleadings.

[588] In its written submissions, the defendant says that it intends to amend the traversal in paragraph 49(a) upon completion of disclosure. Having regard to the restraint referred to in *QNI Resources*, I do not strike out paragraph 49(a). However, the paragraph requires amendment within a reasonable period of time.

[589] I have already dealt with the issue of the sufficiency of the particulars of the "sufficient access" which the defendant asserts it provided.

Paragraph 50

[590] Paragraph 50 of the FADCC responds to paragraph 33(c) of the ASOC.

[591] Paragraph 33(c) of the 2FASOC states –

33. The defendant failed to give the plaintiff sufficient, timely or appropriate access to the GPN haul road to avoid delay or disruption to the Work, in that:

(a) … [Particulars]

(b) … [Particulars]

(c) The defendant did not provide access to the GPN haul road to the plaintiff until 27th November 2011 and that access was limited to a single access point with incomplete berms on the GPN haul road as particularised in Schedule A1 to the 25 February 2019 F&B Particulars.

(d) The defendant provided sufficient access to Reclamation Bunds C area by the GPN haul road enabling the plaintiff to utilise its plant and equipment on the GPN haul road on or between (sic) 4 February 2012.

[592] Paragraph 50 of the FADCC states –

As to paragraph 33(c) of the Amended Statement of Claim, the defendant:

(a) does not admit the allegation that the defendant did not complete the GPN haul road until 27 November 2011. The defendant has made reasonable enquiries and remains uncertain as to the truth or falsity of the allegation.

(b) denies the allegation that the defendant did not provide the plaintiff with sufficient access to commence the works because the plaintiff was provided with sufficient access to perform the works.

Particulars

(i) The defendant repeats and relies upon the particulars set out in paragraph 48 above.

(ii) The defendant cannot presently further particularise this allegation but intends to provide further particulars upon the completion of interlocutory steps (including disclosure)

[593] AE complained that the explanation for the nonadmission is inadequate, particularly having regard to the lapse of time since the allegation was pleaded. It also complained about CMC's failing to particularise the "sufficient access" it said it did provide.

[594] CMC said that paragraph 33(c) has been materially amended and that "plainly" the amended allegation supersedes the plaintiff's complaint.

[595] AE said there has been no material amendment: the FASOC and the 2FASOC were in the same terms, complaining about access to the GPN haul road. The amendment, AE said, was the inclusion of paragraph 33(d) to plead the actual date upon which the defendant did provide sufficient access to the Reclamation Bunds C Area. The amendment was in fact more extensive than that.

[596] The terms of the paragraph of the Amended Statement of Claim, to which CMC responded may be gleaned from the FASOC. Paragraph 33(c) of the Amended Statement of Claim was as follows –

> 33 The defendant failed to give the plaintiff sufficient, timely or appropriate access to the GPN haul road to avoid delay or disruption to the Work, in that:
>
> …
>
> (c) The defendant did not provide sufficient access to the GPN Haul Road to the plaintiff until 27th November 2011.

[597] I am not convinced that the amendments to paragraph 33(c) explain the inadequacy of CMC's response to it – particularly having regard to the matters pleaded in *CMC v WICET* which included CMC's pleading delay to the construction of the haul route from the GPN Borrow Pit. Nevertheless, I will not strike out paragraph 50, in light of CMC's statement that it intends to amend this traversal upon completion of disclosure. I consider that amendment ought to occur with a reasonable period of time.

Paragraphs 51(a) and (b)

[598] Paragraph 51 of the FADCC responds to paragraph 34 of the Amended Statement of Claim.

[599] Paragraph 34 of the 2FASOC states –

> The defendant failed to give the plaintiff sufficient, timely or appropriate access to the OLC Cut area to the Reclamation Bunds C Area to avoid delay or disruption to the Work, namely:
>
> (a) The defendant failed to complete the Pyealy Creek haul road crossing by the access date, 17 November 2011, so as to provide access between the OLC Cut and the Reclamation Bunds C Area.
>
> [Particulars follow]
>
> (b) The defendant completed the Pyealy Creek haul road crossing by on or about 16 December 2011 as access to the OLC Cut.
>
> (c) The defendant failed to complete the OLC haul road by the access date, 17 November 2011.
>
> (d) The defendant completed the OLC haul road on or about 19 January 2012.

[600] Paragraphs 51(a) and (b) of the FADCC state –

> As to paragraph 34 of the Amended Statement of Claim, the defendant:
>
> (a) denies the allegation that the defendant failed to give the plaintiff sufficient access to the OLC Cut to the Reclamation Bunds C Area

because the plaintiff was provided with sufficient access to the Works; and

Particulars

(i) The defendant repeats and relies upon the particulars set out in paragraph 48 above.

(ii) The defendant cannot presently further particularise this allegation but intends to provide further particulars upon the completion of interlocutory steps (including disclosure)

(b) … does not admit the allegations contained in paragraphs 34(a) – (d) of the Amended Statement of Claim. Despite making reasonable enquiries the defendant remains uncertain as to the truth or falsity of the allegations.

[601] AE complains that

- the particulars do not support the allegation in paragraph 51(a) in so far as it alleges that it provided "sufficient access"; and
- the nonadmission was an abuse of process having regard to CMC's case in *CMC v WICET*.

[602] I note CMC's submission, in response to this complaint and others, to the effect that the goal of just and expeditious resolution of the real issues in dispute is served by allowing the defendant to revisit its traversals in an orderly and complete fashion – rather than a piecemeal one.

[603] AE's position (in its most recent written submissions) is that the paragraph is liable to be struck out or the defendant is required to give further and better particulars of what it means by sufficient access.

[604] I consider it appropriate to require the defendant to provide the particulars of the sufficient access it asserts it did provide within a reasonable period of time. I also consider it appropriate to allow CMC a reasonable period of time to amend its explanation for the nonadmission of the allegations in paragraphs 34(a) – (d).

Paragraphs 52(a) and (b)

[605] Paragraph 52 responds to paragraph 35 of the Amended Statement of Claim.

[606] Paragraph 35 of the 2FASOC states –

> The defendant failed to give the plaintiff sufficient, timely or appropriate access to the rail receival area to avoid delay or disruption to the Work, namely:
>
> (a) The access date for the rail receival area was 28 October 2011.
>
> [Particulars follow.]
>
> (b) The defendant first provided the plaintiff access to the rail receival area on or about 4 February 2012, which the defendant then withdrew and then did not provide ongoing access until on or about 28 March 2012.
>
> [Particulars follow.]

[607] Paragraph 52 of the FADCC states –

> As to paragraph 35 of the Amended Statement of Claim, the defendant:
>
> (a) denies the allegation that the defendant failed to give the plaintiff sufficient access to the rail receival area because the plaintiff was provided with sufficient access to perform the works.
>
> **Particulars**
>
> (i) The defendant repeats and relies upon the particulars set out in paragraph 48 above.
>
> (ii) The defendant cannot presently further particularise this allegation but intends to provide further particulars upon the completion of interlocutory steps (including disclosure).
>
> (b) does not admit the allegations contained in paragraph 35(a) and 35(b). The defendant has made reasonable enquiries and remains uncertain as to the truth or falsity of the allegation.

[608] The plaintiff complains that –

- The particulars provided are not of the allegation;
- The denial is unresponsive;
- No particulars have been provided of "sufficient access";
- the explanation for the nonadmission is inadequate; and

- for the defendant to allege that it provided sufficient access, it is an abuse of process for it to plead a nonadmission as to the times at which it says sufficient access was provided.

[609] CMC submitted that paragraph 35 had been materially amended and that I ought not to evaluate paragraph 52 until it had a chance to respond to the amended allegation.

[610] Further it submitted that the allegation in paragraph 52(b) was vague and ambiguous in its allegation of the "withdrawal" of access and "ongoing (rather than sufficient) access". CMC submits that I should require AE to amend its allegation before requiring CMC to plead to it.

[611] AE submitted that the amendments were minor ones, to particulars, and that the substance of the allegation has not changed.

[612] I consider that the amendments to the particulars of paragraph 35(b) which appear in the FASOC give colour to the allegation in (b). CMC should be permitted to respond to them (and to the other amendments which appear in the 2FASOC) before the adequacy of its paragraph 52 is considered.

[613] Particulars of the "sufficient access" which the defendant asserts it did provide are to be provided as before.

[614] There was no application before me about the ambiguity of paragraph 35 of the 2FASOC. Whether the plaintiff wishes to amend it in the light of CMC's statements about its ambiguity is a matter for the plaintiff.

Paragraph 54(a)

[615] Paragraph 54 responds to paragraph 37 of the ASOC, which CMC submits has been materially amended.

[616] One of the amendments to paragraph 37 introduced the particulars in Schedule A. I consider that a significant amendment of itself, which elaborates on the allegation pleaded.

[617] However, that observation is taken over by the fact that I have ordered that the particulars of paragraph 37 be struck out, with leave to re-plead.

[618] CMC will need to respond to the re-pleaded allegation before the sufficiency of its response may be evaluated.

Paragraphs 57(a) and 57(b)

[619] Paragraph 57 responds to paragraph 40 of the Amended Statement of Claim.

[620] I have ordered the striking out of paragraph 40, with leave to re-plead. CMC will need to respond to the re-pleaded allegation before the sufficiency of its response may be evaluated.

[621] However, for the purposes of CMC's response, it is worth noting AE's complaints.

[622] In paragraph 57(b), CMC denied the allegation that AE would have completed work by 20 March 2012, even if it had been delayed by CMC – which was denied – due to AE's own delays.

[623] AE complained about the adequacy of the particulars provided about its own delays. Those particulars were as follows –

> (i) The best particulars that the defendant can presently provide are as follows.
>
> The plaintiff's delays included the following:
>
> A. the plaintiff was late to mobilise their own plant and equipment and did not mobilise until the end of October 2011;
>
> B. the plaintiff was delayed from breaches to its own method statement and because it did not have a full chain of equipment on site;
>
> C. the plaintiff incurred delays due to it getting a 50 tonne dump truck bogged on or about 8 March 2012 in which the entire site had to be subsequently shut down for at least 4 days; and
>
> D. the plaintiff's equipment on site repeatedly broke down, causing delays.
>
> (ii) Detailed particulars to be provided upon disclosure and the completion of interlocutory steps, including expert evidence.

[624] AE argued that particular A was "a rather curious pleading" because the contract had not been signed until after that date – although it acknowledged that the parties were treating the contract as if it were on foot before that date. AE argued that A was "a red herring" because the plaintiff had not claimed for plant which was not then on site.

[625] With respect to particular B, AE argued that it did not know what a "chain of equipment" was nor were its alleged breaches of its own method statement, or their effect, identified.

[626] AE considered particular C to be adequate.

[627] With respect to particular D, AE sought particulars of the delay caused when its own equipment was said to have broken down, including particulars of the date or dates of its breaking down. It referred me to paragraph [169] of *CMC v WICET* which referred to Mr Vance's evidence that breakdowns contributed very little to the delay. Paragraph [169] states (footnotes omitted) –

> Mr Vance, however, did not accept the blame for the loss of productivity up to 13 January 2012 could be laid at the feet of Alexanderson. Mr Vance identified the delay from truck breakdowns as being for a defined period in January 2012. To similar effect was Mr Barry's evidence that truck breakdowns contributed "very little" to the length of time the Reclamation C Bunds took to construct.

[628] James Barry was CMC's project superintendent.[36]

[629] Counsel for AE explained that there was evidence before Flanagan J that there was no delay caused by AE's equipment breaking down. AE also argued that particular (ii) ought to be struck out because whether equipment broke down or not was not a question of expert evidence; disclosure had occurred and AE had no idea what interlocutory steps CMC was waiting for.

[630] CMC acknowledged that paragraph 57(b) was "inelegantly put" – but it was responded to a "defective" allegation in the 2FASOC.

[631] While CMC's response to the re-pleaded paragraph 40 will depend on the way it is re-pleaded, CMC may wish to take into account AE's complaints about (i) B and D, and (ii) in its response.

Paragraph 60

[632] AE complained similarly about paragraph 60.

[633] Paragraph 60 responded to paragraph 42 of the ASOC. CMC submitted that paragraph 42 had been materially amended, as had Schedule B (mobilisation dates) and the quantum claimed.

[634] AE submitted that the amendment to paragraph 42 had been by way of cross-referencing the parts of the pleading which provided the entitlement to contractual standby – cross-referencing which it was not required to do.

[635] Also, AE submitted, its complaint had not been superseded by the amendments. Its complaints were that CMC had not provided adequate particulars of the plaintiff's own delays nor identified the part of the Contract which supports the construction of it pressed in paragraphs 60(a)(ii) and 60(b).

[636] Paragraph 42 of the 2FASOC states –

> Pursuant to the matters pleaded and particularised in paragraphs 8, 9, 10(e), 10(g), 10(h), 10(i), 10(m), 10(n), 11 and 26, 27(a)(ii), 27(b), 28 to 40, and 41(a) hereof, the defendant was obliged to pay the plaintiff the amount of $1,189,164 for standby and the defendant has not made payment for standby at the Standby Rates.
>
> Particulars
>
> (a) The particulars of the amounts are set out in Schedule B hereto.

[637] Paragraph 60 of the FADCC states –

> As to paragraph 42 of the Amended Statement of Claim, the defendant:
>
> (a) denies the allegation that the defendant is required to pay the plaintiff the Standby Rates in the amount of $1,242, 345 because:

---

[36] *CMC v WICET* [60].

(i) the plaintiff was responsible for its own delays; and

(ii) the plaintiff is only entitled to Standby Rates if the defendant issued the plaintiff with an instruction to stand down, and no such instruction was issued by the defendant; and

(b) says, in any event that the Contract provides that the plaintiff is not entitled to costs for the delays.

[638] In my view, the amendments to paragraph 42 do not supersede the complaints.

[639] However, rather than striking out paragraph 60(a)(i), CMC is required to provide further and better particulars of AE's "own delays" to ensure that AE understands the case it has to meet.

[640] As to the complaint that CMC has not identified the parts of the contract which support the contentions made in paragraphs 60(a)(ii) and 60(b) – I do not consider it necessary for CMC to do so. The relevant parts of the contract have been identified in earlier paragraphs of the defence, which must be read as a whole.

Paragraph 61

[641] Paragraph 61 of the FADCC responds to paragraph 43 of the ASOC, which CMC submitted, had been materially amended.

[642] AE submitted that the paragraph had not been materially amended in a relevant way.

[643] Paragraph 43 of the 2FASOC states –

> Pursuant to the matters pleaded and particularised in paragraphs 8, 9, 10(e), 10(g), 10(l), 10(m), 10(n), 11 and 26, 27(a)(i), 27(c), 28 to 40, and 41(b) hereof, the plaintiff incurred additional costs in the estimated amount of $29,841 as a consequence of the Defendant's Delays by reason of overtime and penalty rates for personnel.
>
> [Particulars followed.]

[644] The FASOC amended the paragraphs "pursuant to" which the allegation in paragraph 43 was made.

[645] The 2FASOC amended the FASOC by including particulars about penalty rates for public holidays.

[646] Paragraph 61 of the FADCC states –

> As to paragraph 43 of the Amended Statement of Claim, the defendant:
>
> (a) denies the allegation that there were "Defendant's Delays" because the plaintiff was provided sufficient access to the site;
>
> **Particulars**

(i) The defendant repeats and relies upon the particulars set out in paragraph 48 above.

(ii) The defendant cannot presently further particularise this allegation but intends to provide further particulars upon the completion of interlocutory steps (including disclosure).

(b) says that the defendant never instructed the plaintiff that its personnel were required to work overtime nor otherwise required the performance of overtime; and

(c) insofar as the plaintiff's personnel did work overtime, says:

(i) this was due to delays for which the plaintiff was responsible; and

(ii) there is, in any event, no entitlement under the Contract for the plaintiff to claim such costs.

[647] AE complained about the particulars of 61(a) and (c) and, specifically, the lack of particulars of "sufficient access" and "delays for which the plaintiff was responsible".

[648] I do not consider the amendments to paragraph 43 to warrant the deferral of AE's complaint about paragraph 61. I consider the particulars of "sufficient access" and "delays for which the plaintiff was responsible" to be a necessary part of the pleading, to be provided within a reasonable period of time.

Paragraph 62(a)

[649] Paragraph 62 of the FADCC responds to paragraph 44 of the ASOC. I have ordered the striking out of paragraph 44 of the 2FASOC, with leave to re-plead. Therefore AE's complaint about paragraph 62 has been superseded.

Paragraph 70

[650] Paragraph 70 of the FADCC responds to paragraph 53 of the ASOC.

[651] Paragraph 53 of the 2FASOC asserted that the plaintiff's performance of the Work was disrupted by inclement weather and its particulars included a reference to Schedule C1 which was entitled "Wet Weather Utilisation".

[652] Paragraph 70 of the FADCC is to the effect that CMC could not admit the allegations in paragraph 53 of the ASOC because, despite reasonable inquiries, it remained uncertain about it.

[653] AE's complaint is that the explanation for the nonadmission is inadequate: CMC ought to have known about the wet weather events because it had pleaded wet weather delays in its pleadings in the *CMC v WICET* litigation.

[654] CMC's response was to the effect that, while CMC might have at one stage pleaded certain wet weather delays in the *CMC v WICET* proceedings, those allegations were withdrawn. In those circumstances the inference to be drawn was that CMC did *not*

think that its allegations as to wet weather delays could be supported. Also, CMC said it was intent on making further inquiries and intended to amend in due course.

[655] I have ordered that the particulars of paragraph 53 be amended but I do not consider AE's complaint about paragraph 62(c) to have been superseded.

[656] I consider the appropriate way to deal with the complaint is to allow CMC to amend its pleading.

Paragraph 89(b)

[657] Paragraph 89 respond to paragraph 77 of the Amended Statement of Claim.

[658] Paragraph 77 of the 2FASOC states –

> The extent of vertical settlement which occurred under the Reclamation Bunds C Area resulted in the total cubic meterage of Fill being around 10 to 12% in excess of the volume calculated by measuring between the preconstruction surface and the post construction surface.
>
> Particulars
>
> (a) The plaintiff cannot provide full particulars of this calculation until the defendant has provided disclosure of the relevant settlement data, and geotechnical records and survey records.
>
> (b) The plaintiff cannot provide further particulars until the provision and completion of expert evidence.

[659] Paragraph 89 of the FADCC states –

> As to paragraph 77 of the Amended Statement of Claim, the defendant:
>
> (a) denies the allegations contained therein because the extent of vertical settlement alleged by the plaintiff is incorrect; and
>
> (b) says that the extent of the vertical settlement has been significantly exaggerated by the plaintiff compared to the amount of settlement that actually occurred.
>
> **Particulars**
>
> Detailed particulars to be provided upon disclosure and expert evidence.
> The defendant cannot presently particularise this allegation.

[660] AE complained that CMC did not state what settlement it claimed had occurred.

[661] It submitted that it was an abuse for the defendant to maintain an "ambiguous allegation of fact" (that the extent of vertical settlement had been significantly exaggerated) having regard to the way in which it pleaded in *CMC v WICET* as reflected in paragraphs [991] – [997] of the judgment.

[662] AE said, at [9] of its written submissions –

To make it clear for the court:

(a) In CMC v WICET the issue is that the change in volume placed was 11% - not that the vertical settlement was 11%.

(b) The difference conceptually is that the Bund is trapezoid in shape, and the addition volume caused by settlement is magnified against the vertical percentage by reason that the trapezoid is larger at its base.

[663] CMC said that these "new submissions" in [9] demonstrated that the allegation made by the plaintiff in the present proceeding was materially different from CMC's claim in *CMC v WICET*. I do not agree that the submissions at [9] have that effect.

[664] The issue here is whether 10 – 12% more fill was required because of the extent of vertical settlement. The issue in *CMC v WICET* was the appropriate quantity calculation for fill and whether it ought to have included an allowance of 10% of fill volume for settlement of the bunds. They cover the same ground.

[665] CMC pointed out that –

- AE said that it would provide particulars of the extent of vertical settlement, upon receipt of expert evidence; and
- CMC said it was going to provide particulars upon the provision of disclosure and expert evidence.

[666] CMC submitted that plainly both parties needed expert evidence to identify the extent of settlement and the matter ought not to be taken further at this stage.

[667] I accept that expert evidence is required before the matter may be taken further.

Paragraphs 102 and 103

[668] Paragraph 102 of the FADCC responded to paragraph 91 of the Amended Statement of Claim.

[669] Paragraph 103 of the FADCC responds to paragraph 92 of the Amended Statement of Claim.

[670] Paragraph 91 of the 2FASOC states –

> The Contract relevantly provided that the Reclamation Bund were to be constructed from a combination of clay and general fill [**General Fill**].
>
> [Particulars follow.]

[671] Paragraph 92 of the 2FASOC states –

> The Contract relevantly provided that the OLC formation was to be constructed from a general fill [**General Fill**].

[672] Paragraphs 102 and 103 of the FADCC state –

> The defendant does not admit the allegations contained in paragraph 91 (*or, in paragraph 103, 92*) of the Amended Statement of Claim. The defendant has made reasonable enquiries and remains uncertain as to the truth or falsity of the allegations

[673] AE's complaint is that the explanation for the nonadmission in each case is inadequate.

[674] CMC argued that there was no evidence that CMC had failed in its obligation to make inquiries going forward. CMC submitted that AE's complaint was an example of the plaintiff's demanding an admission or a denial, but pleading the nonadmission was appropriate. Consequences followed if the matter was not dealt with in due course. CMC was mindful of its continuing obligations and intended to address these issues.

[675] AE submitted that CMC had to know what it contracted to build the bunds from. Nine months had passed since its first defence – it was not good enough for CMC to say that it would get to it "eventually".

[676] The appropriate way to deal with AE's complaint is to set a time for CMC's response to these paragraphs.

Paragraphs 113 and 114

[677] AE's complaint about these paragraphs is that CMC has not identified the part of the Contract which supported its assertions that –

> (as per 113): there is no entitlement [to the reasonable rate for the rocky fill] on a proper construction of the contract; and
>
> (as per 114): there is no entitlement [to the reasonable direct additional plant and equipment construction consumables and maintenance costs for the rocky fill]

[678] These paragraphs respond to paragraphs 101(a) and 101(b) of the 2FASOC. I have ordered AE to comply with rule 115(2)(c) in its pleading of paragraph 101. Accordingly, I consider its complaint about paragraphs 113 and 114 of the FADCC to be premature.

Paragraphs 116(a) and (b); 117(b), 117(c) 118 and 119

[679] Paragraph 116 of the FADCC responds to paragraph 103 of the Amended Statement of Claim.

[680] Paragraph 103 of the 2FASOC states –

> The defendant has paid, or the plaintiff has otherwise claimed herein, for the placement and compaction of the Rocky Fill as General Fill.

[681] Paragraph 116 of the FADCC states –

> As to paragraph 103 of the Amended Statement of Claim:

(a) the defendant does not admit the allegation. The allegation relates to events which occurred over six years ago, and the defendant has made reasonable enquiries and is uncertain as to the truth or falsity of the allegations contained therein; and

(b) in any event, the plaintiff is only entitled to receive payment for the placement and compaction of rocky fill as general fill.

[682] As to paragraph 116(a), AE's complaint is that the explanation for the nonadmission is inadequate.

[683] As to paragraph 116(b), AE's complaint is that the CMC has not identified the part of the contract which supports the construction for which it contends.

[684] The assertion in paragraph 103 does not appear to me to be complex. However, I am not prepared to strike out paragraph 116(a) at this stage.

[685] As to the complaint about 116(b), CMC should identify the relevant part of the contract upon which it relies.

[686] The defence is to be read as a whole. Once the parts of the contract upon which CMC relies for its assertion in paragraph 116(b) have been identified for the purposes of that paragraph, there is no need to repeat them for the purposes of paragraphs 117(b), 118 or 119 which make a similar assertion.

[687] Paragraph 117(c) of the FADCC states that a reasonable and competent contractor would have anticipated the placement and compaction of rocky fill when cutting into a hill. The particulars of that paragraph state –

> Clause 2.1 of the Contract provided that the Plaintiff was not entitled to any additional costs for different site, surface and sub-surface conditions.

[688] AE's complaint is that the particulars are irrelevant to the defence pleaded. On their face, they appear to be irrelevant, unless the defendant is intending to suggest that having regard to that clause of the contract, rocky fill would have been anticipated. They might also be intended as the particulars of paragraph 117(b).

[689] In any event, as they presently stand, the particulars do not fill in the picture of the allegation in 117(c). I strike out the particulars of paragraph 117(c), with leave to re-plead.

[690] That is the last of the paragraphs listed in Schedule B to the plaintiff's written submissions.

Complaints by AE about CMC's failure to particularise (paragraph 2 and 3)

[691] The inadequacy of CMC's particulars, or its failure to particularise, is the subject of paragraphs 2 and 3 of AE's application, in which it seeks either the striking out of the listed paragraphs because of inadequacies in the particulars or the defendant's failure to particularise, or in the alternative, an order that the defendant provide the particulars requested.

[692] The parties' position as to the particulars of the nominated paragraphs was contained in, in each case, Schedule A to their written submissions.

[693] Generally, AE argued that where CMC responded that it would provide "evidence" after the completion of "interlocutory steps" and it had not – then the paragraphs concerning that evidence of its Further Amended Defence should be struck out. There had been no adequate excuse for its failure to provide those particulars. Bland statements that the particulars would be provided by way of expert reports were unsatisfactory. The statement "unable to provide particulars pending completion of interlocutory steps" was, AE submitted, a device to avoid having to answer questions.

[694] I note that in almost every case, CMC has indicated that it will provide the required particulars. Having regard to *QNI Resources*, and the need to ensure the just resolution of the real issues, I consider it appropriate to permit CMC a reasonable time to do so.

Paragraph 11(b)

[695] Paragraph 11(b) of the FADCC states –

> As to paragraph 10(m) of the Amended Statement of Claim, the defendant:
>
> (a) …
>
> (b) says in any event that the plaintiff was required to comply with the Construction Programme set out in the Contract.

[696] AE complained that the contract pleaded at paragraph 9 of the Amended Statement of Claim did not identify a "Construction Programme" nor did CMC identify a clause in the Contract which requires the plaintiff to comply with the Construction Programme.

[697] That complaint is difficult to understand because paragraph 10(m) of the 2ASOC refers to, and in effect defines in its particulars, "the Construction Programme". It states –

> The express terms of the Contract provided, *inter alia*, that:
>
> …
>
> (m) Pursuant to a direction given by Vance in or around October 2011, the plaintiff was to complete the Work in accordance with the Construction Programme (infra).

[698] As I understand the pleading, the particulars which follow suggest that the Construction Programme is to be identified by way of reference to clauses in the written contract, oral directions, a Contract Revision, letters 2 and 3 and certain discussions.

[699] However, as I understand the written submissions, each party has identified the construction programme differently – the defendant by reference to clause 8.1 of the Contract and the plaintiff by reference to a programme dated 16 September 2011.

[700] Regardless, CMC has indicated that it will provide further particulars of this paragraph upon completion of disclosure. I will make an order that it do so.

Paragraphs 37(b), 39, 40(a), 48, 49(b), 50(b), 51(a), 52(a), 54(a), 57(a), 58(a), 59(a), 61(a) and 62(a)

[701] AE submitted that a factual defence is raised in paragraphs 37(b), 39, 40(a), 48, 49(b), 50(b), 51(a), 52(a), 54(a), 57(a), 59(a), 61(a) and 62(a) of the FADCC by way of CMC asserting that it provided AE with "sufficient access".

[702] AE complained about the absence of particulars of that allegation.

[703] In respect of each of those paragraphs, as above, I agree that CMC ought to provide particulars of the sufficient access which it says it did provide.

Paragraphs 57(b)

[704] This paragraph denies the allegation that the plaintiff would have completed the work by 20 March 2012 even if it had been delayed by the defendant, due to the plaintiff's own delays.

[705] AE requests particulars of its "own" delays.

[706] CMC has indicated that it will provide further particulars of the plaintiff's own delays (and not only after expert evidence has been obtained). It has indicated that it will provide further particulars of late mobilisation by the plaintiff, break down, truck bogging et cetera. As above, I consider it appropriate to allow CMC a reasonable time to provide those particulars which are not dependent on expert evidence.

Paragraph 59(d)

[707] Paragraph 59(d) asserts that "working public holidays is a common practice in relation to fly in and fly out work".

[708] This paragraph responded to the assertion in the 2FASOC that as a consequence of the Defendant's Delays, the plaintiff was required to work on public holidays.

[709] AE requested that CMC –

> (a) identify the basis of the allegation "working public holidays is common practice" by reference to how "common practice is alleged"; and
>
> (b) "identify the basis upon which it is said that "common practice" is relevant to the defence pleaded.

[710] Its complaint is that CMC has not answered (b) of its request.

[711] The response given by CMC in correspondence referred to the fact that the contract made no allowance for public holidays and stated that it was not unusual for work to be done on public holidays because crews were already on site. CMC says that that response answers the request.

[712] Paragraph 59(d) must be considered in the context of the whole of the paragraph. When read with 59(e) in particular, it denies that the defendant *required* or *instructed* the

plaintiff to work public holidays; and says in any event working on public holidays was common practice.

[713] Reading those two paragraphs together, the relevance of "common practice" is, in my view, obvious and no further particularisation of it is required.

Paragraphs 60(a)(i), 61(c)(i)

[714] These paragraphs contain an assertion by the defendant about the plaintiff's "own delays" or "delays for which the plaintiff was responsible". CMC submits that the best particulars it was able to give of the "plaintiff's own delays" are those stated in paragraph 48 of the FAD. It was not apparent to me that these paragraphs referred back to the delays referred to in paragraph 48. Nevertheless, CMC has indicated that it will provide further detailed particulars of the "plaintiff's own delays. I will order that it do so.

Paragraphs 76(b), 79(c), 81(c), 82(b)

[715] These paragraphs refer to the defendant carrying out surveys.

[716] In its request for particulars, AE sought details about the persons who conducted the surveys and of the surveys themselves.

[717] Certain particulars were provided including the names of the surveyors. AE complains that the names alone do not allow it to identify "with precision" whether the persons are licenced.

[718] AE now –

- complains that the names of the surveyors are not enough to allow it to identify whether they are licenced;
- challenges CMC's resistance to providing some of the particulars required on the basis that they request evidence – given that CMC has indicated that it will provide particulars; and
- complains that a company cannot be a licenced surveyor (and therefore there was no response to its request for the name of independent surveyor).

[719] I agree with CMC that there is no issue raised in the pleadings about the surveys not having been conducted by licenced surveyors. I consider the response to the particulars to be sufficient.

[720] I agree with CMC that AE's requests at paragraphs 18(c) and (e) – (j) are requests for evidence – indeed matters likely to be the subject of expert evidence.

[721] I note that CMC has provided the best particulars is it able to and agree with it that a request for the name and address of an individual surveyor is a request for evidence.

[722] I consider that CMC has adequately responded to AE's request for particulars.

Paragraph 92(c)

[723] Paragraph 92 of the FADCC responded to paragraph 80 of the 2FASOC.

[724] In paragraph 80, the plaintiff asserted that it was entitled to $123,367.50 under the contract because it had been required to place more fill in the Reclamation Bunds C area than the contract provided for because the fill was placed on highly compressible material and settled vertically. The plaintiff said it could not calculate the extra fill required because of settlement until the defendant had disclosed certain data and survey records.

[725] In paragraph 92 of the FADCC, the defendant denied that the plaintiff was owed $123,367.50; asserted that payment for the work was to be based on the surveyed volumes in accordance with a certain specification; and said –

> (c) … the defendant has carried out such surveys as required by the terms of the Contract and has already paid the plaintiff for the work performed based upon the quantities determined in the surveys.

[726] In particulars at paragraph 92(c)(iii), the defendant said that it had provided the survey information to the plaintiff on a disc on or around August 2012.

[727] It seems that AE's initial complaint was that the CD had not in fact been provided and there was therefore no support in the particulars for the allegation made in paragraph 92(c) (relying on *Project Leaders Australia Pty Ltd v Mt Isa Association Friendly Society Limited* [2003] QSC 032).

[728] At the hearing, Mr Codd said that "a" CD had been located which "seemed to fit the description" but the question whether it supplied the required particulars could only be determined upon expert evidence. For that reason, it wished to adjourn that part of the application which concerned the particulars of the surveys.

[729] CMC argued that this part of the application ought to be dismissed, rather than adjourned. It argued that any argument about the adequacy of the data was something different from the application to strike out of the paragraph of the FADCC because of the particulars did not support the allegations in the counterclaim because the CD had not been provided.

[730] I consider it more efficient to dismiss, rather than to adjourn, this part of AE's application to strike out paragraph 92(c) of the FADCC. AE is not in a position to say anything about the adequacy of the particulars contained on the CD. If there are issues about the adequacy of the survey data provided, they may be raised in the course of case management.

[731] I dismiss AE's application in so far as it concerns paragraph 92(c) of the FADCC.

Paragraph 93(c), 94(c), 98(c) and 100(c)

[732] These paragraphs refer to the defendant carrying out such surveys as required by the terms of the contract, and indicating that particulars will be provided upon disclosure or referring to the disc of survey data.

[733] AE sought detailed particulars about the surveyors and the surveys themselves.

[734] It complains that CMC's response to its request (at 20(c) of the response) was "nonsensical". That paragraph said –

> In respect of paragraphs 93(c), 94(c), 98(c) and 100(c) of the Defence, the Defendant repeats and relies upon the particulars pleaded directly above at paragraph 20(b) … In doing so, the Defendant states that paragraph 20(e) of the request is not a valid request for particulars as the GPN Excavation does not relate to the matters pleaded at paragraphs 93(c), 94(c), 98(c) and 100(c).

[735] CMC explained that AE made a composite request for particulars concerning surveys in relation to the GPN Borrow Pit and Bunds quantities claims – rather than two separate requests. The response in 20(c) is therefore identical.

[736] I do not consider that to be a nonsensical response.

Paragraph 85(a)

[737] This paragraph refers to surveys conducted in accordance with the contract and the provision of the CD containing the surveys to AE.

[738] AE sought details of the survey and – at that stage not appreciating that the CD had in fact been provided – details of the circumstances in which the CD was provided to it.

[739] The CD issue has been sorted. Otherwise, I consider the particulars provided to be adequate.

Paragraph 87(b)

[740] This paragraph asserts that the amount of fill used by the plaintiff was as set out in the surveys undertaken by the defendant and provided to the plaintiff. CMC asserts that it will provide detailed particular upon disclosure and pending completion of interlocutory steps.

[741] AE complains that CMC has failed to provide the particulars it requested without excuse and that the response was not proper.

[742] AE sought details of the survey and – at that stage not appreciating that the CD had in fact been provided – details of the circumstances in which the CD was provided to it.

[743] The CD issue has been sorted.

[744] In terms of further disclosure, I accept that expert evidence is required before that can occur having regard to the nature of the information.

Paragraph 88, 89, 107(b)

[745] Paragraph 88 states –

As to paragraph 76 of the Amended Statement of Claim, the defendant denies the allegation because it is not true because the entirety of the fill was not placed over marine sediments.

Particulars

(i) As shown on drawing 1530-DR-0003 Rev 2, in some areas it was placed over:

A. gravel and clay; and

B. areas with trees on them;

(ii) both of which were not marine in any way.

Paragraph 89

[746] Paragraph 89 states –

As to paragraph 77 of the Amended Statement of Claim, the defendant:

(a) denies the allegations contained therein because the extent of vertical settlement alleged by the plaintiff is incorrect; and

(b) says that the extent of the vertical settlement has been significantly exaggerated by the plaintiff compared to the amount of settlement that actually occurred.

Particulars

Detailed particulars to be provided upon disclosure and expert evidence. The defendant cannot presently further particularise this allegation.

Paragraph 107(b)

[747] Paragraph 107(b) states –

As to paragraph 96 of the Amended Statement of Claim, the defendant:

(a) denies the allegation that it issued oral directions to the plaintiff in relation to the rocky fill as the defendant did not issue any such directions;

(b) otherwise does not admit the allegations. As the allegations relate to alleged events that occurred over 6 years ago, the defendant had made reasonable enquiries and is uncertain as to the truth or falsity of the allegations and is unable to admit them because they concern matters within the knowledge of the plaintiff and interlocutory steps have not yet been completed.

[748] AE's complaint is that CMC has failed to provide particulars in response to its requests in respect of each of these paragraphs, without reasonable excuse, and that its response is not proper.

[749] CMC provided some of the particulars of paragraph 88 requested of but resisted others on the basis that they were requests for evidence. I consider that CMC has appropriately differentiated between requests for (expert) evidence and requests for particulars in relation to this paragraph. For example, AE's request that CMC –

> Identify whether the aforesaid allegation is limited to the full extent of the vertical profile of soil types below the surface or whether it is made just in reference to the surface soil types

is not a request for particulars – but a request for evidence, indeed expert evidence. Also, the defendant's particularity (as in its reference to gravel and trees) complements the plaintiff's identification of marine sediment as clays and muds.

[750] I have dealt with paragraph 89 earlier in these reasons. I accept that expert evidence and calculation is required to allow CMC to provide the requested particulars.

[751] As to paragraph 107(b), CMC notes that the request for particulars relates to a previous denial which was amended to a nonadmission. Rule 166 applies. I will order the defendant to amend its traversal within a reasonable period of time.

Paragraphs 16 of the counterclaim

[752] Paragraph 16 states –

> The Defendant has previously paid to the Plaintiff on account the sum of $614,411 (previously paid on account to the Plaintiff) in relation to variation 1 and 46.

[753] AE asked for the date upon which the money was paid for "variation 146".

[754] CMC took advantage of an obvious error.

[755] However, I note CMC's position that the plaintiff admitted in its answer that the defendant paid for items 1 and 46 and I accept that the request is redundant.

Paragraph 25 of the counterclaim

[756] Paragraph 25 states –

> The Plaintiff, engaging in trade or commerce, provided the Defendant with various payment claims throughout the course of the Subcontract Works, including the Payment Claim; and in doing so represented that:
>
> (a) it was entitled to the amounts which where (sic) the subject of payment claims in accordance with the Contract for alleged variations and dayworks; and
>
> (b) in relation to the Plaintiff's alleged Access Delays claim, the Plaintiff represented to the Defendant that it would provide a detailed claim, demonstrating such entitlement and fully substantiating the amount claimed would be provided to the Defendant (sic).

[Particulars follow.]

[757] AE sought particulars about the person said to have made the representation and to whom they were made, when, how et cetera.

[758] CMC has provided particulars identifying that the representation was allegedly made by Mr Alexanderson in November 2011. It has indicated that it intends to provide further particulars upon completion of disclosure. I will order that it do so.

[759] AE's complaint about the lack of particulars of "instructions" is no longer relevant.

Objections to evidence

[760] CMC objected to Mr Malcolm's evidence which was given by way of four affidavits. CMC's objections and the plaintiff's response to those objections were provided by way of written submissions.

[761] I embarked on a consideration of the objections however I found it a time-consuming exercise with little application to the way in which I approached the issues for determination. Accordingly, I note that the affidavits were received subject to CMC's objections about which there has been no ruling.

Orders

[762] I make the following orders:

In the defendant's application filed 12 March 2019

As to paragraph 1:

(i) I strike out, with leave to re-plead by 17 December 2019, the following paragraphs of the Second Further Amended Statement of Claim (2FASOC):

- 36 – 38;
- 40; and
- 44.

(ii) I direct the defendant to plead to the re-pleaded paragraphs of the 2FASOC by 10 February 2020.

As to paragraph 2:

(i) Having struck out the paragraphs of the 2FASOC listed above, the following schedules fall:

- Schedule A, B of the 2FASOC; and
- Schedule A1, A2, G, H, of the Plaintiff's Further and Better Particulars.

(ii) The plaintiff has leave to re-plead the schedules by 17 December 2019.

As to paragraph 3:

I order that:

(i) By 17 December 2019, the plaintiff is to amend the first seven particulars of paragraphs 41(a) and 53 of the 2FASOC to include details about the part of the site relevantly affected by sufficient rain.

(ii) By 17 December 2019, the plaintiff is to provide further particulars of the directions referred to in paragraphs 41(a)(viii) and (ix).

(iii) By 17 December 2019, the plaintiff is to provide further particulars of the directions referred to in paragraph 96.

(iv) By 17 December 2019, the plaintiff is to comply with Rule 155(2)(c) in its pleading of paragraphs 101 and 104.

In the defendant's application filed 16 November 2018:

I order that Brown J's order 3, made on 26 September 2018, be varied so as to read:

> "The defendant is to respond to the particulars requested by the plaintiff:
>
> (a) in its request for particulars of the defence and counterclaim dated 29 June 2018; and
>
> (b) in the reply and answer,
>
> by 15 October 2018."

In the plaintiff's application filed 16 November 2018:

As to paragraph 1:

(i) I strike out the particulars of paragraph 117(c) FADCC, with leave to re-plead by 10 February 2020.

I order that:

(ii) The defendant is to amend its traversals in the following paragraphs of the Further Amended Defence and Counterclaim (FADCC) by 10 February 2020:

- 49(a);
- 50;
- 51(b);
- 70;
- 102;
- 103;
- 107(b); and
- 116(a).

(ii) The defendant is to respond to the following paragraphs of the Second Further Amended Statement of Claim (2FASOC) (which paragraphs have been amended since the plaintiff's application was filed) by 10 February 2020):

- 31;
- 32;
- 35; and
- 43.

(iii) The defendant is to provide particulars of paragraph 116(b) FADCC by 10 February 2020.

(iv) The defendant is to provide particulars of the following assertions in the FADCC by 10 February 2020:

- in every paragraph in which the defendant has asserted that it did provide the plaintiff with "sufficient access" – particulars of when and where it gave the plaintiff "sufficient access" and how and when the fact of access was communicated to the plaintiff; and

- in every paragraph in which the defendant has referred to "the plaintiff's own delays" or "delays for which the plaintiff was responsible" or similar – particulars of the nature of the plaintiff's delays.

As to paragraphs 2 and 3:

I order that:

(i) The defendant is to provide particulars of the following paragraphs of the FADCC by 10 February 2020:

- 11(b) – "the construction Program set out in the Contract";

- 37(b), 39, 40(a), 48, 49(b), 50(b), 51(a), 54(a), 57(a), 59(a), 61(a) and 62(a) – particulars of when and where it gave the plaintiff "sufficient access" and how and when the fact of access was communicated to the plaintiff;

- 57(b), 60(a)(i), 61(c)(i), - particulars of the nature of "the plaintiff's own delays" or "delays for which the plaintiff was responsible" or similar.

- 25 (of the counterclaim) – further particulars of the representation made by Mr Alexanderson in November 2011.

As to paragraphs 4 and 5:

(i) I order that, in relation to item 16(dd) in the final version of the Schedule of Non-Disclosed Documents (emailed to my associate on 1 May 2019), if the notification was in the form of a document, and that document is in the defendant's possession and control, it is to be disclosed to the plaintiff by 17 December 2019.

(ii) As to items 16(kk) and 16(ll) in the final version of the Schedule of Non-Disclosed Documents (emailed to my associate on 1 May 2019) – the question of their disclosure is to be deferred until the next review of the matter.

Otherwise, the applications are dismissed.

And further:

Within 14 days, the parties are to provide a copy of these orders to the Supervised Case List Judge and arrange for the next review of this matter.

[763] I will hear the parties as to costs.