SUPREME COURT OF QUEENSLAND

CITATION:	*Timms Contracting Pty Ltd v Pipes International (Qld) Pty Ltd* [2010] QSC 88
PARTIES:	**TIMMS CONTRACTING PTY LTD** **(ACN 070 456 567)** (Plaintiff) **v** **PIPES INTERNATIONAL (QLD) PTY LTD** **(ACN 076 159 423)** (Defendant)
FILE NO/S:	No 4354 of 2007
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	23 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	2-5 November 2009
JUDGE:	Philippides J
ORDER:	**1. Judgment for the plaintiff of $300,674.48 being $236,384.40 on its claim and $64,290.08 for interest.** **2. The defendant's counterclaim is dismissed.** **3. The defendant pay the plaintiff's costs of the proceeding, including the counterclaim, to be assessed on a standard basis.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – whether contract for design and construction – whether contract for construction of specified works only – whether breach of implied contractual terms – whether representations made as to fitness for purpose – whether warning given as to need for maintenance *G.H. Myers & Co. v Brent Cross Service Co*. [1934] 1 KB 46 *Martin v McNamara* [1951] St R Qd 225 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 *Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd* (1968) 120 CLR 516 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165
COUNSEL:	Ms C Muir for the plaintiff Mr M B Ambrose for the defendant
SOLICITORS:	Forbes Dowling for the plaintiff

Clarke Kann for the defendant

PHILIPPIDES J:

The plaintiff's claim

[1] The plaintiff, Timms Contracting Pty Ltd is an earthmoving and demolition contractor. The defendant, Pipes International (Qld) Pty Ltd, carried on business in Brisbane as an importer and merchant of specialist pipes and fittings.

[2] The plaintiff's claim is for monies owing pursuant to an agreement for the construction of a hardstand at premises at 133-147 Sandmere Road, Pinkenba. The plaintiff claims $236,384.40 being the balance owing under the contract and interest at a rate of 9% per annum pursuant to s 47 of the *Supreme Court Act* 1995. The sum of $236,384.40 is calculated after taking into account two progress payments made by the defendant totalling $265,000 (on 19 January 2007 and 2 April 2007) from the total invoiced price of $501,384.40.

[3] The defendant does not dispute the quantum of the plaintiff's claim, but counterclaims for damages for breach of contract and/or negligence and/or misleading and deceptive conduct in breach of s 52 of the *Trade Practices Act* 1974 (Cth) in the amount of $1,400,161.02 including GST.

The issues

[4] The plaintiff claims that, pursuant to a contract between the parties, the plaintiff undertook to carry out a scope of work to build a hardstand at the site. It is not in contention that the work was carried out by the plaintiff between 8 November 2006 and 8 February 2007. The contract comprised a written quotation dated 13 September 2006 (prepared by the plaintiff's director, Mr Timms and accepted by the defendant's director, Mr Schueler, on 7 November 2006). By the terms of written quotation the scope of the services to be provided by the plaintiff was specified as follows:

> " SCOPE OF WORK
> (1) Strip grass, excavate back right hand corner 60m by 17m spread Ref (Back Boundary) strip 2 mtrs of boundary, lay, and compact over bottom of site.
> (2) Excavate, lay and compact existing ground.
> (3) Strip blue rock & throw back in stockpile ready to crush.
> (4) Supply, Lay, & compact compactable fill (approve by next door [Mr Gettings]) to heights of 3.2m back of black to 2.8m front of block, 33,300 squares total.
> (5) Spread crushed blue metal 200-300 ml thick over block. Lay & compacate (sic) to main road spec.
> (6) Batter right hand side of block and back of block 1 to 2.
> (7) Supply 75 ml crushed concrete to nominated driveways. (lay & compacate (sic)).
> (8) Provide Testing 12 compaction tests, 4 tests for 300ml layers. (Brisbane soil testing).

(9) Contaminated material ZN (cu material on site) Load, Cart and Dump to nominated dump (new chum) line landfill as varrified (sic) by your consultant.
(10) Total 200m3 Loose Remaining contaminated material does not have to be removed from site which will be capped with a 300ml layer of clay. (refer to consultants diagram).

PLEASE NOTE:
(1) All material dug out of back part of block 60m by 17m and grass. Strippings will be spread over bottom of the block when blue metal is removed reading (sic) for crushing
(2) All over size materialk (sic) will be placed at the bottom of the block.
(3) Set out is the clients (sic) responsibility
(4) Trimming will trim with grader & roller with flat drum. Roller within 80ml to 100ml tolerance.
(5) Blue Rock if we don't have enough Timms Haulage will supply crushed concrete roadbase at a cost of $8.00 per loose m3 to the clients at the clients cost.
(6) Rubbish & trees will be stockpiled on site. Timms Haulage will get approvable (sic) before any removale (sic) & nominated sites for dumping and price for removal & dumping."

[5] The defendant alleged that in addition to the written terms contained in the scope of works, set out above, the contract comprised the oral terms that the plaintiff would:
(a) design the construction of the works;
(b) determine which landfill and compacting materials to use to undertake and/or perform the works;
(c) ensure that the works would be suitable for the purpose of allowing the site to be commercially used as:
(i) a storage facility for heavy loadings and goods such as pipes;
(ii) a thoroughfare for the passage of heavy vehicles such as trucks and forklifts for the transport of heavy loadings and goods.

[6] Furthermore, the defendant alleged that Mr Timms on behalf of the plaintiff made misleading and deceptive representations in breach of s 52 of the *Trade Practices Act*, in reliance upon which the defendant entered into the contract. The representations alleged are that the plaintiff:
(a) was a contractor skilled in earthworks, excavation and design construction of the works;
(b) was a contractor with special knowledge of the defendant's land;
(c) would be able to undertake the works and achieve the result required, namely that the works would be suitable for the purpose referred to above.

[7] These allegations are alleged to be misleading and deceptive in that the plaintiff was not skilled in earthworks, excavation and design construction of the works, did not have special knowledge of the defendant's land and did not construct the works in the manner that was fit for the purpose or use referred to above.

[8] The defendant also alleged that it was an implied term of the contract that the defendant would carry out the works in a good and workmanlike manner, that it was made aware of the purpose of the works and that it owed the defendant a duty of care to ensure that the works were carried out in the manner of a reasonable competent contractor.

[9] The defendant particularised the manner in which there was a breach of the terms of the contract and/or s 52 of the *Trade Practices Act* as follows:

(a) The hardstand was unsuitable for its purpose as it could not withstand heavy loadings from trucks and forklifts traversing the site or transporting heavy loadings or goods;

(b) The hardstand became soft after periods of wet weather causing heavy loadings and goods stored on the said site to sink into the hardstand;

(c) The land fill and compacting materials used by the plaintiff failed to meet at least the specification Type 2 material in the Queensland Main Roads specification MRS 11.05;

(d) The quality of the materials used for the sub-grade and the unsealed wearing surface was unsuitable and the fill materials are of poor quality. (These allegations were ultimately confined to the unsealed wearing surface); and

(e) A further allegation concerning whether the compaction met the relevant Australian Standard was not pursued.

[10] The defendant alleged that as a result of the alleged breaches, the defendant has suffered loss and damage in that the works require rectification and repair and counterclaims for such rectification costs in the sum of $1,400,161.02 including GST.

[11] As to the allegations pleaded by the defendant, the plaintiff denied that it was engaged to design the works and denied that Mr Timms made any representation that the plaintiff was a contractor skilled in design construction. The plaintiff admitted that it told the defendant that it would be able to undertake the works so that the works would be suitable for the pleaded purpose, but alleged in its reply that the plaintiff told Mr Gettings, the defendant's general manager, and Mr Schueler on various occasions that the hardstand would require ongoing maintenance in that:

(a) due to the nature of the ground at the site, the hardstand was subject to subsidence;

(b) unless the hardstand was built using concrete or bitumen, it would be subject to sinkage and slippage;

(c) the site would need to be maintained by the laying of road base on any holes or sinkage applied using a bob cat.

[12] The crux of the dispute between the parties thus centred on the defendant's contentions that the contract required the plaintiff both to design and construct the hardstand (and not, as the plaintiff maintained, merely to construct specified works as directed by the defendant) and whether the hardstand was fit for the purpose for which it was constructed. The plaintiff maintained that the hardstand was fit for the purpose or use contracted and that any deficiency in the hardstand resulted from a failure by the defendant to maintain it, which the defendant had been informed would be required.

Evidence

[13] In 2006 the defendant began making inquiries into developing two adjoining properties (lots 480 and 481) at 133-147 Sandmere Road, Pinkenba with a view to relocating the defendant's operations from an old airport site at Eagle Farm. The property was not owned by the defendant, but by Mr Gettings and a company associated with Mr Schueler.

[14] Mr Gettings approached Mr Timms informally in August/September 2006 to discuss the construction of a hardstand on the Pinkenba site. The evidence indicated that in essence a hardstand was a hardened surface with a compacted top layer on which vehicles can travel. At that time, the plaintiff was constructing a hardstand on a lot adjacent to the Pinkenba site, where it undertook crushing operations (that site was referred to during the proceedings as the L&D site). Discussions were had concerning the plaintiff constructing a similar hardstand on the defendant's premises. It is not disputed that after the initial contact, Mr Timms was again contacted by Mr Gettings and further discussions took place between 13 September and 7 November 2006 for the construction of a hardstand at the defendant's premises.

[15] A meeting took place on 13 September 2006, at which Mr Timms met with Mr Gettings and Mr Parsons but not Mr Schueler. That meeting concluded with Mr Timms agreeing to prepare a scope of work. Subsequently, there were a number of meetings. Mr Timms also met with both Mr Gettings and Mr Schueler, although most of the discussions were with Mr Gettings.

[16] In total, Mr Timms prepared three quotations all dated 13 September 2006, which were provided at different times, as discussions with Mr Gettings and Mr Schueler progressed. The first quotation provided was for lot 480 only. Subsequently, the defendant engaged professional consultants (Bowler Geotechnical) to advise about contamination issues. Thereafter, the plaintiff was asked to provide a further quotation for both lots which resulted in the addition of item 9 to the quotation. The third and final quotation was prepared after the defendant provided instructions as to the quantity of contaminated material to be removed and what was to be done with remaining contaminated material; hence the addition of item 10 to the quotation. The final quote was faxed to the defendant on 8 October 2006.

[17] Mr Schueler met with Mr Timms and Mr Gettings in early November 2006, some days prior to the quotation being signed on 7 November 2006. The defendant specified that the quotation was to be read in conjunction with the defendant's email of 6 November 2006. That email stated that the quotation was accepted "with the only possible additional expense being in the event that some extra fill, which is covered by your second item 5", referring to utilising road base from the L&D site if there was insufficient material on the defendant's premises. The email also specified that an extra crossover was to be included.

[18] In order to provide a quotation, Mr Timms was given a site contour drawing by Fulton Consulting and the RL levels being engineering levels. Mr Gettings' evidence was that he obtained these from "the design that was done by Henwood Consulting [Engineers]".

[19] Mr Timms gave evidence of various discussions with Mr Gettings. Mr Timms said that Mr Gettings told him that the defendant would be building a warehouse on the Pinkenba site in the future, but that in the meantime the defendant wanted a hardstand for the storage of pipes as well as a general use block and that the hardstand would have to withstand heavy loads, with reference being made to B-double trucks and forklifts. Mr Gettings' evidence was similar. He said that Mr Timms was told that the hardstand would need to withstand very heavy loads with trucks going in and out on a regular basis and that forklifts would be used on the site. He recalled mention of B-double trucks, but also that he mentioned weights of 50 tonnes. Evidence was given by Mr Schueler, however, of considerably more specific details being given to Mr Timms as to the weight bearings that the hardstand would have to withstand.

[20] Mr Timms indicated that he was familiar with the area. Mr Timms' evidence, which was disputed by Mr Gettings, was that Mr Gettings said that he "wanted to do the job the cheapest form possible."

[21] Mr Timms said he showed Mr Gettings the work the plaintiff was carrying out on the L&D site. Mr Timms gave evidence that, in relation to the L&D site, material from bulk digs was carted to the site and oversized material was crushed to create better quality material which was then used to create the hardstand. Mr Timms said that he indicated to Mr Gettings:

> "… He had material on his block which could have been utilised and crushed because it was oversized rock which could be used in his application to build his hard stand. So, basically, we pointed this out to him so he could use that material to save himself money instead of buying material and we could crush his own material on his own site."

[22] Mr Timms gave further evidence as follows:

> "So we both were standing on site, myself and Mr Gettings, and I explained to him with that rock because he had it pushed over - all over his block there, I said, 'You could do exactly what we do next door.' You could – we would stockpile it in a stockpile, we crush it and we would utilise it instead of him buying in material at a significant rate. We would use what he had on the block already. Then we explained to him, 'If we have any rubbish or anything that shouldn't be there, we will - we will indicate to you to come down, sign off on it or explain to us or tell us what you want done with it'."

[23] Mr Gettings' evidence was that Mr Timms told him that he "would use the existing blue metal that was on our block because it was very large, he would then take it, crush it and bring it back in smaller pieces". The term blue metal/rock meant nothing to Mr Gettings. He said that Mr Timms told him that "the blue rock was probably the best that was suitable for our needs". Mr Parsons' evidence was that Mr Timms indicated to Mr Gettings and/or Mr Schueler that the blue stone on the defendant's land was suitable for constructing a hardstand.

[24] Mr Schueler's evidence about the meeting in early November 2006 was that those present were Mr Gettings, Mr Timms and Mr Parsons. Mr Schueler's evidence was that Mr Timms said there was "blue rock or blue metal and that it was the very best quality of material that one could have", that "it would make an excellent surface"

and "that he would reuse that and he would take that next door to his site and crush it". The term "blue rock" did not have any meaning to him either. Mr Schueler gave evidence that Mr Timms said the crushed material to be supplied was to be the equivalent of blue rock. Mr Schueler also gave evidence that Mr Timms made mention of "Main Roads spec" which was a source of great comfort and that that related to the compaction of material and also to the quality of the material. Mr Gettings, however, gave evidence that there was no mention of Main Roads specification at all.

[25] Mr Timms' evidence was that blue rock is oversized rock that can be crushed to create blue metal. Mr Timms accepted as a general proposition that blue metal is considered to be a superior quality material for constructing the top layer of a hardstand if it was processed by a quarry. He stated that blue metal can be graded and that there were different grades of road base; there were "all different strengths of that, 2.1, 2.2, 2.3, 2.5 …" being Main Roads specifications concerning the strength of metal from a quarry that is certified and tested. His evidence was that engineered fill was tested and graded after being cut to different sizes for strength.

[26] Mr Timms' evidence was that the process undertaken on the L&D site was not the equivalent of that processed by a quarry because it was not engineered fill. He said "he showed Mr Gettings 'what we crush to produce what we have … What I showed him next door, what we do, 100 mil minus'". When cross-examined as to whether he recommended to the defendant that that was an appropriate level to crush at, Mr Timms responded, "I showed [Mr Gettings] what I did next door and that's the way we accepted the agreement … I showed him my process, the way we process next door to see if it was acceptable". Mr Timms was asked whether he recommended to Mr Gettings that it might be a good idea to have the blue stone or the blue metal tested to see how good it was and he replied, "No. As I said to Gettings, 'This is the way we do it next door. Is that acceptable?'"

[27] Mr Timms was asked about the note to item 5 of the quotation, which states: "Blue rock if we don't have enough Timms Haulage will supply a crushed concrete road base at a cost of $8 per loose metre cubed to the client at the client's cost" as follows:

> "Did you discuss this – the fact that there may not be enough blue rock with Mr Gettings or Mr Schueler?-- Yes, with Mr Gettings and we even showed him our pile that we crushed next door of the material that we indicated we will be using for the top of the hardstand."

[28] Mr Timms accepted that he indicated that the site would be suitable to run trucks and forklifts on. Mr Timms' evidence was that he showed Mr Gettings the L&D site and how the trucks moved on that site. In this regard, he said:

> "We showed [Mr Gettings] exactly the way we construct a hard stand. We showed him exactly what the material is we use for the hard stands and we showed him how heavy vehicles run across the hard stands and we also showed him the use - the application we were using the hard stand for."

[29] Mr Timms gave evidence that he told Mr Gettings at a meeting with Mr Parsons, who was acting as a consultant, that there would always be upkeep on the hardstand because of wet weather. Mr Timms accepted that the defendant was not told that

the site could not be used in wet weather, only that it would require maintenance. He said that he told Mr Gettings that "you have to have preventative maintenance. Every time you rough up your surface, you must grade it off again." Additionally, Mr Timms' evidence was that, when he showed Mr Gettings the L&D site, he explained that as the hardstand was being built over land that had been a swamp, there could be sinkage in which case top up maintenance was required. Mr Timms' evidence was:

> "… We showed him trucks driving over it and we also showed him how trucks can move the material. Because you're building on top of a swamp we showed him how it can move, there can be sinkage, because he's building on top of a swamp and we also pointed out to him for what you're going to get you always have to top up the material if you have a sinkage hole or you have a distorted area from rain intervention."

[30] Mr Timms gave evidence when cross-examined on the issue of maintenance as follows:

> "What I mean by maintenance is, right, you got a hard stand area there, right? He's got a forklift in the middle of rain screwing an area. What happens then, it doesn't matter what top you have on it, he's breaking the crust. Once you break the crust, water gets down amongst your soils and you spoil the forklift's crusted up and it goes soft. Then what you have to do is you have to then scrape that out, put some more road base back in there when it's dry and that attains your level again.
>
> And that is the maintenance you warned them about at the very beginning?-- Correct.
>
> Not knowing what kind of forklift they had on site?-- Any forklift. I showed him where our trucks go across our pad and I said, 'Have a look at that. There's indentations on that. We always top it up with the loader so we keep it up the level' because it allows for your sinkage and allows for your working platform not to be discouraged.
>
> So there are two different requirements for maintenance. One is general sinkage and the other one is for use?-- Correct."

[31] Mr Timms also gave evidence that he told Mr Gettings, "If you get any subsiding or you get any loose material on top or you get any sinkage, all you have to do is grab - ring us, we'll supply a bobcat, you can grab a load of road base next door and we'll fix it up".

[32] Mr Timms said that he discussed the limitations of the site and other options for the surface such as concreting the site:

> "… when we were speaking to Mr Gettings, we explained to him that there will always be subsiding on your land because you're building on a swamp. There always will be preventative maintenance because you are building on a swamp and the only way that you can reduce the - reduce this so you don't have any problem there is to concrete the whole block."

[33] Mr Parsons gave evidence in similar terms. He said he told Mr Gettings that the only way to avoid subsidence was to concrete or bitumen the site or to preload it,

none of which the defendant wanted to pursue. His evidence was that he warned the defendant about the shortcomings of the site:

> "I told the gentleman with the material that they wanted to purchase for the price they wanted to do it at, I told the gentleman that no matter what he does, because he was point loading with forklifts and trucks and screwing in one spot, it can be dry and nothing will happen except you scuffle the surface. Then if it rains that surface in that one point's been scuffled, slight ponding or whatever. Then because you're going back to that area every single time, like you're driving down - like a railway track, so each time you go down, that surface will then slightly move and go down until you lose the surface. … So that's when I offered him - I offered him two more alternatives for an all weather, less maintenance product."

[34] When cross-examined on the matter of other surface options, Mr Gettings admitted that other surface options such as concrete and bitumen were mentioned, but that if he wanted to save money the existing site material could be used. When cross-examined as to whether Mr Timms and Mr Parsons were clear that there would always be upkeep on the hardstand because of wet weather, Mr Gettings replied, "No. I can't remember that part of the conversation", but accepted that it was possible that they might have said something about maintaining the hardstand. When pressed about Mr Timms' evidence about the offer to supply a bobcat and road base, Mr Gettings stated that he could not remember, but also accepted that it "could have happened", commenting that "there was a lot of things going on at the time". When Mr Schueler was cross-examined about whether he had had discussions with Mr Timms or Mr Parsons in relation to the need for ongoing maintenance, his response was not to deny categorically that they had occurred, but to state that he "did not remember those discussions".

[35] The plaintiff commenced work pursuant to the scope of works in early November 2006. Mr Timms' evidence was that Mr Gettings came down to the site "nearly every week to monitor what we were doing", and that if he had any problems he would call Mr Gettings, who would meet on site to determine what he wanted to do. Mr Timms stated that, during the construction of the hardstand, additional RL levels were provided by North Surveys Group, who were surveyors engaged by the defendant.

[36] Mr Timms described the defendant's site as being littered with car bodies, general rubbish, concrete, trees, grass and builder's rubbish. He was to identify this material and seek his instructions as to what was to be done with it. He said Mr Gettings indicated that he did not want to spend money removing that material off site and that it was to be put "in the bottom of the fill because he was going to have significant cover over the top of it".

[37] During the course of the works, it became apparent that there was more contamination than initially envisaged. Mr Timms stated that the removal of all the material would have cost about $300,000 and that he was asked to quote for its removal but ultimately, on the advice of the contamination experts, the defendants instructed him to bury the bulk of it and to cap it. There were two variations made to the scope of works in accordance with measurements indicated by North Surveys Group. The first variation was for $7,205 for the removal of contaminated material.

[38] A second variation was for $28,274.40 for road base supplied by the plaintiff. In respect of that additional material, Mr Timms stated that he considered it to be as good as blue metal but that it varied from crushed concrete to crushed porphyry to crushed blue stone and was whatever rock was available at the time on the L&D site. He said, "I showed Mr Gettings the stockpile we use on site and that's exactly what I brought over from our site". Mr Gettings' evidence was that he was told that the plaintiff had been unable to procure any blue metal and that the material was as good as blue metal.

[39] On 8 February 2007 the plaintiff sent the defendant a letter indicating that the work had been finished. Subsequently, Mr Timms said he attended the defendant's site on 15 February 2007 in response to a request from Mr Gettings. He said there had been heavy rainfall after the completion of the hardstand and that a failure had occurred because the defendant had been using forklifts over the same area when it was raining which broke the crust of the hardstand, creating a soft-spot through which water could seep in. Mr Timms said that he sent an employee over to dig the soft spot out, grade it and that the hole was fixed. This was denied by Mr Gettings.

[40] Mr Timms said that also on 15 February 2007 he provided a quote for sealing the surface of the hardstand, which Mr Gettings considered too expensive. Mr Gettings' evidence was that the defendant sought the quote because it was considering whether to make the site dust proof rather than to deal with the wet weather issue.

[41] A further quote was also provided on 15 February 2007 to modify the front boundary and compact the batter. The work under that quote was carried out and invoiced. As mentioned, the defendant made two progress payments totalling $265,000 (one on 19 January 2007 of $165,000 and the other on 2 April 2007 being $100,000).

[42] On 10 April 2006, Mr Timms wrote to Mr Gettings noting that the defendant appeared to "have a problem with compaction" of the hardstand on the defendant's site. Arrangements were proposed for testing the compaction by experts. On 11 April 2007, Mr Gettings responded. Noting that $236,384.40 remained outstanding, he wrote:

> "From our perspective there are some anomalies which I will list.
> … After meeting with you on site, we discussed the need for further testing to be done on our behalf to satisfy that the work completed by you have (sic) been done in accordance with specific standards.
> These tests were required due to the fact that we experienced two 'Soft Spot' areas. One during filling the first block and the 2nd after completion.
> You were in total agreeance (sic) that these tests be completed by us, and to quote you 'You had nothing to hide'.
> … After all testing is completed and results forwarded to us, we are more than happy to meet with you and your partners to discuss and finalise any outstanding amounts."

[43] The trial proceeded on the basis that it was accepted by the defendant that compaction tests carried out by its expert demonstrated that the compaction was in accordance with the Main Roads specification required by the scope of works and

the only complaint was as to the quality of the material used in the upper 3000 mm crust of the hardstand.

[44] Mr Gettings conceded that the defendant had been operating its business with the benefit of the hardstand since February 2007 "through rain, hail and shine", although he maintained that that was under "extreme conditions and hardship". Mr Gettings' evidence was that he was aware of two instances of forklifts bogging and that the effects of the defects on the site resulted in corrugations and uneven patches which slowed down the pace of work.

[45] However Mr Van der Wilk, the defendant's site manager, gave evidence that the hardstand was in constant use since February 2007 and that the problems with the hardstand had not resulted in trucks being unable to be loaded on time for delivery. Furthermore, he accepted that there had been no days when the defendant had been unable to use the hardstand, although he did say that there had been at least 15 occasions when forklifts had become bogged. His evidence was that to deal with the problem of "rutting" the method of maintenance adopted by the defendant was to place a steel beam at the front of a forklift and used to "knock off the tops of the corrugations". Mr Van der Wilk gave the following evidence concerning the site:

> "It is true - the problem really is the wet weather?-- The wet weather, that's the problem.
>
> And the problem is that when the clay formed during the operation in the wet weather - when those ruts are formed and they're not removed, they become dry and hard?-- They become a danger, yes.
>
> Yes. But that's a simple issue of maintaining, would you agree?-- It is a maintenance item.
>
> So it is actually - your concern would be, would it, that there has to be regular maintenance on this site?-- Constant maintenance.
>
> Constant maintenance and it is fair to say that that constant maintenance hasn't been happening, has it?-- The maintenance that we are doing after the wet, I would have assumed that it was work that we wouldn't have had to do normally.
>
> But the work you then do you say makes the hardstand usable again?-- Yes.
>
> You haven't even had to bring in further dirt, have you? You haven't been topping up?-- No.
>
> No. So you are just wearing it down, so to speak, without bringing in anything to put on top of the top 300 millimetres?-- No."

[46] The evidence of Mr Gore (a civil engineer with expertise in design of works who was called as an expert for the plaintiff) was that the problems the defendant complained of were caused by inadequate maintenance following wet weather usage. Mr Gore explained that when the hardstand was used in wet weather, vehicles travelling on the site would displace surface mud creating raised "rills" which would harden, leading to an uneven work surface. This evidence was consistent with Mr Van der Wilk's account of the "rutting" or "corrugated" effect on the hardstand surface caused by the forklift tyres in wet weather.

[47] Mr Gore's opinion was that the hardstand was working as intended. He described it as doing a "brilliant job". He explained:

> "… prior to this work there were two blocks of land which were floodplain which is sort of wasteland, not usable with any sort of

> load at all. You wouldn't be driving any vehicles and loading anything on it and it came with a price. It was contaminated wasteland. Now, that contaminated wasteland has been converted to uncontaminated land … and instead of it being unable to be operated during most weathers, including wet weathers, it is now 24/7 operation. Rain or fine, they operate it. So I think that's - and it is minimalist cost. I mean, I think the experts would agree that this was the minimum you could do to get to any sort of level of hardstand and the minimum has been done and they have got, in my opinion, a great result for that."

[48] Mr Gore agreed that he would not describe the hardstand as an "all weather one" and agreed with the proposition put to him that, if a hardstand was being prepared on a minimalist basis, that would ordinarily be attended with a warning, that "perhaps you shouldn't do the heaviest work on this in wet weather. You can't treat it as if it is concrete or asphalt."

[49] Mr Gore gave the following evidence when asked what the consequence would be if heavy work was done in wet weather:

> "Well, it appears in practice there has been no consequence in the sense that it will take the heavy loads in the wet weather, but because it is wet it causes the disturbance to the surface and so you can still operate with that disturbance because when the heavy tyres just run through the disturbance it doesn't get in the way of the tyres, but if you don't after it fines up, get rid of the disturbed shape of the road or hardstand then it goes hard. That's when the problem is when it goes hard, but if as soon as it is getting – it started to – stopped raining, you just blade it flat, run on it flat and make it go flat like that again, when it goes hard it will be like that again. So the operating in wet weather is not a problem, it is what you do when the wet weather stops."

[50] Mr Parsons gave evidence of visiting the defendant's site after the plaintiff had received complaints about the hardstand as follows:

> "… I went unofficially down with Mark one day to have a look at the site because they were complaining about the surface. They had driven over the surface in some areas constantly, especially up and down the aisles where the pipes are stacked and they're using the same - they're using the same tracks constantly day in/day out. So if it has rained, being a dirt surface, it puts just an indentation in it, then more rain, more water because it is at a lower level, you compress it slightly or push the stone away slightly by screwing around, then next time in - and eventually you break through it."

[51] Mr Morrison, the defendant's expert, provided two reports in addition to giving evidence. In his first report he drew attention to the issue of poor drainage as contributing to the problem with water ponding on the surface of the hardstand and softening the base and sub-grade. His second report moved away somewhat from that position. However, in giving evidence Mr Morrison conceded that ponding would still occur if the drainage problem was not attended to even with a stronger surface layer such as crust gravel from a quarry, and that maintenance and topping up would still be required but to a lesser extent. His evidence as to how inadequate

drainage contributed to the difficulties experienced by the defendant was mirrored in the evidence of Mr Timms, Mr Parsons and Mr Gore.

[52] Mr Morrison in his first report proposed four options for improvement of the hardstand. The first three were a rigid concrete slab, segmental flagstone paving, and a sealed pavement with granular sub-base. Mr Morrison accepted that all of these options constituted variations which were outside the scope of works. Only the fourth option, being an unsealed pavement with granular wearing force and sub-base, did he consider to be within the scope of works. That option required a quarry grade material and Mr Morrison accepted that had that option been adopted there would have been a need to remove material from the defendant's site in order that the works be completed to the Henwood levels provided to the plaintiff in accordance with the approvals that the defendant had obtained.

What were the contractual terms?

Design construction of the hardstand?

[53] The defendant's contention is that it was an oral term of the contract that the plaintiff design the construction of the hardstand, including determining which landfill and compacting materials would be used to ensure that the hardstand would be suitable for the pleaded purposes.

[54] Clearly, the scope of works did not specify that the plaintiff undertook to "design the hardstand". Counsel for the defendant did not put to Mr Timms, nor to Mr Parsons, that the plaintiff was requested or required to design the hardstand. It was not Mr Timms' or Mr Parsons' evidence that they were requested to design the hardstand. Mr Parsons gave evidence that although he had been involved in the construction of many hardstands he had not designed them and that task was usually conducted by geologists and engineers.

[55] I note Mr Schueler's evidence that Mr Timms told him that the plaintiff was skilled in design construction and his evidence that Mr Timms and Mr Parsons said "they would have no problems about designing and building" what was being asked for in terms of the hardstand. However, I do not accept his evidence in that regard. Not only was the assertion not put to either Mr Timms or Mr Parsons, but it is at odds with the circumstances surrounding the provision of the scope of works and the opinions expressed by and implicit in the experts' evidence.

[56] In this respect, I note that in the first report prepared by Mr Morrison it was Henwood Consulting Engineers who were identified as the design engineers for the project. Furthermore, the expert evidence of Mr Gore was that the design responsibility for the hardstand would generally encompass responsibility for drainage of the site. Yet, as Mr Timms stated and Mr Gettings conceded, the responsibility for drainage was not left with the plaintiff. Indeed, as counsel for the defendant accepted, "in terms of formal drainage" that was no part of the quote provided by the plaintiff. (In effect the only drainage resulted from the fall of the site). Not only did the plaintiff bear no responsibility for the design of drainage, but according to Mr Parsons the defendant gave directions on various matters to do with drainage, such as the blocking of a drain at the Sandmere Road side of the defendant's site. The fact that the plaintiff had no responsibility concerning drainage design supports the view that the plaintiff's scope of work was not a

contract to design and construct but only to construct specified work. This is reinforced by Mr Gore's evidence of various design criteria (principal project requirements) that were not provided to the plaintiff, including a copy of the development approval for the site, and operational loadings. (As to the latter I do not accept the evidence of Mr Schueler which does not accord with that of Mr Timms and Mr Gettings).

[57] I also note that the scope of work was provided in the context where the defendant engaged various professional consultants, including Bowler Geotechnical to deal with contamination issues, Henwood Consulting Engineers to provide engineering drawings from which the RL levels were obtained and North Survey Group. The defendant thus provided the finish levels, details as to the falls, the survey and directions as to how contamination was to be dealt with. Moreover, the scope of works specified in the note to item 3 that "Set out is the client's responsibility". Mr Timms' evidence was that North Surveys Group "set out the block" and that "everything we did we were getting signed off on" or that the defendant "told us not to do it or how to do it". The evidence of Mr Timms and Mr Parsons was that batters, falls and cross-overs and other matters to do with the levels were all supplied by the defendant.

[58] In the circumstances, I do not consider that the defendant's case that there was an express term of the contract that the plaintiff would design the hardstand is made out on the evidence that I accept. I find that there was no such oral term, nor any representation by the plaintiff that it was skilled in design construction. The evidence of Mr Timms which I accept makes it abundantly clear that what was contracted for was simply the construction of specified work as provided in the scope of work. I find that the contract was one which merely required the plaintiff to provide particular works in accordance with the specifications in the scope of works. This included crushing the oversized rocks on the defendant's site in the manner conducted on the adjacent L&D site and providing additional crushed concrete material if required, with the material being compacted to Main Roads specification. All of this the plaintiff performed.

The fill and compacting materials and reference to blue rock and blue metal

[59] As mentioned a point of contention between the parties concerned the quality of the material used in the top 300mm layer of the hardstand. Differing expert evidence was given as to what was referred to in the scope of work as "blue rock" and "blue metal" and the suitability of the materials used in the top 300mm layer. Mr Morrison stated that the material used in the top crust of the hardstand was not blue metal and not of sufficient quality in that it was of insufficient strength. He proceeded on the premise that the quality of the material for the top 300mm layer ought to have been to a Main Roads specification. Mr Gore's evidence was that while blue metal had a meaning in the construction industry along the lines stated by Mr Morrison (that is as referring to structural material that meets certain accepted specifications) it was also an expression used freely among people within the industry and lay people outside its more technical meaning.

[60] In construing the terms of the contract as recorded in the quotation, an objective approach is required as confirmed in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165. The meaning of the terms of a contractual document is to be determined by what a

reasonable person would have understood them to mean. That normally requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.

[61] As to the question of what was the contractual requirement concerning "blue metal" and "blue rock", whatever the technical understanding of blue metal in the construction industry, it is clear that the parties were not using the term in that sense. Blue metal and blue rock had no particular meaning to Mr Gettings and Mr Schueler. Mr Gettings accepted that there were no discussions with Mr Timms or Mr Parsons to the effect that the blue metal being provided for the surface was to be to a Main Roads specification. It was only Mr Schueler who maintained that Mr Timms represented that the blue metal to be supplied was to be to a Main Roads specification. I am unable to accept his diverging evidence on this point. It is clear from the evidence as to the discussions leading to the contract that the reference to blue metal and blue rock was simply a reference to the material on the defendant's site which the plaintiff was to crush as a surface for the hardstand.

[62] It should be noted that it was not pleaded by the defendant that there was a contractual obligation to use blue metal complying with a Main Roads specification. Nor was it pleaded that the defendant made any misleading or deceptive representation in relation to the nature of the material on the defendant's site which was described by Mr Timms as blue metal or blue rock or the nature of the additional material to be supplied.

[63] The contract required the plaintiff to crush the material located on the defendant's site and to supply additional crushed material as required. As I have found, these obligations the plaintiff performed.

Contractual liability

[64] The defendant contended that irrespective of whether there was a contract for the design of the hardstand, the plaintiff breached the oral term of the contract pleaded in paragraph 2(a)(iii)(c) of the second further amended Defence and Counterclaim; namely to ensure that the works would be suitable for the purpose pleaded. Furthermore, it is said that the plaintiff breached an implied term that the works would be carried out in a good and workman like manner. The defect that the defendant points to in the hardstand is the claimed inability to use it in or after periods of wet weather without causing significant damage to the upper layer or crust.

[65] The defendant contended that the plaintiff was liable in contract because the defendant made known to the plaintiff the purpose for which the site was to be used and reasonably relied on the skill and judgment of the plaintiff to achieve it. Relying on authorities such as *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 455, it was contended that in the present case there was an implication as to the works would be reasonably fit for their intended purpose. Reference was made to the general rule laid down in *G.H. Myers & Co. v Brent Cross Service Co*. [1934] 1 KB 46 at 55:

> "a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty."

[66] The defendant's case centred in part on a contention that the plaintiff undertook responsibility for the composition of the hardstand because it was the plaintiff who determined the material to be used for the top 300 millimetres. (The defendant was compelled to that position because the experts' reports were united in concluding that the plaintiff had properly compacted the hardstand in accordance with the contractual requirement that it be to Main Roads specification).

[67] It was submitted by the defendant that "the selection of the material was ostensibly done on the recommendation of Mr Timms". Counsel for the defendant stated that, while it may be conceded that if the on-site material had not been used and other material imported that would have price implications, there was nevertheless no suggestion that Mr Timms at any point indicated that the materials available on site or on the L&D site were not suitable. Citing *Martin v McNamara* [1951] St R Qd 225 at 232, *Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd* (1968) 120 CLR 516 at 521 and *Young and Marten Pty Ltd* (supra), counsel for the defendant contended that the prerequisites for the implications of a term as to fitness were met. It was submitted by the defendant that "if a contractor himself designs or selects materials for the work, either because he provides the whole design himself or because a part of the design is left to his judgment and choice, there will be an implied term that the work or materials will be suitable for their purpose". The defendant further submitted:

> "true it may be that some part of the design had been provided to Timms by the defendant, namely the height, the fall, the placement of the batter and the placement of the driveways. However, it was Timms who nominated the fill to be used, the levels of compaction and the identification of the levels to be used in the top 300mm layer. Those are all elements of 'design' which required the exercise of the skill and judgment of [the plaintiff]."

[68] It was argued by the defendant that, in exercising its skill and judgment, the site provided by the plaintiff was not fit for its purpose; it was not an all weather stand but one which left machinery susceptible to bogging and one which required high levels of maintenance.

[69] The defendant's submission overlooked the plaintiff's contention that the implication of the terms contended for by the defendant is to be considered against the statements and warnings the plaintiff claims were given by it to the defendant on various occasions as to the need for maintenance, given the nature of the surface and the nature of the ground upon which the hardstand was being constructed. As mentioned, these are pleaded by the plaintiff as being that:

(a) the hardstand would require ongoing maintenance because the hardstand was subject to subsidence due to the nature of the ground at the site;
(b) unless the hardstand was built using concrete or bitumen, it would be subject to sinkage and slippage;
(c) the site would need to be maintained by the laying of road base on any holes or sinkage applied using a bob cat.

[70] The tenor of the evidence given on behalf of the defendant suggests that it took the view that the hardstand should require minimal to no maintenance and that the fact that on-going regular maintenance was required indicated that the surface was not fit for its intended purpose.

[71] I accept the evidence of Mr Timms and Mr Parsons that the defendant was advised of the limitations associated with a non-sealed surface and was offered other surface options, such as concrete and bitumen, which the defendant chose not to pursue. I also accept Mr Timms' evidence that the defendant was seeking to construct a hardstand in the cheapest form possible. On the question of whether the defendant was warned of the need for maintenance because of the nature of the hardstand specified under the scope of work and the land itself, I prefer the evidence of Mr Timms and Mr Parsons over that of Mr Gettings and Mr Schueler. Mr Schueler I found to be a witness who tended to embellish and overstate matters to suit the defendant's case. (An example of this was that, unlike Mr Gettings, he insisted that Mr Timms stated that the material for the hardstand would be to a Main Roads specification. I find that Mr Timms made no such statement). In relation to Mr Gettings' evidence on the question of maintenance, I note that he accepted that there may have been mention of the matter.

[72] I accept the evidence of the plaintiff's witnesses, particularly Mr Gore, that the hardstand is suitable for the purpose pleaded by the defendant if maintained, as I find the plaintiff indicated was required. I also accept the evidence that the deficiency in the hardstand is one of maintenance and that it is exacerbated by poor drainage.

[73] In this regard, I note that the defendant had been operating its business from the hardstand since February 2007 and that the defendant's own witness Mr Van der Wilk gave evidence that the hardstand was useable once the maintenance work was carried out. Moreover, I note Mr Gore's evidence which I accept, that although the existing hardstand uses lower quality material than that recommended by Mr Morrison, even if material of a standard referred to by Mr Morrison in his fourth option was employed, the problem currently experienced with the surface would remain (although to a lesser extent) because the surface would still be unsealed.

[74] The defendant's counterclaim for breach of contract is unsustainable on the evidence I accept.

Trade Practices Act Claim

[75] In relation to the defendant's claim for breach of the *Trade Practices Act*, the defendant faces the same difficulties that arise in relation to its breach of contract claim. I find that the representations which the defendant claims it relied upon were accompanied by the warnings which I have already referred to. In those circumstances, I find that there was no conduct that was misleading or deceptive in breach of the Act.

Orders

[76] The plaintiff is entitled to judgment on its claim. The defendant fails on its counterclaim. I order that the defendant pay the plaintiff the sum of $236,384.40 together with interest at a rate of 9% per annum pursuant to s 47 of the *Supreme Court Act* 1995 and costs to be assessed on a standard basis in respect of the proceeding including the counterclaim.