SUPREME COURT OF QUEENSLAND

CITATION:	*McGrath Corporation Pty Ltd v Global Construction Management (Qld) Pty Ltd & Anor* [2011] QSC 178
PARTIES:	**McGRATH CORPORATION PTY LTD** **ACN 010 829 491** (plaintiff) **v** **GLOBAL CONSTRUCTION MANAGEMENT (QLD) PTY LTD** **ACN 085 856 882** (first defendant) and **IAN VINCENT TAYLOR** (second defendant)
FILE NO:	1199 of 2007
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	20 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	8, 9, 10, 11, 12 November 2010; Written submissions and chronology
JUDGE:	Daubney J
ORDERS:	**1. That there be judgment for the plaintiff against the first defendant in the sum of $557,166;** **2. Further, that the first defendant pay to the plaintiff the sum of $138,504.11;** **3. That the counterclaim is dismissed;** **4. I will hear the parties as to interest and costs.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – PERFORMANCE OF WORK – REMEDIES FOR BREACH OF CONTRACT – DAMAGES – where the plaintiff is seeking damages for breach of contract and negligence – where the first defendant was the construction manager for the relevant project – where the first defendant has counterclaimed contending its termination by the plaintiff was repudiation – where the plaintiff alleges the

first defendant overcharged in breach of the contract.

TORTS – NEGLIGENCE – APPORTIONMENT OF RESPONSIBILITY AND DAMAGES – APPORTIONMENT IN PARTICULAR SITUATIONS AND CASES - where the plaintiff is seeking damages for breach of contract and negligence – where the first defendant was the construction manager for the relevant project – whether the claim is caught by the *Civil Liability Act* 2003 (Qld) – whether the claim is an apportionable claim and how are the damages to be apportioned.

Civil Liability Act 2003 (Qld), ss 28, 30, 31, 32, 32A, Schedule 2

Bellgrove v Eldridge(1953-1954) 90 CLR 613, cited
John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd (1996) 13 BCL 292, cited
Laing Management (Scotland) Ltd v John Doyle Construction Ltd [2004] BLR 295, cited
Yates v Mobile Marine Repairs Pty Ltd [2007] NSWSC 1463, considered

COUNSEL: C Wilson for the plaintiff
RA Perry SC with G I Thomson for the first defendant

SOLICITORS: Herbert Geer for the plaintiff
HWL Ebsworth for the first defendant

Introduction

[1] In 2005, the plaintiff ("MCPL") commenced development of a site it owned at 1 O'Connell Street, Kangaroo Point. The project in question was the construction of a twin tower unit development. MCPL engaged the first defendant ("Global") as construction manager for the project. The second defendant, who traded under the name ITF Formwork, was engaged by the plaintiff to perform form working on the project. (The second defendant took no part in this trial. For convenience, I will refer to the second defendant as "ITF".)

[2] A component of the works performed by ITF was the form working for the lift shafts in the two buildings. ITF performed its contract poorly – it devoted too few personnel to the job and caused delays. Its form working was of poor quality and execution – so poor, indeed, that the lift wells, as constructed, were twisted such that extensive remedial work had to be undertaken to bring the lift well dimensions to acceptable tolerances for the installation of the lifts. Other formwork ITF completed was also defective. Eventually, ITF's retainer was terminated. The plaintiff also terminated the services of Global, and appointed another company, Broad Construction Services (Qld) Pty Ltd ("Broad") to manage the project to completion.

[3] By this proceeding, MCPL sued ITF and Global for damages for breach of contract and negligence. The case at trial was pursued against Global. The damages sought to be recovered fall into the following broad categories:

(a) The cost of remedial work;

(b) Additional site costs caused by delay in completion;

(c) Costs associated with retaining the replacement construction manager;

(d) Extra local authority rates paid during the period of delay;

(e) Additional costs of retaining a quantity surveyor;

(f) Additional insurance premiums;

(g) Additional financing costs.

[4] MCPL also claims that Global overcharged in respect of the cost of its onsite personnel and claims repayment of the amount overpaid.

[5] Apart from denying the claim in all respects, Global has counterclaimed, contending that MCPL's termination was a repudiation of the construction management contract and that Global is entitled to damages for the fees it would otherwise have been paid to the end of the construction phase of the development.

[6] The case, as pleaded and argued before me, was relatively narrow in scope. Before turning to outline the issues raised in the pleadings, it is appropriate to set out the relevant contractual terms and some other matters of background.

The construction management contract

[7] MCPL, as "Principal", and Global as "Construction Manager", entered into a written construction management contract dated 30 June 2005 ("the Contract").

[8] The Contract provided for management fees totalling $470,000 (exclusive of GST) to be paid to Global for performing the construction management services required under the Contract. The general conditions of the Contract were in the Master Builders' Association standard form CM2-1998, subject to certain amendments and special conditions.

[9] Clause 1(a) of the general conditions contained definitions, including:

> "**Trade Contract**" means an agreement between the Principal, or the Construction Manager on the Principal's behalf, and a Trade Contractor to construct any part of the Works.
>
> "**Trade Contractor**" means a contractor or supplier who enters into a Trade Contract in connection with the Works."

[10] Clause 2 relevantly provided that Global "shall act as the agent of [MCPL] in providing the construction management services stated in the Contract".

[11] Clause 5 specified the construction duties of Global in the following relevant terms:

> "**CLAUSE 5 CONSTRUCTION DUTIES**

At an agreed time, the Construction Manager shall organise commencement of the Works and, in consultation with the Principal, co-ordinate construction of the Works by the Trade Contractors and use every reasonable endeavour to achieve Final Completion in accordance with the terms of this Contract. The Construction Manager's construction duties shall include to –

...

(b) unless otherwise directed by the Principal, enter into a Trade Contract or supply agreement, as the case may be, with each Trade Contractor or supplier as agent for a disclosed Principal and provide the Principal with a copy of all such Trade Contracts and supply agreements;

...

(j) monitor the work of Trade Contractors in order to –

(i) assess their performance and likely future performance and recommend any course of action that may be available to the Principal when the requirements of a Trade Contract are not being met; and

(ii) be reasonably satisfied that the work is being performed in accordance with the requirements of the Trade Contracts;

...

(x) ensure that all records and reports in relation to the Project are available to be inspected on request during reasonable business hours by the Principal, its agents and the Project's financier;

..."

[12] Clause 7 relevantly provided:

"**CLAUSE 7 PRINCIPAL'S WARRANTIES**

The Principal hereby warrants that –

(a) the Construction Manager shall not incur any liability for –

(i) the construction means, methods, techniques, sequences and procedures employed by a Trade Contractor in the performance of its Trade Contract;

(ii) the failure of any Trade Contractor to carry out its work in accordance with its Trade Contract;

(iii) for the design or any failure or inadequacy in the design of the Works other than design provided by the Construction Manager, and

(iv) any breach by a supplier of, or failure by a supplier to comply with, a supply agreement;"

[13] Clause 16 provided, inter alia, for Global to submit monthly progress claims, stating all costs of the works incurred during the relevant period and an estimate of the fees then due to Global. The clause went on to provide a mechanism and time for payment by MCPL.

[14] The general conditions were amended and augmented by special conditions contained in Schedule 12.

[15] Special Condition 24.1 contained additional definitions for the purposes of the Contract, including:

> "'*the Services'* means the construction management services referred to in this *Contract* (including the *Construction Manager's* fee proposal dated June 2005), and as are to be provided by the *Construction Manager* to the *Principal* in accordance with this *Contract*;"

[16] Special Condition 25.2 imposed further duties on Global in the following relevant terms:

> "**25.2 Other Contract Manager's Duties**
>
> Without derogating from the *Construction Manager's* duties in clauses 3 and 5 of the *General Conditions*, the *Construction Manager* must:-
> ...
>
> (g) Engage, manage, coordinate and be responsible for the activities of all its subcontractors and managers and provide all necessary supervision (including persons experienced in the supervision of specialist service subcontracts) and attendance;
>
> ...
>
> (k) ensure all *work* complies with all aspects of the approvals, permits and certificates issued by the *Authorities*, and obtain all permits, consents and approvals that may be required at any stage before or during construction of *the Works* and to this end consult with all appropriate *Authorities*;
>
> ...
>
> (n) Ensure the timely identification of defects and oversee the defect rectification in any part of work carried out for the *Project*;
>
> ..."

[17] Special Condition 25.4 provided:

> "**25.4 Trade Contract obligations**
>
> (a) The *Construction Manager* acknowledges that the *Principal* will be entering into the *Trade Contracts* with the *Trade Contractors* .

(b) The *Construction Manager* will ensure that it carries out its duties as contract manager under the *Trade Contracts*:

(i) consistent with its obligations under this *Contract*; and

(ii) in accordance with its corollary obligations as construction manager under the *Trade Contracts*."

[18] The special conditions also specified further warranties by Global in the following terms:

"**30.3 General Warranties**

(a) The *Construction Manager* is engaged in and conversant with and skilled in the business of the construction management of projects with components similar to the *Project* and carrying out work of the kind described in and contemplated by this *Contract*.

(b) The *Construction Manager* will carry out and complete *the Services* in a good, proper and workman like manner to the standard of professional care, skill, judgment and diligence expected of a professional consultant and construction manager experienced in providing the same or similar work; and

(c) The *Construction Manager* has a clear understanding of the *Project* and the *Principal's Project requirements* and is familiar with the *Project* detail."

[19] Termination of the Contract for default on the part of Global was dealt with by Special Conditions 31.3 – 31.5:

"**31.3 Construction Manager's default**

If the *Construction Manager* commits a substantial breach of the *Contract*, the *Principal* may, by hand or by registered post, give the *Construction Manager* a written notice to show cause.

Substantial breaches included, but are not limited to:

(a) Breach of a warranty in clause 7 of the formal instrument of agreement and clause 30 of the *Special Conditions*.

(b) Failing to provide evidence of insurance;

(c) Wrongful suspension of *the Services*.

(d) Substantial departure from a *Project program* or *Project budget* without reasonable cause or the *Principal's* approval; and

(e) Where there is no *Project program*, failing to proceed with due expedition and without delay.

31.4 Principal's notice to show cause

A notice under subclause 31.3 shall state:

(a) That it is a notice under clause 32 of these *Special Conditions*;

(b) The alleged substantial breach;

(c) That the *Construction Manager* is required to show cause in writing why the *Principal* should not exercise a right referred to in subclause 31.5;

(d) The date and time by which the *Construction Manager* must show cause (which shall not be less than 7 clear days after the notice is received by the *Construction Manager*); and

(e) The place at which cause must be shown.

31.5 Principal's rights

If the *Construction Manager* fails to show reasonable cause by the stated date and time, the *Principal* may by written notice to the *Construction Manager*:

(a) Take out of the *Construction Manager's* hands the whole or part of *the Services* remaining to be completed and suspend payment until it becomes due and payable pursuant to subclause 31.7; or

(b) Terminate the *Contract*."

[20] The effect of a termination pursuant to, inter alia, cl 31.5(b) was stated in Special Condition 31.11 to be that "the parties' remedies, rights and liabilities shall be the same as they would have been under the law governing the Contract had the defaulting party repudiated the Contract and the other party elected to treat the Contract as at an end and recover damages".

The ITF Contract

[21] ITF was retained to provide form work services pursuant to a Trade Contract dated 26 October 2005 ("the ITF Contract"). The ITF Contract was between MCPL as "Principal" and the "Contractor", nominated under the ITF Contract as "ITF Formwork Pty Ltd". In fact, there is no such company as ITF Formwork Pty Ltd. It appears that the true situation was that the second defendant personally traded under the business name "ITF Formwork".

[22] Clause 1(a) of the ITF Contract conditions provided:

"1.(a) The Contractor will execute and complete the Works described in the **Schedule** ("the Works"):-

(i) in a proper and workmanlike manner using due diligence;

(ii) in accordance with this Contract and all relevant Plans and Specifications as detailed in the **Schedule (*refer to Point C*)**;

(iii) in conformity with all reasonable directions and requirements of the Construction Manager;

(iv) to the Construction Manager's reasonable satisfaction; and

(v) in the time specified (***refer Point D***)."

[23] It should be noted in passing that the time specified in Point D of the Schedule to the ITF Contract was:

> "(i) **Construction Period** Commencement:18/10/2005 Completion: 14/07/06 ***(subject to approved extension of time claims – refer Clause 2(b))***."

[24] By Condition 22(b), ITF warranted in favour of MCPL "that a satisfactory result in the time specified in the contract will be achieved".

[25] The special conditions to the ITF Contract included:

> "24.19 **Set Out:** The Contractor will be responsible for setting out the works and detailed set out of building elements. The Construction Manager has established primary survey control points within the boundaries of the site from which the Contractor's surveyor is to commence setting out the works."

[26] The works required to be completed under the ITF Contract were described as "all works related to the formwork package in accordance" with documents specified in the schedule to the ITF Contract. One of the trade specification documents so specified were the minutes of a form work works vetting meeting held on 27 September 2005 between representatives of Global and representatives of ITF. Those minutes relevantly record:

> "**8. Set Out**
>
> The principal will arrange for a surveyor to set out grid lines and a common datum points on completion of initial bulk excavation works and on each floor level.
>
> All other set outs in the horizontal and vertical planes will be the responsibility of the Trade Contractor (Not the Construction Manager). **Accepted & Agreed by the trade contractor.**"

Termination of the Contract

[27] Having set out the relevant terms of the Contract, it is convenient to mention now the circumstances of its termination.

[28] On 29 November 2006, MCPL served on Global a Notice to Show Cause ("the Notice") under Special Condition 31 of the Contract. The Notice alleged that Global had committed numerous substantial breaches of the Contract. In general terms, these were:

(a) Failing to complete its work in a good, proper, and workmanlike manner;

(b) Failing to use its best endeavours to make further savings on the project budget;

(c) Failing to monitor the estimated total cost of the works under the project and notify MCPL of any variances;

(d) Failing to institute a system of cost control;

(e) Failing to ensure that all records in relation to the project were available for inspection;

(f) Causing or permitting a substantial departure from the project budget without MCPL's approval;

(g) Letting a contract for the performance of substantial rectification work without MCPL's authority;

(h) Failing to ensure that the works complied with all approvals, etc;

(i) Misstating the cost of works by claiming reimbursement for staff at an excessive rate.

[29] These broad allegations were further particularised in the Notice. For present purposes, the following particularised allegations of breach should be noted:

(a) Paragraph 2(a) of the Notice provided:

> "(a) In breach of the warranty in clause 30.3(b) of the Contract, the Construction Manager has failed to carry out and complete the Services (as defined in the Contract) in a good, proper and workman like manner to the standard of professional care, skill, judgment and diligence expected of a professional consultant and construction manager experienced in providing the same or similar work. In particular:
>
> (i) The Construction Manager has failed to adequately supervise the performance of ITF Formwork, a Trade Contractor (as defined in the Contract), as required by clause 5(i) of the Contract; and has failed to assess the performance of the Trade Contractor and make recommendations on any course of action available to the Principal when the requirements of the Trade Contract were not being met, as required by clause 5(j) of the Contract.
>
> **Particulars**
>
> (A) The Construction Manager was aware that the Trade Contractor was failing to perform the works required under the relevant Trade Contract in a timely and efficient manner, so that it was inevitable that the Trade Contractor would be unable to complete the works under the Trade Contract to an acceptable standard within the time required by the Trade Contract.

(B) The Construction Manager failed to properly manage the performance of the Trade Contractor, also failing to make recommendations to the Principal on any course of action available to the Principal when the requirements of the Trade Contract were not being met.

...

(iii) The Construction Manager has failed to let Trade Contracts necessary for the completion of the works in a timely manner.

Particulars

(A) The works are programmed for completion on 21 February 2007[1]

(B) The Construction Manager has not yet let Trade Contracts for:

(I) Landscaping
(II) Fencing
(III) Screens
(IV) Miscellaneous Metalwork"

(b) Paragraph 2(f) of the Notice relevantly provided:

"(f) In breach of clause 31.3(d) of the Contract, the Construction Manager has caused or permitted a substantial departure from a Project budget (as defined in the Contract) without the Principal's approval.

Particulars

(i) The budget included in Construction Management Cost Report No.17 contains the following unapproved changes to the budget that were described in the reports as "approved":

...

(ii) In breach of its obligations under clause 25.5(c) of the Contract, the Construction Manager has let a contract for the performance of substantial rectification work (or alternatively authorised a substantial variation to the Trade Contract for Render) without authority from the Principal.

Particulars

(A) The Construction Manager made reference in a letter to the Principal dated 30 October 2006 to "works currently being undertaking [sic] in remedials [sic] to Lift Shaft concrete surfaces."

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[1] The reference to 21 February should have been to 3 March, but nothing turns on this.

(B) The Construction Manager on 23 November 2006 sent to the Principal "for approval" tax invoices from Queensland Solid Plaster Services, the Trade Contractor for Render on the Project, claiming payment of $32,166.20 for "Lift Shaft", "Balconies" and "Spitters".

(C) No authority has been requested of the Principal to let a Trade Contract for this work.

(D) No authority has been requested of the Principal to have this work done as an approved variation under the Render Trade Contract."

(c) These last mentioned Particulars were also nominated as the Particulars of the substantial breach alleged in paragraph 2(g) of the Notice:

"(g) In breach of its obligations under clause 25.5(c) of the Contract, the Construction Manager has let a contract for the performance of substantial rectification work without authority from the Principal. Alternatively, in breach of its obligations under clause 25.6(a) of the Contract, the Construction Manager has authorised a substantial variation to the Trade Contract for Render without the prior approval of the Principal.

Particulars

(i) As specified in paragraph 2(f)(ii) above."

[30] On 11 December 2006, Global responded to the Notice. The response stated, inter alia, as follows:

(a) With respect to paragraph 2(a)(i) of the Notice:

"i. We refute the allegation. The records indicate McGrath Corp. were fully informed and advised throughout the project of the performance of ITF formwork. Including but not limited to PCG minutes, window programmes issued fortnightly and carbon copies of general correspondence sent to ITF. Furthermore, McGrath Corp ignored Globals recommendations. The Principal has also confirmed in writing the praises as to the professional manner in which the Construction Manager has handled ITF – refer to McGrath correspondence dated 23rd October 2006."

(b) With respect to paragraph 2(a)(iii) of the Notice, Global asserted, in brief, that it was MCPL's failure to observe its obligations and responsibilities under the Contract which had caused delays.

(c) With respect to paragraph 2(g) of the Notice, Global asserted:

"2 g) Refuted in all respects. Rectification is and would in all likeliness be required to be carried out due to the McGrath Corp premature direct termination of ITF formwork contract (against the recommendations of the Construction Manager). The Principal were fully aware that the costs of rectification would be offset against ITF retentions held. Refer to McGrath Correspondence dated 26/10/06."

[31] Having received that response, MCPL then, by a Termination Notice dated 2 January 2007, terminated the Contract.

The case pleaded against ITF

[32] In its case against ITF, MCPL pleaded the contractual obligations on ITF to perform the form work in a proper and workmanlike manner, to set out and measure the form work, and to accurately undertake all set outs in the horizontal and vertical planes. It also pleaded the concomitant duties of care to take reasonable steps to perform the form work in a competent and workmanlike manner, and to take reasonable steps to ensure that the set outs were accurate and undertaken in a proper and workmanlike manner.

[33] The statement of claim[2] then pleaded a series of events which occurred in relation to the construction of the lift shafts in the two towers on the site. The events pleaded against ITF were included in the longer list of events subsequently pleaded in the statement of claim against Global, and I will be setting those out in detail shortly. For present purposes, it is sufficient to note that the "events" pleaded against ITF include a recitation of ITF's repeated failures to perform the form work property, and concludes with the assertion that as at 2 January 2007, the following defects existed in the lift shafts:

> "(i) Tower One:
>
> - a twist was present in the location of the internal corners, to a maximum of 23mm south east from true and 22mm south west from true and 8mm north west from true, whilst the shaft was out of vertical alignment between 10mm and 18mm;
>
> - The concrete openings for lift doors were not aligned with the floors above or below;
>
> (ii) Tower Two:
>
> - a twist was present in the lift shaft such that there were variations up to 78mm from the design;
>
> (iii) Most of the exterior columns in both towers were not formed to the slab edge and are up to 40mm in misalignment;
>
> (iv) the formed concrete hobs and columns did not meet in the one plane, the misalignment being up to 30mm;
>
> (v) the exterior lift shaft concrete formed walls are substantially misaligned with the walls above and below."

[34] By paragraph 25A of the statement of claim, MCPL alleged that the matters enumerated as the "events" concerning ITF comprised breaches of the contractual obligations and duties of care owed by ITF to MCPL. The statement of claim then alleged:

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[2] Second amended statement of claim filed 14 September 2009.

> "25B. By reason of ITF's breach of contract and breach of duty the plaintiff has suffered loss and damage as pleaded and particularised at paragraph 27(a) and (b) herein."

These heads of damage were:

(a) by paragraph 27(a) remedial costs of $321,977 (exclusive of GST);

(b) by paragraph 27(b) additional site costs caused by delay in completion, totalling $259,302 (exclusive of GST).

The case pleaded against Global

[35] In reliance on the contractual provisions which I have set out at length above, MCPL alleged that Global owed it the following contractual obligations:

(a) To monitor the work of ITF;

(b) To provide all necessary supervision;

(c) To ensure the timely identification of defects and oversee the defect rectification in any part of the work carried on by the project;

(d) To ensure that Global carried out its duties as construction manager under the ITF Trade Contract consistently with its obligations under the Contract;

(e) To carry out and complete its services in a good, proper and workmanlike manner to a standard of professional care, skill, judgment and diligence expected of a professional consultant and construction manager experienced in providing the same or similar work.

[36] It was also alleged that Global owed MCPL common law duties of care to:

(a) Take reasonable steps to properly monitor and supervise the work done by ITF under the ITF Trade Contract;

(b) Take reasonable steps to ensure that Global inspected the work done by ITF under the ITF Trade Contract in order to identify and cause to be made good all defects;

(c) Immediately advise MCPL of any known defects.

[37] The statement of claim then pleaded a lengthy series of events which occurred prior to MCPL's termination of the Contract on 2 January 2007. It is worth noting here that there was really no factual issue between the parties as to the occurrence of these events. It would have been surprising if there had been issue in that regard, given that the basis for the assertion of most of these events is found in Global's own documents. It is, therefore, sufficient for present purposes if I recount the events relied on by MCPL, without unnecessarily pointing to the source information from which information about each event is derived.

[38] Paragraph 24A of the statement of claim pleads that, prior to the termination of the Contract on 2 January 2007, the following events occurred in relation to the

construction of the lift shafts in the two towers on the site. I find that these events occurred:

(a) On 12 August 2005, at a meeting attended by representatives of MCPL, Global and Liftronic Pty Ltd ("Liftronic" – the installer of the lifts), Global undertook to provide a "lift shaft with intolerances" in relation to each tower;

(b) On 15 November 2005, Global provided ITF with copies of certain Liftronic drawings showing details of the lift shaft to be constructed in concrete using form work to be erected by ITF;

(c) In late February 2006, John Densley of Global advised Stephen McGrath of MCPL that a "minor twist" existed in the tower two lift shaft; this advice was given immediately prior to the pouring of the level 3 podium floor slab (which was common to both floors);

(d) On 2 March 2006, the level 3 podium floor slab was poured;

(e) On 21 April 2006, the tower one level 4 mezzanine slab was poured;

(f) Global's "project daily report and diary" dated 24 April 2006 records, inter alia, information from the onsite surveyor confirming "M1 lift shaft not plumb & in correct position" and the site manager's comment "directed formworker to confirm position of lift shaft to M1 L4", thereby indicating Global's knowledge that the tower one lift shaft, then constructed to the level 4 mezzanine slab, was not plumb or in the correct position.

(g) On 24 April 2006, Global gave ITF a written "site instruction" in reference to the tower one lift, stating "It is apparent that the lift shaft walls are not vertical" and "it is also apparent that the lift shaft at level 4 is not in the correct position", and calling on ITF to immediately attend to the following matters:

    (1) Confirmation that the lift shaft was in the correct position or report any discrepancy;

    (2) Confirm the lift shaft was vertical or report any discrepancy;

    (3) Follow the same procedure on the tower two lift and

    (4) If discrepancies exist, stop work on the vertical elements until control measures were in place to ensure quality control.

(h) Global's project daily report diary dated 27 April 2006 records, inter alia, that the lift shaft to M1L4 had still not been plumbed or measured by ITF;

(i) On 27 April 2006, at about 3.50pm, Global sent ITF a written site instruction referring to the site instruction which had been given on 24 April 2006 and stating:

> "As at close of business today you have still not provided the information requested on 24-4-06. This is delaying program. We have organised a surveyor to determine the position of the lift shaft. This activity will commence at 6.30am on 25-4-06."

(j) Global's project daily diary dated 28 April 2006 reports that it had been confirmed that the lift shaft (i.e. the tower one lift shaft) was "out of plumb & position". It records that the tower one lift shaft was "50mm out of plumb", and that Liftronic was checking to assess the consequences;

(k) On 28 April 2006, Global was provided with a sketch prepared by the surveyor for the project, indicating the points at which the tower one lift shaft varied from the design and the degree of such variation;

(l) On 11 May 2006, the tower two level 4 mezzanine slab was poured;

(m) On 18 May 2006, the tower one level 5 slab was poured;

(n) On 27 May 2006, the tower two level 5 slab was poured;

(o) The project daily report and diary of Global dated 31 May 2006 records the following comments:

> "Formworker has still not got lift wall ready for steel – lift shaft not vertical or in right position and this is causing delay – formworker has still not solved this."

(p) On 2 June 2006, Global sent by facsimile to ITF a defective concrete work notice stating:

> "We draw your attention to your Contract Agreement to progressively remedy defects in YOUR work.
>
> To date you have not completed or signed off the following levels:
>
> Basement Level 1
> Basement Level 2
> Podium Level 3
> Tower 1 Level 4
>
> As previously advised we will engage an alternative contractor, on your behalf, to carry out your remedial works should you fail to complete them yourself."

(q) On 5 June 2006 the tower one level 6 slab was poured;

(r) On 16 June 2006 the tower two level 6 slab was poured;

(s) On 26 June 2006 the tower one level 7 slab was poured;

(t) On 3 July 2006 the tower two level 7 slab was poured;

(u) On 5 July 2006 Global wrote to ITF complaining of repeated failures by ITF to comply with its Contract program. The notice referred to:

- ITF's failure to meet program requirements, which necessitated rescheduling of pour dates for floor slabs;
- ITF's site personnel leaving the site early;
- ITF failing to use due diligence to maintain program activities;
- failing to work the required hours to mitigate delays incurred on the project;
- failing to co-operate and co-ordinate with other trades;
- supplying insufficient labour to the project.

This facsimile concluded:

> "Having set down your past Contract breaches we look forward to your immediate upgrade at labour attendances to the project, and remind you that your continued failure on Program Compliance shall cause without fail the pursuance of Clause 2(a) or your TC/CMI Contract.
>
> We trust our position is clear on this matter and further trust you will heed our advice and now responsibly attend and mitigate the Formwork delays to this project."

Annexed to this letter were copies of a series of facsimiles which had been sent by Global to ITF between 7 May 2006 and 26 June 2006 confirming the timing of slab pours and complaining of delays experienced by other trades as a consequence of ITF's inadequate work practices.

(v) On 10 July 2006 the tower one level 8 slab was poured;

(w) On 18 July 2006 the tower two level 8 slab was poured;

(x) On 18 July 2006, Global wrote to ITF saying:

> "Further to previous advice and surveys of both Lift shafts, Bennett & Bennett [the project surveyors] have carried out a further survey of both shafts at Level 7 and record that Tower 1 shaft is (worst case – front wall) 22mm out of plumb and Tower 1 is 78mm out of plumb. The agreed tolerance for lift installation is 12mm.
>
> Following a meeting with the Lift Engineers, Liftronic, major remedial work to the structure will be required, alternatively amendments to the manufactured lift equipment will need to be made.
>
> Please refer to the attached survey drawings taken at Level 4, 5 and 7, and advise what action you propose to adopt to make the necessary corrective action and also your proposal to bring the sections of lift shaft back into the correct alignment."

(y) On 26 July 2006, the tower one level 9 slab was poured;

(z) On 3 August 2006, the tower two level 9 slab was poured;

(aa) On 11 August 2006, the tower one level 10 slab was poured;

(bb) On 18 August 2006, the tower two level 10 slab was poured;

(cc) On 28 August 2006, the tower one level 11 slab was poured;

(dd) On 31 August 2006, Global gave ITF a written site instruction referring to the lift shafts and saying:

> "In some areas work to the lift shaft walls is incomplete and they are not of a standard to receive applied finishes.
>
> Please ensure these matters are attended by the time the shaft is poured to the top & the roof is poured, so lift installation and other trades work can continue without delay."

I interpolate that there was a further site instruction issued by Global to ITF on 31 August 2006.[3] This site instruction concerned "incomplete works", and stated:

> "In several situations the concrete face of a vertical element (wall or column) does not align with the slab edge. For instance, on tower 1 the lift wall at L5 & columns C45 & C49 at L4 are proud of the slab edge.
>
> Scabble back as required and plaster to a fair finish ready to accept applied finishes.
>
> Please attend this work immediately & complete within 7 days.
>
> Please advise when <u>all</u> these works are completed.
>
> Your failure to attend this matter will result in others being engaged to complete this work and all associated costs will be charged to your account."

(ee) On 7 September 2006, the tower two level 11 slab was poured (this was the top floor of tower two);

(ff) On 21 September 2006, the tower one level 12 slab was poured;

(gg) On 21 September 2006, Global sent a facsimile transmission to ITF stating:

> "Further to your Agreement with [MCPL] dated 20 September 2006 regarding completion of your works we confirm that you have not commenced any remedial/ completion works to Lift Shaft Tower 2 and that handover to Liftronic for installation of the lift \is programmed for 29 September as per your agreed programme.
>
> This work is now behind programme."

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[3] Exhibit 1 document 13.

(hh) Global's project daily diary of 14 November 2006 records Global's knowledge of "trouble with lift shaft plumb" and that Global "will continue to assess tomorrow to determine what if any concrete to cut out".

(ii) Global's project daily diary of 15 November 2006 records that Global had been addressing the "lift shaft plumb with Liftronic" and that Liftronic had advised that it would "re-plumb tomorrow". The diary also recorded that Global had cancelled the "cut & core" contractors who had been booked to do rectification.

(jj) On 29 November 2006, Liftronic sent a facsimile to Global in respect of each of tower one and tower two. Each of these facsimiles from Liftronic informed Global that the "shaft vertical alignment measurements [had] indicated major discrepancies outside of the tolerances required for the lift installation" and that in each case extensive rectification work would be required, including modification of lift equipment, chopping out of protruding concrete, extension of time and variations to the Liftronic trade contract.

[39] Paragraph 24A(kk) of the statement of claim alleged that in or about the second week of December 2006, MCPL was first advised of the problems with the lift shafts when Global provided MCPL with copies of these Liftronic faxes of 29 November 2006. This was a point of contention between the parties. I will discuss this shortly.

[40] Paragraph 24B of the statement of claim then pleaded:

> "Other than as specifically pleaded in paragraph 24A herein [Global] did not notify or advise [MCPL] of any of the matters pleaded in paragraph 24A herein, nor recommend to [MCPL] any course of action available to [MCPL] to prevent, ameliorate or remedy the defects in the work undertaken by ITF or to prevent or reduce delay to the project caused by ITF's failure to perform its obligations under the ITF trade contract."

[41] Paragraph 25 of the statement of claim then pleaded the defects which existed in the project as at the date of termination of the Contract. They are the same defects as were pleaded against ITF (see [33] above).

[42] MCPL then alleged against Global:

> "26. The Defendant:
>
> (a) in breach of clause 5(i) of the Contract and its duty of care, failed to:
>
> (i) monitor the work of ITF in relation to the lift shafts and other form work in Towers One and Two;
>
> (ii) assess the performance of ITF in relation to the construction of the said lift shafts and other form work;
>
> (iii) recommend any course of action available to the Plaintiff arising from ITF's failure to perform its contractual obligations by constructing the said lift shafts containing

the defects pleaded at sub-paragraphs 24A (c), (f), (g), (j), (o), (x), (dd), (hh), (jj) herein;

(b) in breach of clause 25.2 (g) of the Contract and its duty of care, failed to provide adequate supervision of the work undertaken by ITF in the construction of the said lift shafts and other form work;

(c) in breach of clause 25.2 (m) of the Contract and its duty of care, failed to identify in a timely fashion the defects in the construction of the said lift shafts and other form work by ITF as pleaded as sub-paragraph 26 (a) (iii) herein, and to oversee the defects rectification rendered necessary by such defects;

(d) in breach of clause 25.4 of the Contract and its duty of care failed to carry out its duties as construction manager under the ITF Trade Contract, in the manner pleaded at sub-paragraphs 26(a), (b) and (c) above;

(e) in breach of clause 30.3(b) of the Contract and its duty of care, failed to carry out the Services to the standards of a professional construction manager, by virtue of the breaches pleaded at sub-paragraphs 26(a), (b) and (c) above."

[43] I will deal later in this judgment with the various heads of damage claimed against Global.

[44] Before passing from the statement of claim, however, it should be noted that shortly prior to the trial MCPL gave some further particulars of a number of the allegations in the statement of claim.

[45] In relation to paragraph 24B, MCPL particularised that the actions which Global should have recommended were:

"(a) Undertaking a detailed investigation of the defects and causes of defects in ITF's work;

(b) Directing the first defendant to supervise and check the setting out of formwork for the lift shafts prior to each concrete pour, if necessary with the assistance of a surveyor;

(c) Directing [Global] to supervise and check the rigidity and stiffness of the formwork erected for the lift shaft, prior to each concrete pour, if necessary with the assistance of a qualified engineer."

[46] Similar particulars were provided in respect of the allegation in paragraph 26(a)(iii) of the statement of claim.

[47] For completeness, I should also note that the statement of claim raises an issue under the *Civil Liability Act* 2003 (Qld) ("CLA"). I will deal with that separately later in the judgment.

The case on liability

[48] It is not necessary for me to recount the contents of the defence in detail. Much of the defence consisted of traverses which put the plaintiff to proof, and in any event,

as I have said, the matters in issue between the parties became quite focused by the end of the trial. Global's counsel, for example, properly conceded that most of the "events" which I recited at length above were uncontroversial in the sense that there was no dispute that the events occurred.

[49] In the case as ultimately presented and argued by MCPL, it was submitted that the crucial issue was whether Global had breached its contractual and common law obligations "to monitor the work of trade contractors in order to assess performance and likely future performance, and to recommend any course of action that may be available to [MCPL] if the requirements of a trade contract are not being met".[4] Reliance was also placed on Global's obligation to ensure "timely identification of defects and oversee the defect rectification".

[50] MCPL argued that, on the evidence:

(a) Defects emerged in the lift shafts as constructed in the form of twisting and lack of straight vertical walls;

(b) Global was aware of these problems from February 2006 but took no steps, apart from an initial informal advice that there was a "minor twist" which could be "humoured out";

(c) Global did not advise MCPL of the ongoing misalignment in the lift shafts as they were being constructed nor make any recommendations as to rectification of that problem;

(d) Global gave various directions to ITF in an attempt to address the problem but misalignment continued throughout construction of both towers, from which it is to be inferred that ITF was unable to correct the ongoing problem.

[51] Before turning to the evidence relied on by Global to rebut these assertions, it is convenient to dispose of an argument which Global contended was a complete answer to the claim, namely that cl 7 of the general conditions exonerated it completed from any liability to MCPL.

[52] The terms of cl 7 are set out above. The short answer to Global's attempt to rely on that clause, however, is that MCPL, by this proceeding, is not seeking to argue that Global has incurred "any liability for" any of the matters enumerated in sub-clauses 7(a)(i), (ii), (iii) or (iv). The case advanced by MCPL is that Global breached the contractual and common law obligations which it, Global, owed to MCPL and that MCPL suffered loss because of Global's breaches of the duties it owed. The method of quantifying that loss calls up matters such as the costs incurred in rectifying ITF's shoddy workmanship. But the loss is not claimed for ITF's breach, but for the breaches alleged against Global. Clause 7 does not have the effect, as argued by Global, of relieving Global from the consequences of any breach of the contractual and common law obligations which it (as opposed to ITF) owed to MCPL.

[53] It is apparent, even from the litany of events recited above, that Global:

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[4] Plaintiff's written submissions, para 4.

(a) had knowledge from February 2006 of the "minor twist" in the tower two lift shaft;

(b) had knowledge from (at latest) April 2006 of the fact that the tower one lift was out of plumb;

(c) from April 2006 was giving directions to ITF with a view to identifying and rectifying defects in the verticality of both lift shafts.

[54] MCPL submitted that Global's breach of its contractual and common law obligations was found in its failure to give any advice of the misalignment, or any consequent recommendation on how to rectify the misalignment, until the second week of December 2006. Global submitted that evidence which it led established that it did, in fact, "keep [MCPL] informed of the lift shaft issue".[5] Resolution of this issue requires reference given in competing versions given by the witnesses called for the parties.

Mr Stephen McGrath

[55] Mr Stephen McGrath is a director of the plaintiff. He was actively involved in dealings with the defendants in respect of the project. He said that he attended at the project every week, usually for several days at a time.

[56] Stephen McGrath said that he first became aware of problems with ITF's work in the early part of 2006. He gave evidence about a short formal meeting with Mr John Densely (of the defendant) about the construction of the tower two lift shaft. He said that, in a response to a question about ITF's quality of work, Mr Densely described it as "generally good except for a small problem, a slight minor shift in the lift shaft of tower two". Stephen McGrath said Mr Densely explained that the lift shaft had a "minor twist in it", and that he told Mr McGrath not to worry about it because the "problem is minor and it can be humoured out over the next couple of floors".

[57] Stephen McGrath said that during the course of 2006, while the towers were being constructed, he was advised of other problems concerning ITF. The problems that were described to him were that ITF was not applying the correct number of trades onsite to comply with the program, so "they were slow". He was also told of "minor formwork problems"; he gave the example of being told of ITF not attending to a proper stripping and grinding back of the concrete soffits in the basement.

[58] Stephen McGrath described these problems with ITF's failure to adhere to the program and minor work quality issues as leading to a further agreement being entered into between MCPL and ITF later in 2006.

[59] That agreement was formalised in a document headed "Variation to agreement", and was entered into in September 2006. This agreement recited:

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5 Defendant's submissions, para 144.

> "THE DISPUTE
>
> Whereas ITF Formwork and McGrath Corporation Pty. Ltd have entered into an agreement for the provision of formwork to the MILLENIUM PROJECT Kangaroo Point and a dispute has arisen as to the anticipated late completion of that work by ITF Formwork and the non payment of submitted invoices to the 19th of September 2006 and further that ITF Formwork has with drawn its labour from the site."

The terms of this agreement included:

(a) That ITF would return to site immediately and recommence "and continue with the works in a diligent and workmanlike manner with a 17 man crew" until all of their work was completed "including substantial completion and rectification of defective work";

(b) ITF was to complete all of its work by 21 October 2006;

(c) ITF agreed to a reduction in its contract price (acknowledging that liquidated damages against it had originally been assessed at $225,000) of $150,000 (including GST);

(d) MCPL agreed to pay the balance of the contract price by specified instalments.

[60] As it transpired, ITF failed to perform even if accordance with the terms of that agreement, and the contract between it and MCPL was subsequently terminated on the recommendation of Global.

[61] Stephen McGrath said that construction of both lift shafts had been completed by the time ITF's services were terminated, and that no-one from Global had given him any advice about "problems with the straightness or plumbness of the lift shaft" as at that date.

[62] Stephen McGrath also gave evidence about the Notice to Show Cause which was issued to Global on 29 November 2006. He said that when the Notice was issued, he had not been advised by anyone from Global about any problem with "the twisting or plumbness" of the lift shafts. Stephen McGrath said he had no knowledge of this issue of 29 November 2006. His evidence was to the effect that the basis of the Notice was the information which he then had, particularly relating to the delay which ITF had caused to the building program.

[63] Stephen McGrath confirmed that he had, in October 2006, been aware that some remedial work was being carried on in the lift shaft, but said that he understood this to be "very minor work being done to the surface of the lift shaft to prepare it for painting". It was only later that he found out that the work then being done was to remediate ITF's defective alignment.

[64] Stephen McGrath was cross-examined about, amongst other things, the further agreement entered into with ITF in September 2006, and confirmed that MCPL's position was that ITF was in default by not complying with the program such that it was appropriate to levy $225,000 by way of liquidated damages, and that this

amount of liquidated damages was negotiated down to take account of other concessions obtained from ITF in the agreement.

[65] In his evidence in chief, Stephen McGrath was firm in stating the circumstances under which he learned about the true nature of the defects in the lift shaft:

> "Your Honour, I was standing outside the lift shaft No. 1 at car park level 2 when Ian Bisset in the second week of December 2006 handed to me the plumb charts from Liftronic for the elevator shafts."

[66] These were the Liftronic documents dated 29 November 2006 to which I have referred above.

[67] When cross-examined, Stephen McGrath denied that Global had discussed with him in early 2006 the prospect that "ITF had the potential to be a problem on site". He denied discussing the misalignment of the lift shafts with Mr Bisset, and confirmed that the first he became aware of a significant problem with the misalignment of the lift shafts was the second week of December 2006. He was asked about his knowledge of remedial works that were being undertaken in October 2006, and said:

> "I was aware that there was some rendering work being done inside the lift shafts, but I thought that that was of a cosmetic nature only, not major rectification work."

[68] It was put to him that his interest and involvement in the project is such that it "is simply untenable for you to suggest that there was no discussion between you and Bisset about the misalignment of the lift shafts", to which he replied:

> "There was no discussion about the matter whatsoever."

[69] He was strongly challenged on this evidence, and responded with equal strength. As it later transpired in the trial, Mr Bisset confirmed that he had not had any such discussions with Stephen McGrath.

[70] Stephen McGrath confirmed that MCPL stopped paying ITF the instalments referred to in the September 2006 Agreement after receiving advice from Global that ITF was not adhering to the required number of staff that ITF should have had on site.

[71] He was asked about a "client project control group meeting" held on 12 May 2006. This meeting was attended by, inter alia, Stephen McGrath, Paul McGrath, Mr Bisset and Mr Densely. The minutes of this meeting recorded in relation to "ITF Formwork" that Mr Bisset and Mr Densely had held a number of meetings "over the past few weeks regarding program and their behaviour onsite", and that Mr Bisset said that he "lacks confidence in ITF's ability and believes they will have to be managed closely & that their performance poses a risk to the project" and Mr Densely advised that "surveying is now being done on behalf of ITF to simplify their work".

[72] Stephen McGrath agreed that he attended this meeting and that he received the advice recorded in those minutes. I observe in passing that there is nothing in the minutes about the extent of the misalignment of the lift shafts, nor was it suggested to Mr McGrath that he was given that advice at this meeting.

[73] Stephen McGrath was then cross-examined on the fact that the surveyors for the project (Van Bennett & Bennett) were engaged to set out the location of ITF's form work panels before each pour was done on each floor. When asked about this, Stephen McGrath said: "I believe it was grids and control points from which measurements are then taken by the form worker and supposed to be checked by Global before the form it put in place ...".

[74] He was challenged on whether there was a contractual obligation on Global to undertake this checking, and referred Global's counsel to general condition 5(j)(ii), special condition 25.2(g), special condition 30.1(b) and special condition 30.3(a), (b) and (c).

Mr Paul McGrath

[75] Paul McGrath is also a director of MCPL.

[76] Paul McGrath said that he was not at any point between April and November 2006 told that there was a misalignment in the lift shafts that were under construction. He said that the only issues that Bisset had raised with him regarding ITF was ITF's staffing issues and problems on site in regards to the number of people they were bringing to work.

[77] Paul McGrath also confirmed that he received monitoring results from the surveyor, Vann Bennett & Bennett, and explained that this related to the surveyor monitoring the site boundary of the property on which the project was proceeding as part of an agreement with the neighbours to ensure that underpinning of the property did not cause any shifting of the boundaries.

[78] Under cross-examination, Paul McGrath confirmed attending weekly meetings with Mr Bisset from the time when Mr Bisset started on site in early 2006. It was put to him that during at least one of those Monday meetings the issue of lift shafts being twisted and not vertical were discussed between Paul McGrath and Mr Bisset. Paul McGrath said that this was not correct and that he absolutely did not agree with the suggestion. He was further cross-examined and asked whether he could "discount the possibility" that issues of twisted lift shafts and verticality had been discussed at these monthly meetings, to which he responded:

> "Oh, I do discount it. They were not discussed."

[79] He went on to explain that the reason he was so adamant was that his (i.e. Mr Paul McGrath's) job onsite was to act for MCPL in giving Global whatever assistance was required to resolve an issue; it was up to Mr Paul McGrath to sort matters out.

Mr Ian Bisset

[80] Mr Bisset is a project manager by profession. He was called to give evidence by Global. His evidence was taken by videolink, as he has relocated to New Zealand. In late 2005, he was engaged by Global to act as project manager on this particular project. He described his role as project manager as being "overall supervision of the site as project manager with site managers and site foremen reporting to me and the trade contractors reporting through me to McGrath".

[81] He said that his day to day liaison with MCPL was through Paul McGrath. He described regular meetings – both informal and formal.

[82] In relation to giving advice about the alignment of the lift shafts, Mr Bisset gave the following evidence in chief:

> "Was anything ever said to you – sorry. Was anything ever said by you to Mr Paul McGrath during any of these meetings about the lift shafts? -- Yes, I do recall discussing with him because we had a problem with ITF as a trader contractor. One of the problems was the – the lift shaft being out of plumb but there were a number of other problems to do with quality, labour resources, payments, et cetera, et cetera.
>
> And on how many occasions do you think you may have mentioned the issue of the lift shafts being out of plumb to Mr Paul McGrath? – It – in the early stages of our meetings it wasn't a topic of conversation. It became a problem when the lift shaft became majorly out of – out of plumb. Initially there are building tolerances and we treat – we have a quality assurance plan which deals with remedial works to do with problems caused by subcontractors. Until it became a concern that it was out of plumb and we had to engage the surveying company additionally to their contract to monitor the dimensional coordination of the lift shaft."

[83] A little further in his evidence in chief, Mr Bisset said:

> "And what was the outcome of conversations that you had with Mr Paul McGrath concerning the issue of the plumb of the lift shafts? Where did they go? -- Basically, it was how we were dealing with the remedial work or the quality control process and what actions we were doing to ensure that the trade contractor ITF Formwork got the job back on – on line.
>
> And what were those actions? -- I basically advised them because they were not – obviously not capable, they didn't perform their – their responsibilities under the contract to set-out the lift shaft properly so we actually engaged Vann, Bennett & Bennett to do the lift shaft setting-out on top of the grid set-out that they were contracted to do and that was again through McGrath."

[84] Under cross-examination, Mr Bisset confirmed that he had told Paul McGrath about problems with the lift shaft alignment. He had no recollection of giving such advice to Stephen McGrath.

[85] Mr Bisset confirmed that the first he became aware of the extent of the problems would have been in about May 2006. By that time, the lift shaft was so out of tolerance that he realised "obviously there were going to be consequences or ramifications of the lift shaft not being plumb". He confirmed the project diary note of 31 May 2006, and also confirmed the facsimile sent to ITF on 18 July 2006. The following evidence was given:

> "So was that when you first became aware that it would – that the problems with the lift shaft were going to cause major problems for the lift installation? -- Yes, because I think by that time Liftronic had been on site and had been doing measurements and then they recorded they would have to do some alteration to their equipment to make the lift work in the shaft, yes."

[86] Mr Bisset also confirmed that he was aware of the agreement entered into between MCPL and IFT in September 2006. He said he recalled the facsimile dated 21 September 2006 concerning the remedial works to the tower two lift shaft and confirmed that handover to Liftronic for installation was proposed for 29 September. Mr Bisset then gave the following evidence:

> "So at the time you sent that fax to ITF on the 21st, you knew that major remedial work remained to be performed on the entirety of the lift shaft? -- Yes, correct.
>
> And hadn't been commenced? -- And hadn't been commenced, yes.
>
> So there was no prospect, was there, that they would have that work done by the 29th of September? On the 21st there was no prospect? -- Depending on resources – one of the problems with ITF was they didn't have sufficient resources on site so they needed to increase their resources for remedial works to make sure that they were completed to enable the lift engineers to commence, yes."

[87] Mr Bisset was then cross-examined about the Liftronic letters dated 29 November 2006, and was asked whether the receipt of those letters was the first time that he realised it would be necessary to cut out concrete to rectify the discrepancies, to which he responded:

> "No, it was part of the advice and directions we'd been giving ITF or I'd been giving ITF to remedialise the defective workmanship that had been going on for some time."

[88] He said he had been giving ITF these directions from April 2006, and then gave the following evidence:

> "So from April to September, although you told ITF on a number of occasions to fix the problem, each time another pour was done it was apparent to you that the problem remained? -- The problem remained but by realigning the lift shaft, you can bring the lift shaft back into its true line."

[89] Mr Bisset then described the work undertaken Van Bennett & Bennett to provide specific set out for each stage of each lift shaft and also of engineers Wethered Howe to check on the reinforcement of the form work set up by ITF. Mr Bisset gave the following evidence:

> "So where was the problem in your opinion? Why did the misalignment continue all the way up to the top of the shaft? -- An inexperienced formworker and - I wouldn't say incompetent, but not a very good formwork contractor. And that point was made quite clearly to McGrath during the course of the projects and to my own management.
>
> ...
>
> I see. You never made – you never made any recommendations to McGrath Corporation as to how to address this problem, did you? -- Yes, from the point of view of remedial work that needed to be done, because we saw it as a quality control point of view the structural integrity of the lift

> shaft was fine; it was the alignment, which can be addressed in a number of waste.
>
> And your decision was to address that by attempting to remediate it – or, sorry, by directing ITF to remedy it? -- My recommendation to McGrath Corporation was to carry out remedial works, which is – I won't say standard, but it's normal in the construction industry to rectify defective or substandard work.
>
> You recall that I asked you, and you remembered, a facsimile that you sent to ITF of 21 September 2006 which advised that ITF had not commenced any remedial work to tower 2 lift shaft, and handover was due eight days later on 29 September? -- Yes.
>
> Do you recall that? -- Yes, I do.
>
> And you didn't know at that point how long it would take to perform the rectification works to that lift shaft; is that correct? -- I didn't know, because it was the responsibility of ITF to give me a timeline – timeframe and the number of resources necessary to carry out the remedial work. I wouldn't dictate to a trade contractor labour resources or methodology to rectify his work.
>
> You wouldn't dictate to a trade contractor? -- No, it's not my responsibility. It's the contractor's responsibility."

[90] Mr Bisset further confirmed under cross-examination that after the services of ITF were terminated on 27 October 2006, another contractor, Queensland Solid Plaster Services, were retained to perform, amongst other things, remedial work on the defective lift shafts. He was asked about the advice then subsequently received from Liftronic about the necessity to cut concrete and agreed that he had been aware "throughout the construction of the lift shaft that there would be some remedial work which involved cutting concrete", but he did not know the exact dimensions that were going to be necessary until receipt of the Liftronic letter on 29 November 2006.

[91] Mr Bisset asserted that he had told Paul McGrath of the misalignment of the lift shafts, agreed that the project control group meeting minutes did not refer to that problem but said it came "under the banner of remedial work".

[92] Mr Bisset said that he certainly did not recall telling Stephen McGrath that the lift shaft was out of line, but he certainly did recall discussing it with Paul McGrath, as a consequence of which the plastering contractors were engaged and remedial contractors were engaged. In response to a suggestion that he never made any recommendation to MCPL as to what other steps might be taken independently of ITF to attempt to control the problem, he said:

> "There were some discussions, and I think they were recorded in the project control group meetings about we had a lack of confidence in ITF and – but I would suggest – and I don't recall the discussion at that PCG meeting, but it was too late to replace them with an alternative contractor because that would involve a large expense."

The following evidence was given:

> "So if it were necessary to sack ITF because they simply couldn't do the job, that was going to cause a significant delay? -- It would have caused significant delay and additional cost, yes.
>
> And it was abundantly clear by September 2006 that ITF weren't up to the task, wasn't it? -- Abundantly clear. Prior to that it was clear, and reasonably clear, that they were not up to the task. So we were struggling on with a contractor that was less than competent, yes."

[93] In re-examination, Mr Bisset was asked how he made the ITF issue clear to Paul McGrath, and said:

> "How was it made quite clear, according to you? -- That there were a number of factors. That ITF were causing delays to the project problems with the project. Some of them were labour, some of them were quality issues. But there was one particular point, that the lift shaft was out of plumb. There was absolutely no reason for me to hide that. It was a factor in their quality – or lack of quality, and I can say now I recall talking to Paul McGrath about that and saying that the lift shaft with was out of plumb. At that stage we would have had – we wanted to engage Vann, Bennett & Bennett, and the reasons for engaging Vann, Bennett & Bennett to monitor the dimensional coordination of the lift shaft was approved by Paul McGrath and instruction given.
>
> Thank you. You said in response to another question from my learned friend that your recommendation to Mr McGrath was remedial works. How did you make that recommendation? And when I say how, I mean actually how did you communicate it? -- Well, apart from verbally, I do recall that we marked up a drawing and – covering the whole of the site, because there wasn't just remedial work to the lift shaft. There was remedial work to columns, there was remedial work to other concrete work. We marked up a drawing quite clearly identifying the scope of works for initially a contractor called Elite, who were engaged by McGrath to come on board to do the remedial work and plaster patching, but then followed up by Queensland Solid Plasterers. So there was a -----
>
> You said apart from verbally. In terms of a verbal or an oral recommendation, what's your recollection? -- That the consequence of the oral discussion was a drawing marked up clearly identifying the scope of remedial works to concrete in the lift shaft and other areas that would be the basis of the package of works for another contractor.
>
> With whom did you have that discussion? -- Paul McGrath. Paul McGrath signed the drawings.
>
> And when was that discussion? I'm not asking you to pin down an exact date after all this time, but roughly. Start of the year? Middle of the year? End of the year? -- August/September time. September time."

Expert evidence

[94] Mr Richard Alexander, an experienced civil engineer and project manager, provided a number of reports relating to issues of delay, to which I will refer later. His principal report also addressed questions of liability. Some attempt was made in the course of cross-examination and final submissions to call Mr Alexander's expertise and experience to give the relevant expert opinion into question. This challenge

focused particularly on his concession that his experience as a project manager did not include projects conducted under precisely the sort of contractual arrangements as were in place in this case. Despite that, however, I consider that Mr Alexander did have the appropriate broad experience and technical expertise to speak with appropriate expert authority.

[95] Mr Mitchell, a quantity surveyor and project manager, gave evidence in the defendants' case. His evidence, however, tended to focus on his interpretation of contractual provisions, and is therefore of limited assistance to me.

[96] In his report dated 25 August 2008, Mr Alexander set out the history of ITF's work on site and of the extent of Global's supervision and intervention. He said:

> "From my own experience on site, I would have expected that any such construction activity that was causing a potentially major problem would be put under intense scrutiny. It was apparent that ITF was having difficulty in setting and plumbing its shutters and I would have expected that the Global foreman would personally double check and verify the set-out, verticality and rigidity of the shutters ahead of each pour of the shaft walls. If the problem continued to occur, I would have expected independent checks to take place (for example by VBB) and for other measures to be initiated, such as increasing strutting and bracing of the shutters to prevent any movement during the concrete pour. The cost of these would reasonably be borne by ITF. However, as was noted above, major misalignments were still occurring on the higher floors.
>
> ...
>
> I would have expected Global to play a significant role in the verification of the formwork ahead of each pour, particularly once errors had been identified. In this respect, after finding such errors on, say, two successive floors, I would have expected Global to take the matter in hand and ensure that no concrete was poured until it was fully satisfied that the formwork was correctly located. While Global appears to have had no standard checklist or proforma for such an inspection, I would have expected such checks to be top of the list for subsequent pours.
>
> I comment in passing that based on the various photos I have seen of other misaligned concrete elements (beams, hobs, steps etc) and what I have seen on site, the issue of the lift shaft misalignment is only a part of the legacy of remedial work left behind by poor setting out. However, being a shaft extending over multiple floors, and being a structural element associated with a precision component such as lifts, it is by far the most expensive and difficult to remedy.
>
> The construction of a lift shaft is not such a highly technical exercise that it could not be adequately controlled with the normal skills expected on a construction site, along with the normal quality checks and controls that should come with experienced site management and specialist tradesmen. In short, the misalignment should not have happened, and – more significantly – once identified, the same problem should not have continued all the way to the top of the building in two separate towers, given a reasonable level of competency and care by those involved."

[97] Mr Alexander concluded:

> "I consider it reasonable that if the misalignment had been properly dealt with at the early stages, and Global had initiated checks, consultation with the Principal and Liftronic and the surveyor, and/or engaged a different formworker for the shafts, then in all likelihood the misalignment in levels 2 and 3 could have been reversed, or "humoured" out. Had this been the case, none of the cost of consequent remedial work and delays would have been incurred."

Findings on liability

[98] Having had the benefit of seeing the witnesses (in the case of Mr Bisset, by videolink), I have concluded that Mr Bisset is mistaken in his recollection of having advised Paul McGrath of the existence and extent of the lift shaft alignment problems.

[99] It is clear that MCPL knew of the ongoing problems being encountered with ITF's failure to comply with the program. This, indeed, was the basis for the settlement of MCPL's claims for liquidated damages against ITF by the agreement of September 2006.

[100] Importantly, however, there is nothing in the contemporaneous documents to suggest that MCPL was aware of the nature and extent of the lift shaft alignment problems until it received the Liftronic letters in late November 2006:

(a) There was no record of such advice in the minutes of the project meetings. Mr Bisset's assertion that the topic was incorporated under "remedial works" is less than convincing. Particularly in circumstances where, as Mr Bisset confirmed, Global knew of the extent of the problem since April 2006, and knew from that time on not only that the problems were getting worse but that its instructions to ITF to remedy the problems were effectively being ignored and that the precautionary steps of engaging the assistance of the surveyor and the engineers were not bringing the problems back under control, this was an issue of such significance that one would have expected it to be the subject to specific and detailed advice from Global to MCPL, at least in the meetings if not in writing. In other words, this topic was so important that, if it had been discussed, one would have expected to see specific mention of it in the minutes of the meetings. I infer from the absence of such specific mention in the minutes that there was no such discussion. The matters of discussion which were recorded in the minutes accord with the versions of events given by Stephen McGrath and Paul McGrath in evidence.

(b) The September 2006 Agreement between MCPL and ITF makes no mention of a dispute concerning misalignment of the lift shafts. By that stage, of course, the extent of misalignment, as known by Global, was significant – so significant that on the day following the September 2006 Agreement, Global gave ITF a work instruction which required the remedial works to be completed to enable Liftronic to attend the following week. It is inconceivable that an issue of the magnitude of the complete misalignment of both lift shafts would not have been taken up for resolution between MCPL and ITF at this time if MCPL had known about it.

(c) To the extent that MCPL did know that some remedial works were to be undertaken after ITF's contract was terminated, a letter from MCPL to Global dated 26 October 2006 makes it clear that MCPL was of the understanding that the remedial works relating to rendering. There is no suggestion of concrete cutting or any of the other extensive rectification works which were required and subsequently undertaken.

(d) The Notice to Show Cause from MCPL to Global makes no reference to the extensive defects to the alignment of the lift shafts. True it is that one of the particulars of the Notice related to the unauthorised letting of substantial rectification work, but that, in turn, referred only to "lift shaft concrete surfaces", "lift shaft", "balconies" and "splitters". On a fair reading of the notice, it is clear that MCPL contended that it did not know what this remediation work was for – that lack of knowledge was the basis of its complaint. But, as with the previous matter, it is simply inconceivable that MCPL would not have made mention in the notice of the extensive lift shaft misalignment if it had known about it.

[101] It is clear that the requirements of ITF's trade contract were not being met insofar as the misalignment of the lift shafts was concerned. Global was contractually obliged not merely to monitor and assess the work of ITF but, by general condition 5(j), to recommend to MCPL any course of action that may be available to MCPL. Global failed to make any such recommendation to MCPL.

[102] Global was also contractually bound by special condition 25.2(n) to ensure "timely identification of defects and oversee the defect rectification". Whilst Global identified the lift misalignment defects at a relatively early stage of the construction of the two towers, called on ITF to remedy the misalignments, and sought to put in place some processes (through the surveyor and engineers) to check the ongoing misalignments, it is clear that there was a failure of oversight by Global in respect of the defect rectification by ITF. On 2 June 2006, Global threatened to engage an alternative contractor if ITF did not carry out remedial works. Yet ITF continued to form up the lift shafts in misalignment, and Global really did nothing more than call for it to remediate its defective work – see, for example, Global's letter to ITF of 18 July 2006. In short, there was no oversight by Global of the defect rectification work which ITF should have performed.

[103] These are the contractual breaches on which counsel for the plaintiff relied in his final submissions. I find that each breach has been established on the evidence. My findings in this regard are fortified by the expert opinions expressed by Mr Alexander, to which I have referred above.

[104] For completeness, I should also note that, while the case focused particularly on the defective lift shafts, ITF's defective and unremedied work extended to a number of other elements of the form work (see paras [33] and [41] above). I find, in the circumstances outlined at length above, that Global similarly breached its contractual obligation to identify and oversee rectification of these other defects.

[105] I would also find that, in these same respects, Global breached the common law duty it owed MCPL to exercise the reasonable care and skill of a reasonably competent project manager in respect of the identification and oversight of rectification of defective works by a trade contractor.

[106] Having found that Global breached its contractual and common law obligations to MCPL, it is now necessary to turn to consider whether MCPL has proved that these breaches by Global were causative of any loss, and if so the quantum of that loss.

Losses claimed by the plaintiff

[107] The losses which MCPL claims to have suffered by reason of Global's breaches form into two broad categories:

(a) The costs of rectifying ITF's defective work,

(b) The extra costs and expenses incurred by MCPL be reason of delay in completion of the project as a consequence of ITF's defective works. These delay costs are claimed under the following heads:

(i) direct delay costs;

(ii) extra costs of project management;

(iii) extra local authority rates;

(iv) extra quantity surveyor's costs;

(v) additional insurance costs;

(vi) additional financing costs.

[108] The parties called expert evidence in respect of these claims. Each of Mr Alexander, who was called by MCPL, and Mr Mitchell, who was called by Global, produced several reports, and they also produced a joint report following an experts' conclave. The parties also commissioned a joint report from a forensic accountant, Ms Bundesen, with respect to calculations relating to the claim for extra finance costs.[6]

The rectification costs

[109] The experts, who had examined the relevant invoices and payment documents (which were also tendered through Stephen McGrath), agreed that the total paid by MCPL for works done to rectify ITF's workmanship was $226,606 (inclusive of GST). This agreed amount took account of offsets and other discounting amounts.

[110] The general nature of these costs was described by Mr Alexander as follows:

> "The sum of these particular costs is derived from a review of invoices paid by the Principal for work that is specific to particular elements of repair work associated with the lift shaft rectification and other errors in setting out by the formwork trade. It includes remedial work by Liftronic, Queensland Solid Plaster Services, Steve Casey Bricklayers, Labour Hire, (Rimtel, Lindmark and Evenco) and material hired or bought for repair purposes. It also includes work by D & L Painting, who painted the inside of the lift shaft under Global's direction, before large sections of render and

6 Exhibit 31.

> concrete had to be subsequently jackhammered out. It also includes work by Artisan FX and Grenwood, who undertook hebel block remedial work to the lift doors on each level, to align them to match the final vertical run (best fit) of the lift in each tower."

[111] In relation to the remedial costs, Mr Mitchell said:

> "It is unquestionable that the direct remedial costs calculated by [Mr Alexander] have been incurred as a result of ITF. These costs have been incurred due to the rectification of the lift shafts and other structural elements which were formed incorrectly and constructed out of tolerance. I have not assessed if the costs are reasonable, however it is evident that ITF did not rectify their defects therefore Global and Broad instructed alternative contractors to rectify the works."

[112] Whilst there was, therefore, no issue as to the amount which MCPL had actually paid to rectify the defects, Global argued that this claim should fail because there was no evidence of the reasonableness of the costs which had been incurred. As noted, Mr Mitchell made no assessment of the reasonableness of the costs. Under cross-examination, Mr Alexander also said that he had not assessed the reasonableness of the costs charged to MCPL for the rectification works. He described examining the invoices to ascertain those which, on their face or by cross-reference to other records, he could establish had a definite connection with rectification, and then totalled the amounts paid under these invoices.[7]

[113] Counsel for Global submitted that the absence of evidence of the reasonableness of the remediation costs charged to and paid by MCPL is fatal to this part of the claim. It was argued that there was no evidence called from Broad or any of the contractors who performed the remedial works, and that a *Jones v Dunkel* inference ought be drawn to the effect that evidence from those parties would not have assisted the plaintiff's case. It was argued for Global that, by application of the principles enunciated in *Bellgrove v Eldridge*,[8] this case should fail because there "has been no evidence as to whether that work was necessary or that its cost was reasonable".[9] This submission overstated matters – Mr Mitchell's evidence alone makes it clear that the works were necessary to rectify the defects. Global's real criticism was that there was no evidence adduced as to the reasonableness of the costs paid by MCPL.

[114] Reference was also made in that regard to a letter dated 15 January 2007 from Hyder Consulting (engineering design consultants) to Stephen McGrath in which reference was made to an alternative option to address the lift shaft problem (which was said to be the option preferred by Hyder) of changing lift counterweights to avoid demolition. Neither side called evidence from Hyder Consulting to explain why this option was "preferred" or to explain whether that option would have been feasible with respect to these particular lift installations.

[115] The principle derived from *Bellgrove v Eldridge* is that in a case of defective or incomplete work, the damages recoverable by the building owner is the difference between the contract price of the work or building contracted for and the cost of making the work or building conform to the contract, with the addition, in most

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7 As noted elsewhere, the total paid was, in fact, more than the amount settled between Mr Alexander and Mr Mitchell – deductions were made to account for offsets and other discounts.

8 (1953-1954) 90 CLR 613.

9 Defendants' submissions, para 149(a).

cases, of the amounts of the profits or earnings lost by the breach, but the rule is subject to a qualification that "not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt".[10]

[116] In *Hudsons Building & Engineering Contracts* (12th edition),[11] the following is said in relation to the application of this rule:

> "To state that the prima facie rule applies unless it would be unreasonable for the building Owner to insist on reinstatement of the defective work, although accurate, does not identify the circumstances in which a court will find unreasonableness. The following factors either individually or in combination may be relevant, although not of equal importance, namely:
>
> (a) whether the work actually carried out is reasonably satisfactory for its purpose;
>
> (b) whether the building Owner has carried out or in fact intends to carry out the work of reinstatement;
>
> (c) whether the defect or omission has substantially affected either the market value or the amenity value to the building Owner of the works; and
>
> (d) whether the cost of reinstatement is wholly disproportionate to the advantages of reinstatement.
>
> If condition (d) is satisfied, the court will not adopt cost of cure as the appropriate measure. Factors (a)-(c) are indications as to whether or not it would be unreasonable for the building Owner to insist on reinstatement as the correct measure of damages."

[117] In the present case, there was no challenge to the necessity for the rectification works to be carried out. Nor was there any question about the reasonableness of the rectification works themselves – and that is the question to which the proviso in *Bellgrave v Eldridge* is actually addressed. What Global was really trying to do with this argument was contend that MCPL had failed to mitigate its loss. The onus for a claim of failure to mitigate rested on Global, and it led no evidence in that regard. Nor did it plead a failure to mitigate. In fact, the pleaded defence to MCPL's claim to recover damages for the rectification costs was in the following terms:

> "as to paragraph 27(a) [the defendant]:
>
> (i) denies liability and causation in relation to this alleged loss on the grounds pleaded above;
>
> (ii) says that in any event the reasonable quantum of the direct remedial costs cannot exceed the sum of $206,006.49 excluding GST set out in the Quantity Surveyors' Schedule; ..."[12]

[118] No evidence was led by Global to establish that the "reasonable quantum" was less than the sum agreed by the experts.

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10 (1953-1954) 90 CLR 613 at 618.

11 (Sweet & Maxwell, London, 2010), pp 997 & 998.

12 The $206,006.49 is the GST exclusive equivalent of $226,607.

[119] In short, if Global wished to argue that the costs incurred and paid by MCPL in achieving the rectification works were too elaborate for what was required, then it was for Global to plead and prove such a case of failure to mitigate.

[120] Accordingly, I find that MCPL has established its rectification costs in the sum of $226,607 (inclusive of GST). I also find that Global's breaches were causative of MCPL incurring those rectification costs.

The delay claims

[121] The experts agreed that the date by which the project ought originally have been completed was 3 March 2007 and that it was actually completed on 25 October 2007. Completion was, therefore, not reached until 155 working days after the date on which it ought originally have been achieved.

[122] MCPL's case is that the breaches by Global of its obligations to MCPL resulted in MCPL incurring all of the extra costs (under the various headings summarised above at [107]) for the entirety of this 155 day period of delay. Global's principle contention was that the evidence disclosed that there were numerous causes for the delay in completion to 25 October 2007, and that MCPL's attempt to attribute all of the delay costs for the entirety of the 155 days was fundamentally flawed.

[123] Further, and in any event, there was a dispute between the experts as to what delay to the completion of the project could be attributed to Global's breaches – Mr Alexander thought the entire 155 days, while Mr Mitchell would allow only 55 days.

[124] There was (largely speaking) common ground between the parties with respect to the base numbers for the calculation of any damages for delay. The real questions were:

(a) Whether the evidence permitted a delay claim to be maintained against Global at all, and

(b) If so, the period of delay to be attributed to Global.

[125] It is as well to deal at this point with an argument which was run with a degree of vigour by counsel for Global. It was contended that, by the case pleaded in the statement of claim, MCPL's case was confined to the consequences of the misalignment of the lift shafts and did not extend to the consequences of the other defective form work. Counsel for Global sought to bolster this argument by referring to the particulars which had been given of paragraph 26(b) of the statement of claim (set out above). This argument, in my view, adopts an unfairly and inappropriately narrow view of the allegations of breach made in paragraph 26 of the statement of claim. A fair reading of that paragraph reveals that MCPL's complaints of breach extended to both the "lift shafts and other form work" in the two towers.

[126] That being said, it needs also to be emphasised that the case, as pleaded and run at trial by MCPL, was that Global's breaches with respect to ITF were responsible for the entirety of the delay costs for the whole 155 delay period.

[127] Global argued that, at law and on the evidence in this case, such a claim by MCPL failed entirely. Counsel for Global drew analogies between the case as advanced for MCPL and cases in which "global claims" are made. 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 MCPL 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.

[128] It is, however, instructive to refer to a couple of the authorities to which I was referred by Global.

[129] In *Laing Management (Scotland) Ltd v John Doyle Construction Ltd*,[13] Lord MacLean gave the following authoritative commentary of causation and global claims:

> "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. (The present case involves a works contract concluded between a management contractor and a works contractor; in such a case the management contractor is obviously in the position of the employer and the works contractor in the position of the contractor.) 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 manner must necessarily fail. If, for example,**

[13] [2004] BLR 295.

> **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.**" (emphasis added)

[130] His Lordship then distinguished a global claim from a so-called "total cost claim", and cited in respect of the proper approach to total cost claims the following 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*:[14]

> "The claim as pleaded ... is a global claim, that is, the claimant does not seek to attribute any specific loss to a specific breach of contract, but is content to allege a composite loss as a result of all of the breaches alleged, or presumably as a result of such breaches as are ultimately proved. Such claim has been held to be permissible in the case where it is impractical to disentangle that part of the loss which is attributable to each head of claim, and this situation has not been brought about by delay or other conduct of the claimant ...
>
> Further, this global claim is in fact a total cost claim. In its simplest manifestation a contractor, as the maker of such claim, alleges against a proprietor a number of breaches of contract and quantifies its global loss as the actual cost of the work less the expected cost. The logic of such a claim is this:
>
> (a) the contractor might reasonably have expected to perform the work for a particular sum, usually the contract price;
>
> (b) the proprietor committed breaches of contract;
>
> (c) the actual reasonable cost of the work was a sum greater than the expected cost.
>
> The logical consequence implicit in this is that the proprietor's breaches caused that extra cost or cost overrun. This implication is valid only so long as, and to the extent that, the three propositions are proved and a further unstated one is accepted; the proprietor's breaches represent the only causally significant factor responsible for the difference between the expected cost and the actual cost. In such a case the causal nexus is inferred rather than demonstrated ... The understated assumption underlying the inference may be further analysed. What is involved here is two things: first, the breaches of contract caused some extra cost; secondly, the contractor's cost overrun is this extra cost. The first aspect will often cause little difficulty but it should not, for this reason, be ignored ... It is the second aspect of the understated assumption, however, which is likely to cause the more obvious problem because it involves an allegation that the breaches of contract were the material cause of all of the contractor's cost overrun. This involves an assertion that, given that the breaches of contract caused some extra cost, they must have caused the

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[14] (1996) 13 BCL 292.

> whole of the extra cost because no other relevant cause was responsible for any part of it."

[131] Lord MacLean, delivering the judgment of the Court, expressed agreement with the statements by Byrne J and said:[15]

> "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 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:[16]

> "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 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."

His Lordship then went on to discuss the way in which such an apportionment might be conducted in different contexts.

[133] It is, therefore, necessary to look at the evidence of the experts on the question of delay and also other relevant evidence.

Mr Alexander

[134] Mr Alexander's overall approach to the question of delay was stated in his first report as follows:

> "It is my understanding that some remedial plastering had been undertaken at the direction of Global late in 2006, after the shaft was finished. In this regard, I have viewed invoices from QSPS that start in late October 2006 and continue through November 2006. I am advised that this work was also painted, before Liftronic arrived to do their lift plumbing exercise. I understand that much of this painting and plastering work in the lift shaft proved abortive when the final plumbing of the lift took place in 2007 under the direction of Broad Construction. Ultimately it appears that

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15 At [14].

16 At [16].

> considerable removal of both this plaster and also areas of concrete was carried out in order to make the lift guide rails and cars sit. This remedial work had serious repercussions in that it:
>
> - Delayed the list installation;
> - Delayed the use of the lifts for vertical materials transportation;
> - Resulted in prolonged hire of the cranes and Alimak hoist in lieu of the unavailability of the lift;
> - Delayed removal of scaffolding in the lift shafts;
> - Delayed removal of external scaffolding (since this was required to bridge the gap between towers, until the T2 lift was operational); and
> - Consequently affected external works which could not progress until the scaffolding was dismantled."

[135] Despite his assertion that the remedial works had "serious repercussions", he conceded under cross-examination that, in fact, he had not specifically assessed the delays occasioned to the construction program by reason of the rectification work because there was insufficient data.

[136] Further in his first report, Mr Alexander gave a "delay analysis":

> "In my opinion, the Principal has incurred additional costs both as a direct consequence of remedial work being done, and also through the extended duration of construction work as a result. This section of my report deals with the calculation of the extent of delay as a precursor to a calculation of the delay costs."

[137] He then referred to the extension of time claims which had been allowed to Global under its Contract, and concluded that the revised original date for practical completion would have been 2 March 2007. As already noted, Mr Mitchell was content also to adopt that date.

[138] Mr Alexander then referred to the fact that, whilst there may have been other causes of delay, the defects in the lift shafts meant that the lifts could not be installed. If the lifts had been installed, they would have been used to transport workers and materials between floors. This would have meant that a hoist and crane on site and external scaffolding could have been removed and other works completed in those areas. He said:

> "The critical delay to the work was incurred initially in the lift shafts, where Global first authorised rendering and painting from late October 2006 through most of November 2006, in an effort to correct the alignment problems within the shafts. A considerable amount of this appears to have been abortive work, since it was directed without a complete understanding of the true extent of the problem and without knowing the final position of the lift guide rails. The lift supplier was only able to finally make a full plumb survey of the entire lift shafts in late November 2006, as shown in the two Liftronic plumb drawings dated 17 and 24 November 2006. (Refer Appendix M, pages 1 & 2)."

[139] He noted that the lift shaft rectifications were completed in mid-May 2007 on the tower two lift and mid-June 2007 on the tower one lift.

[140] Mr Alexander then stated:

> "In this regard it would be unreasonable to suggest that the entire delay was simply due to the lift shaft remedial works and the consequent delay in dismantling the crane, scaffold and hoist. The overall delay appears to have been a combination of inter-related events, including:
>
> - The removal of the site records by Global, thus causing considerable unnecessary duplication of effort by Broad in re-establishing a workable set of site records and re-establishing momentum with the trade contractors;
>
> - Delays with some trade contracts being put on hold until such time as certainty was restored to the project after the change in management, and the project was confirmed as viable;
>
> - The remedial work in the lift shafts delaying the use of these shafts for vertical transport, thus delaying the removal of the hoist and crane, and thus the external works;
>
> - Consequential subcontract delays through unavailability of external trades late in the project due to the delays in removal of external scaffold, hoist and crane."

[141] He then provided some commentary on these other factors, none of which, I observe in passing, were pleaded in MCPL's case as in any way causative of the delay costs and losses for which MCPL has made claim against Global. Notably, Mr Alexander made the following observations in the course of his commentary:

(a) Under the heading "Work in the lift shafts", Mr Alexander was critical of the relatively short periods which Global had originally programmed for lift installation, expressing the opinion that it was clear that "Global's lift installation program would have been in trouble had it continued, even had there been no remedial work required". He continued:

> "In this regard, I would consider the Global program was likely unrealistic and possibly unachievable. I am advised that it was prepared directly by Global, and presumably its duration would have been a driver in McGrath's financing arrangements. It would appear that regardless of the misalignment issues with the lift shafts, additional financing costs would likely have arisen simply because of the significant underestimate of the duration of the critical list installation in each tower."

Global's alleged incompetence in preparing the program also did not feature in MCPL's allegations of breach.

(b) Under the heading "Hoist/crane/scaffold delay", Mr Alexander described in some detail his opinion of the effect of the delay in removing the hoist, crane and scaffolding on the completion of other works on site. Again, however, Mr Alexander was critical of Global's original programmed time frame for the removal of the scaffolding on the two towers, saying:

> "It suggests to me that Global has seriously underestimated the time needed for the external work. In all likelihood, absent the issues of remedial work, Global would have overrun considerably in respect of external work (including the lower level structures) as well as the lift installation (outlined above). Under such circumstances, McGrath would have faced extended hire and finance charges as an obvious consequence of an over-optimistic and likely unachievable Global program."

[142] Despite identifying these inadequacies in Global's own programming, Mr Alexander nevertheless (and somewhat perversely) adopted that program for the purpose of fixing on 2 March 2007 as the revised date for practical completion:

> "That said, I do not consider that the amended Date for PC of 2 March 2007 would have been achievable under such circumstances, the reason being that I believe Global had underestimated the period of time for the lifts to be installed. Given that the typical duration for a list installation is one week per floor, it would have taken at least 13 weeks for Tower 1, not the 5 weeks shown in Global's program. Nevertheless, this was the contractual Date for PC, and in my view should be used as the baseline for any such comparison in a before and after scenario addressing the termination of Global and the hiring of Broad."

[143] He then identified the actual date of practical completion as 25 October 2007, and said:

> "This represents a delay of 237 calendar days (33 weeks and 6 days). Time-based delay costs have thus been taken as actual costs identifiable by invoice as relating to extended duration costs after 2 March 2007."

[144] The balance of Mr Alexander's first report then comprised a calculation of the various specific components of the delay claim over the entire period up to 25 October 2007. Under cross-examination, Mr Alexander confirmed that his approach was that the form work deficiencies (lift shaft misalignment and the other defects) and Global's role in those matters were the only aspects connected with potential delay to the program.[17] Later under cross-examination, however, he said that the other form work deficiencies had no impact on the construction program but were "concurrent delay" or "non-critical delay".[18] A number of other matters emerged in the course of his cross-examination:

(a) Mr Alexander did not discriminate between rectification works performed in October 2006 (before the termination of Global) and those performed after Broad was appointed;

(b) Mr Alexander was not supplied with, and obviously therefore did not consider, any documentation concerning delay claims made by MCPL against other trade contractors in respect of the period from March to October 2007;

(c) Mr Alexander confirmed that he knew that Broad had attributed 11 weeks delay to form work rectification works (and had been granted an extension of time in respect of that delay) and had attributed all other delay on the project to other trades;

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17 D3-29.38.

18 D3-42 & D3-43.

(d) Mr Alexander was referred to the four inter-related events he had described as combining to cause the delay to 25 October 2007 (quoted above in [140]), and said that these factors amounted to the 155 day delay. He then gave the following evidence:

> "Right. And you can't discriminate between those four dot points, can you? -- Correct.
>
> Thank you. So the better view then is that those four dot points total 155 days' delay and you can't say as between any of those four what proportion of that 155 is the responsibility of that particular dot point? -- Correct."

[145] As will appear, Mr Mitchell's opinion was that only 55 of the 155 working days between 2 March 2007 and 25 October 2007 could be considered as delay as a consequence of the problems with ITF's work, and the balance of the delays would have been incurred in any event. In a further report dated 28 October 2009, Mr Alexander took issue with this, and contended that Mr Mitchell did not "appreciate the chain of events that arose from the poor performance of ITF". He said that the delay had to be considered in two stages:

Stage 1 – before the termination of Global

Stage 2 – after the appointment of Broad.

[146] In respect of Stage 1, Mr Alexander said:

> "In my view, the events to this point were the direct consequence of ITF delays, from both the lift shafts and from a multitude of other formwork errors affecting following trades such as blockwork and window joinery. The extent of the mismatch of these errors was documented by Broad immediately after they took over the management of the project in January 2007. A snapshot of the delays at this moment would, in my opinion, show that the critical delays were a direct consequence of the standard of ITF work."

[147] In respect of Stage 2, Mr Alexander repeated his previous arguments about the effect on the project of having to retain the hoist and scaffolding, including knock-on delays to other trades such as landscaping. His report continued:

> "Again, in my opinion, these delays are directly linked to Global's concealment of the lift shaft defects and failure to address the issues of ITF early in 2006. Had Global acted in accordance with their obligations under the contract and replaced ITF, it is likely most of the defects (and consequent rectification, new management, and delays to scaffolding and finished trades) could have been avoided.
>
> I therefore consider it reasonable that the delays (before and after Broad took over) are largely directly attributable to Global, and would not 'have been incurred in any event'."

Mr Mitchell

[148] Mr Mitchell also provided several reports. As already noted, his opinion was that only 55 of the 155 working days between 2 March 2007 to 25 October 2007 could be considered as a consequence of the problems with ITF's work and the remaining days would have been incurred in any event. He agreed with Mr Alexander's calculation of the revised completed dated at 2 March 2007, but expressed the view that Global were entitled to claim a 55 day adjustment as a consequence of ITF's reduced labour force. Global had made such an extension of time claim, but this was not allowed.

[149] Mr Mitchell stated his reasoning in respect of, for example, the head of claim for direct delay costs as follows:

> "I calculate the working days between 2 March 2007 and 25 October 2007 to be 155 days. In my opinion, only 55 of these days can be considered as a consequence of the problems with ITF's work.
>
> This is because prior to termination, Global submitted an EOT claim for an additional 55 days due to ITF's reduced labour force completing defects. This EOT would have extended the Target Completion date to 30 May 2007. I believe that Global would have been entitled to this extension. This opinion is supported by the fact that Broad also made a claim for a 55 day delay due to lift shaft repairs."

[150] Mr Mitchell was of the view that the termination costs claimed by MCPL under the head of delay claims were not recoverable, saying:

> "In my opinion, the Broad costs of $376,734.08 have not been incurred as a consequence of the problems with ITF's work. These extra costs have been incurred as a consequence of the termination of Global.
>
> Similarly I do not regard the Global costs of $84,620.59 to be as a consequence of the problems with ITF's work. This is because the additional Global costs were paid by McGrath for approved extensions of time. Even so, I do not agree with the Evans & Peck calculations which include three Global invoices that are dated after termination of Global's contract. These invoices total $34,129.76."

[151] In respect of the so-called "indirect costs", being relevantly the extra rates and quantity surveyor fees paid, Mr Mitchell allowed only a proportion of those calculated at the rate of 55:155.

[152] As to MCPL's claim to recover extra interest and refinance costs, Mr Mitchell said:

> "This cost comprises interest charges of $722,897.82 and refinancing charges of $76,378.05. Evans & Peck have calculated this cost by adding up all of the interest and refinancing charges between 2 March 2007 and 25 October 2007 and then applying a reduction of 73.66%. This percentage is Evans & Peck calculation of the costs attributable to the allegations.
>
> In my opinion the Evans & Peck calculations are flawed because:

> I do not agree with the methodology and the percentage is incorrectly calculated – the total direct cost includes costs which are not part of the overall project costs reported by Wilde & Woollard. If the methodology was found to be correct, the reduction factor should be 24.57%.
>
> Only a portion of this period could be considered as a consequence of the problems with ITF's work (i.e 55 of 155 days). My reasons for this opinion are the same as those stated previously in (b) Direct Delay Costs.
>
> The cost overruns and decision to refinance is not related to ITF but rather the cost overruns for entire project which amount to $2,565,344.28. I have calculated this amount by comparing Wilde & Woollard's Progress Valuation Report No. 25 (August 2007) with No. 7 (February 2008). This analysis revealed that the trade contracts for concrete, electrical, excavation, windows, reinforcement, pre-stressing, partitions, tiling and external work experienced overruns of $1,250,339.33.
>
> In my opinion the interest charges and refinancing costs were not due to the mistakes of ITF. I believe that these costs would have been incurred in any event because of the increases in cost. Mainly these increases were due to:
>
> The decision to change the Construction Manager.
>
> Delays other than ITF.
>
> The initial trade contract lettings exceeded the trade budgets presumedly [sic] because of the market conditions.
>
> Trade contact variations."

[153] Under cross-examination, Mr Mitchell was challenged on his correlation of the 55 day extension of time claim made by Global with the 55 day extension claim subsequently made by Broad. He was pointed to differences between the claims, but said:

> "They are one in the same, I believe. These issues are arising out of ITF's mistakes. The words may be different but the issues are the same, in my opinion."

[154] In terms of fixing on the 55 day allowance for delay in this case, Mr Mitchell gave the following evidence in cross-examination:

> "MR WILSON: Are you able to actually say now what your opinion is as to the extension of time which should have been allowed, which was allowable if sought, for the rectification works that were required? -- There was only one extension of time claim made by McGrath – sorry, made by Global and it was not decided upon. So, I have relied on that 55 days.
>
> Yes. I'm sorry to labour the point, but are you able to sitting here today to nominate a period of time which you say would represent an allowable extension for the undertaking of the rectification works? -- No. I – I did not observe it and I haven't got that programming experience.

> Okay. Are you – is your opinion that the 55 days that's referred to as agreed there in – that I just took you to in paragraph 4A -----? -- Yes.
>
> ----- that you chose that 55 day period because that's the period of time that was claimed by Global; is that correct? -- Yes."

Joint experts' report

[155] After producing their initial reports, Mr Alexander and Mr Mitchell met to discuss their reports and identify any matters on which they were able to agree. They were, in fact, able to agree on very little, although there was agreement to the proposition that the additional costs on the project occurred in two stages:

> "4. We did agree that the additional costs occurred in two stages:
>
> a. Stage 1: The initial mistakes and the rectification of those mistakes. These events first occurred during the Global contract although all of the costs may not have been apparent until after Global's termination on 2 January 2007. RA was of the opinion that all of the costs were as a result of ITF's breach and in turn Global's breach. DM was of the opinion that only a portion of the costs were as a direct result of ITF. **It was agreed that the direct cost of stage 1 comprised the rectification work and a delay of 55 days from 2 March 2007 to 30 May 2007. It was also agreed that the period between Global's target completion date of 2 March 2007 and Broad's actual completion 25 October 2007 was 155 days and a reasonable method for proportioning the costs was 55:155**.
>
> b. Stage 2: The effects of those mistakes. These effects occurred during the Broad contract. RA is of the opinion that all of the costs were as a result of ITF's breach and in turn Global's breach. DM is of the opinion that only part of these costs were as a result of ITF's breach and Global's termination and accordingly two further sub categories should be established:
>
> i. Stage 2a: being Stage 1 costs plus the further costs that were as a result of the ITF mistakes but arose during the Broad contract due to the termination of Global. Stage 2a includes direct costs arising from the act of termination of Global (if found to be valid). DM is of the opinion that these costs could be reasonably calculated by considering the Broad extensions of time as a proportion of the 155 day period between Global's target completion date of 2 March 2007 and Broad's actual completion 25 October 2007. The documents identifying Board's extensions of time could not be located at the meeting.
>
> ii. Stage 2b: being the total cost if it is found that all costs were as a result of ITF."

(emphasis added – the 55 day period referred to in the highlighted section referred to the delay for rectification work under the management of Broad)

[156] The joint report then went on to subdivide the 155 day delay period further, with the experts proposing in effect that:

(a) the delay in respect of Stage 1 was 55 days;

(b) the delay in respect of Stage 1 and Stage 2a was 116 days, and

(c) the delay in respect of Stage 1, Stage 2a and Stage 2b was 155 days.

[157] The experts then in their joint report, and when cross-examined before me, undertook a notional academic exercise of apportioning the delay costs across these differential periods of delay. At the end of the day, however, it was clear that Mr Mitchell maintained his primary opinion that the period of delay attributable to the defective form works was 55 days, while Mr Alexander continued to maintain his adherence to the 155 day period of delay.

Other evidence

[158] In the course of the trial, it became apparent that MCPL had made numerous claims against other contractors to recover for delays in the completion of the project. This necessitated late further disclosure by MCPL in the course of the trial. The reason for his disclosure not having been made earlier was never given.

[159] In any event, documents were produced and tendered which proved that MCPL had made at least the following other claims:

(a) In a dispute with JT Roofing, MCPL claimed, inter alia, liquidated damages for delay by the roofing contractor for the period 30 June 2007 – 10 March 2009;

(b) On 1 May 2007, Broad issued a formal memo to no less than 12 of the trade contractors warning that "at present, all labour resources on site are not adequate [to] meet the completion of this project" by the end of June 2007;

(c) In adjudication proceedings between MCPL and K & F Fabrications, it was determined that a claim by MCPL against the contractor for liquidated damages for a period of 20 days was not to be decided under the adjudication application, but MCPL was not restricted in taking other action in respect to that claim for liquidated damages;

(d) By a Notice of Dispute dated 13 May 2008, MCPL gave notice to Stegbar Pty Ltd of, amongst other things, its claim for liquidated damages for a delay of more than 200 days from the agreed date for practical completion of 25 October 2007;

(e) In March and April 2007, Broad issued instructions to the air conditioning trade contractor complaining of the fact that the labour provided on site was insufficient to achieve program. A similar complaint was made in May 2007;

(f) On 29 June 2007, MCPL issued a default notice to Curtain's Aluminium Windows, complaining of unremedied faults and defects. Further correspondence to Curtain's Aluminium Windows from Broad dated 13 July 2007 complained about the fact that no works in respect of the

original contract works by that trade contractor had been carried out since 29 June 2007 as the only works on site since that time by Curtain had been rectification. I note also that similar complaints about Curtain's alleged delay to the building program had been made by Global in November and December 2006;

(g) By District Court Claim No 3665 of 2007, MCPL sued Liftronic Pty Ltd claiming, inter alia, liquidated damages for delay for the period 14 September 2007 to 30 October 2007.

[160] The traffic in this regard was not, however, all one way. During 2007 complaints were regularly made by trade contractors alleging non-payment or short payment by MCPL. On 23 June 2007, for example, Broad wrote to MCPL stating:

> "We wish to advise that the non-payment to the trade contractors had an adverse affect on their performance as reflected in the numbers of attendees on site. We have advised you on a daily basis that trade contractor attendance has averaged 20.
>
> Today, 23 June 2007, the trade contractor attendance was zero.
>
> We ask you to reconsider your rejection notice."

[161] Indeed, on 19 June 2007, Broad issued a Notice to Show Cause to MCPL alleging, amongst other things, that MCPL had committed a substantial breach of its contract with Broad in that:

> "(c) The Principal has failed to make payments due to Trade Contractors in breach of clause 9 of the General Conditions of Contract. ..."

Conclusion on the period of delay

[162] It is clear, on any view, that the defects to the lift shafts and other form work were serious and required significant rectification works. It can also pragmatically be accepted that such works would have caused a delay to the building program.

[163] In view of the evidence to which I have just referred at length, however, I am simply unable to accede to MCPL's submission that it ought 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.

[164] It was, at the end of the day, uncontroversial that the ITF defective works had caused a 55 day delay to the whole building program. It was for MCPL, 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. Mr Alexander pointed to other causes of the further delay, and was unable to discriminate between them. Beyond that, it appears on the evidence that in mid-2007 delay was being encountered as a consequence of MCPL's failure to pay contractors. Then there is the fact that MCPL appears to have made overlapping delay claims against numerous trade

contractors in respect of the period for which it now makes claim against Global. None of these matters were taken into account by Mr Alexander in his assessment.

[165] To the extent that the joint report of the experts suggests that there might be a "middle ground" of 116 days delay (comprising Stage 1 and Stage 2a, it is sufficient to note again that this emerged as an academic exercise between the experts, and neither subscribed to it as their assessment.

[166] In all the circumstances, then, I find that the period of delay to the project as a whole (this being the claim made by MCPL) which MCPL has proved on the evidence was caused by ITF's defective works, and therefore is delay attributable to Global's breach of obligations, amounts to 55 days.

[167] Having made that finding, I turn now to consider the individual components of the delay claim.

Direct delay costs

[168] It was uncontroversial that the total of the direct delay costs incurred over 115 days was $285,232 (inclusive of GST). Allowing proportionately for 55 days of that total yields $101,211.

Termination costs

[169] MCPL has claimed, on the basis of Mr Alexander's report, the costs associated with the termination of Global and the engagement of Broad. Mr Alexander said that this amount includes "the extra over cost of commissioning Broad to complete the work". He calculated that MCPL paid Global some $96,620 over and above the contracted price of $470,000, from which he deducted the amount of $12,000 which was not incurred for the defects liability period, yielding what he claimed was a net extra cost of $84,620 in addition to "the actual cost of contracting with Broad to complete the work". He then added the total amount paid to Broad of $376,734.08, and contended that Global ought therefore pay MCPL some $461,354 (exclusive of GST), which yielded $507,489 (inclusive of GST).

[170] Mr Mitchell's opinion on this claim advanced in Mr Alexander's report was as follows:

> "In my opinion, the Broad costs of $376,734.08 have not been incurred as a consequence of the problems with ITF's work. These extra costs have been incurred as a consequence of the termination of Global.
>
> Similarly I do not regard the Global costs of $84,620.59 to be as a consequence of the problems with ITF's work. This is because the additional Global costs were paid by McGrath for approved extensions of time. Even so, I do not agree with [Mr Alexander's] calculations which include three Global invoices that are dated after termination of Global's contract. These invoices total $34,129.76."

[171] It seems to me that Mr Mitchell's analysis is correct. It may be that there is some other basis on which MCPL might have claimed against Global for the extra management costs which it incurred by having to retain Broad after terminating Global. But this case was advanced by MCPL on a very specific and narrow basis, namely to recover the delay costs incurred as a consequence of the ITF defective form work. The evidence simply does not permit of a finding that the defective

form work was a substantial cause of MCPL incurring all of the expenses, or any part of the expenses, claimed under this head.

Brisbane City Council rates

[172] It was uncontroversial that the total of extra local authority rates paid during the 155 day period was $24,238 (inclusive of GST). Allowing for 55 of those days yields $8,600.

Extra quantity surveyor costs

[173] It was uncontroversial that the extra quantity surveyor costs incurred over the 155 day period totalled $15,120 (inclusive of GST). Allowing 55 days of that total yields $5,365.

Additional insurance

[174] It was uncontroversial that the additional insurance costs incurred by MCPL over the 155 days totalled $5,725 (inclusive of GST). Allowing 55 days thereof yields $2,031.

Additional finance costs

[175] The parties jointly retained Ms Bundesen, Forensic Accountant, to provide a report on the extra interest and finance costs incurred by MCPL as a consequence of the delay. Ms Bundesen undertook these calculations on each of the following bases:

(a) Mr Alexander's allowance of 155 days;

(b) Each of these scenarios articulated by Mr Mitchell and referred to in the joint report, namely 55 days, 116 days and 155 days.

[176] Ms Bundesen undertook a detailed review of the financing arrangements which MCPL had in place between March and October 2007. Importantly, in July 2007 MCPL negotiated a refinance with Suncorp of the project, which had originally been funded by Westpac. The refinance with Suncorp proceeded and was drawn down in September 2007.

[177] For each of the bases calculated by her, Ms Bundesen gives two figures:

(a) The amount she calculated on the basis that MCPL made a business decision to refinance with Suncorp; and

(b) The amount she calculated on the basis that MCPL was required to refinance as a consequence of Global's default.

[178] Ms Bundesen said that she undertook these differential calculations because she had not been provided with sufficient documents to determine whether MCPL was required to refinance with Suncorp or whether it was a business decision to acquire finance at a lower interest rate.

[179] Having examined the financial documents made available to her, Ms Bundesen identified the following key events:

". I have not been provided with bank statements for periods prior to 1 January 2007. For the period 1 January 2007 to 7 September 2007, McGrath had a Westpac "Term of Construction" Facility. I have attached the bank statements for this account as Appendix E.01.

· In a letter dated 14 February 2007, Westpac confirms an offer of temporary overdraft, expiring on 31 March 2007. I have attached the Westpac letter as Appendix E.02.

· In a letter dated 27 March 2007, Westpac advised that McGrath was in breach of the "Term of Construction" Facility, as the Facility expired on 31 January 2007. I have attached the Westpac letter as Appendix E.03.

· In a letter dated 27 April 2007, Westpac confirms an offer of temporary overdraft, expiring on 31 May 2007. I have attached the Westpac letter as Appendix E.04.

· In a letter dated 1 June 2007, Westpac confirms McGrath's acceptance of the "Banks Officer". I have attached the Westpac letter as Appendix E.05.

· In a letter dated 4 June 2007. Westpac confirms that McGrath has signed and returned loan documents. Due to hand written amendments made in respect of the establishment fee, Westpac was unable to updated McGrath's accounts. I have attached the Westpac letter as Appendix E.06.

· In a letter dated 20 June 2007, Westpac refers to the establishment fee applying to the expired facilities (expiry date 31 January 2007) and additional funding ($2.104m) required for the successful completion of the project. I have attached the Westpac letter as Appendix E.07.

· In a letter dated 22 June 2007, McGrath confirms and accepts Westpac's reduction of the establishment fee for the facility. I have attached the Westpac letter as Appendix E.08

· In a letter dated 28 June 2007, Westpac refers to various matters, including Progress Draw 23, Statutory Fees, Notice to Show Cause – Broad Constructions and Sale Contracts Millennium. I have attached the Westpac letter as Appendix E.09.

· In a letter dated 29 June 2007, Westpac confirms an offer of temporary overdraft, expiring on 31 July 2007. I have attached the Westpac letter as Appendix E.10.0

· On or around 20 July 2007, Suncorp Business Banking offered two (2) facilities totalling $18,430,781 to McGrath. I have attached the unsigned Suncorp Offer of Finance as Appendix E.11.

· In a letter dated 7 September 2007, Suncorp confirms the draw down of Facility Number 021740745 totalling $12,001,030.55 (inclusive of fees). I have attached the Suncorp letter as Appendix E.12.

· I have been provided with bank statements for the Suncorp Facility Number 021740745 for the period 1 September 2007 to 31 July 2008. I have attached the bank statements for this facility as Appendix E.13.

· In a letter dated 7 September 2007, Suncorp confirms the draw down of Facility Number 021740753 totalling $6,000,000. I have attached the Suncorp Letter as Appendix E.14.

· I have been provided with bank statements for the Suncorp Facility Number 021740753 for the period 1 September 2007 to

> 31 July 2008. I have attached the bank statements for this facility as Appendix E.15."

[180] The reason for MCPL refinancing with Suncorp emerged from the evidence of Steven McGrath. He referred to negotiations he was undertaking with Westpac in mid 2007 with a view to obtaining an extension of MCPL's then current facilities. A sticking point in the negotiations was the establishment fee which Westpac wished to charge MCPL for the further accommodation. Westpac initially insisted on a fee of $220,000, but then agreed to reduce that fee to $103,690 on the basis of a debt reduction being received from another of MCPL's projects.

[181] On 19 July 2007 Westpac then wrote to MCPL saying:

> "We refer to our recent discussions and advise that facilities provided to your company expire 31 July 2007.
>
> The bank will not be renewing facilities and advise that arrangements to clear all facilities be made by the maturity date."

[182] In his evidence, Mr McGrath referred to receiving that letter, and was then asked whether he took steps himself to obtain alternative finance. He responded:

> "Yes, I took immediate steps to obtain additional finance or take out finance, because amongst the negotiations with Westpac, it was clear that after 31 July they would be not charging the regular rate of interest, but rather the default rate, which was double the rate at approximately 18 per cent. So I negotiated a take out facility with Suncorp Metway, and on 20 July 2007 I was provided with a take out letter of offer from Mr Paul Grant from Suncorp Metway."

[183] On the basis of this evidence, it is clear that the decision to refinance with Suncorp was not made as a consequence of Global's alleged defaults, but rather was a commercial decision taken for the purposes of avoiding payment of a higher interest rate with Westpac. Accordingly, the appropriate basis to adopt from Ms Bundesen's report is her calculations on the basis of the refinance being the consequence of a business decision.

[184] Ms Bundesen's calculations have not been challenged by the parties. In respect of the 55 day delay scenario, she has calculated that the amount of interest costs, and the proportion of the Westpac establishment fee and the Suncorp establishment fee recoverable on the basis of a business decision to refinance with Suncorp amount to $372,261. That is the amount which should be allowed.

Summary of rectification & delay costs

[185] I therefore assess the rectification costs and the 55 day delay costs (inclusive of GST, where applicable) as follows:

Rectification	$226,606
Direct delay costs	$101,211
Local authority rates	$8,600
QS costs	$5,365
Additional insurance	$2,031
Additional interest and finance charges	$372,261

Total $716,074

Proportionate liability – *Civil Liability Act* 2003 (Qld)

[186] In its statement of claim MCPL pleaded that the claims to recover in respect of the rectification costs and the direct delay costs fall to be governed by the proportionate liability provisions of the CLA and sought a determination that as between Global and ITF, Global should bear 100 per cent of the liability to pay the rectification and direct delay costs. In final submissions, counsel for MCPL argued, albeit faintly, that despite the plea in the statement of claim, this case was not caught by the CLA. As will appear, however, it clearly is.

[187] The adjudication of proportionate liability is governed by Chapter 2 Part 2 of the CLA. That part applies to an "apportionable clam", which is relevantly defined to mean "a claim for economic loss or damage to property in an action for damages arising from a breach of duty of case".[19] The term "duty of care" in the CLA is defined to mean "a duty to take reasonable care or to exercise reasonable skill (or both duties)".[20] The word "duty" is defined[21] to mean:

> "(a) a duty of care in tort; or
> (b) a duty of care under a contract that is concurrent and coextensive with a duty of care in tort; or
> (c) another duty under statute or otherwise that is concurrent with a duty of care mentioned in paragraph (a) or (b)."

[188] Section 28 provides for a number of exclusions from the proportionate liability regime, none of which are relevant to this case.

[189] It is not necessary for me to repeat the nature of the claim pleaded and proved in this case – they are set out at length above. This is clearly an "apportionable claim" governed by the CLA.

[190] Sections 30 and 31 provide:

> "**30 Who is a concurrent wrongdoer**
> (1) A concurrent wrongdoer, in relation to a claim is a person who is 1 of 2 or more persons whose acts or omissions caused, independently of each other, the loss or damage that is the subject of the claim.
> (2) For this part, it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or had died.
>
> **31 Proportionate liability for apportionable claims**
> (1) In any proceeding involving an apportionable claim –
> (a) the liability of a defendant who is a concurrent wrongdoer in relation to the claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just and equitable having regard to the extent of the

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19 Section 28(1)(a).
20 CLA, Schedule 2.
21 CLA, Schedule 2.

defendant's responsibility for the loss or damage; and

(b) judgment must not be given against the defendant for more than that amount in relation to the claim.

(2) If the proceeding involves both an apportionable claim and a claim that is not an apportionable claim –

(a) liability for the apportionable claim, to the extent it involves concurrent wrongdoers, is to be decided in accordance with this part; and

(b) liability for the other claim and the apportionable claim to the extent is not provided for under paragraph (a), is to be decided in according with the legal rules, if any, that, apart from this part, are relevant.

(3) In apportioning responsibility between defendants in a proceeding the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceeding.

(4) This section applies to a proceeding in relation to an apportionable claim whether or not all concurrent wrongdoers are parties to the proceeding."

[191] Further provisions of Part 2 provide for such matters as the identification of relevant parties[22], for contribution not to be recoverable by a concurrent wrongdoer against whom a judgment is given under Part 2 against another concurrent wrongdoer[23], and the preservation of rights in respect of further proceedings. Again, it is unnecessary for present purposes to recite these other provisions at length.

[192] The equivalent Part in the *Civil Liability Act* 2002 (NSW) was described in the following terms by Palmer J in *Yates v Mobile Marine Repairs Pty Ltd*:[24]

> "[93] The object of Pt IV CLA is remedial and it dramatically changes the previous law. Formerly, a plaintiff could choose to sue only one of several wrongdoers who caused the same loss and the Court could enter judgment for the whole of that loss against the defendant. Even if the defendant cross claimed in the proceedings for indemnity or contribution against the other wrongdoers, the plaintiff could enforce a judgment against the defendant alone for the whole of the loss, leaving the defendant to recover from the cross defendants, if it could. Sometimes the defendant obtained judgment against a cross defendant but could not recover the judgment because of the cross defendant's insolvency.
>
> [94] Part IV is designed to alleviate this perceived injustice. It is intended to visit on each concurrent wrongdoer only that amount of liability which the Court considers "*just*", having regard to the comparative responsibilities of all wrongdoers for the plaintiff's loss. How the Court is to assessed what is "just" is not explained. The Court must exercise a large discretionary judgment founded upon the facts proved in each particular case. The principles upon which the Court will exercise this discretionary judgment will come to be developed on a case-by-case basis. However, it seems

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22 Section 32.

23 Section 32A.

24 [2007] NSWSC 1463.

> clear enough that the policy of Pt IV is that a wrongdoer who is, in a real and pragmatic sense, more to blame for the loss than another wrongdoer should bear more of the liability. This calls for the exercise of the same kind of judgment as the Court exercises in apportioning responsibility as between a defendant sued in tort for negligence and a plaintiff who, by his or her own negligence, has been partly responsible for the injury.
>
> [95] However, under s 35(1) CLA, the exercise is much more complicated than apportioning blame in an action for negligence in tort because the apportionment may have to be made as between a wrongdoer who has breached a contract and wrongdoer who has committed a tort; s 34(1)(a) and (1A)."

[193] In order for s 31 to be invoked the present case, Global and ITF both need to fall within the definition of "concurrent wrongdoer" in s 30. It is clear, both on the pleadings and on the evidence, that:

(a) ITF's breaches of duties under its trade contract and at common law caused the rectification costs and direct delay costs, and

(b) Independently of ITF, Global's breaches of duties under the Contract and at common law caused the same damage.

[194] The central question for present purposes is that posed by s 31(1)(a) – what is the proportion of those damages which I consider just and equitable having regard to the extent of Global's responsibility for those damages? It is to be noted that s 31(1)(a) does not admit of a general enquiry as to what a judge considers "just and equitable in the circumstances". The discriminating factor for the determination of the just and equitable proportion is an assessment of the extent of the impugned concurrent wrongdoer's responsibility for the damages.

[195] In *Yates v Mobile Marine Repairs*, the plaintiff owned a fishing vessel. The first defendant was a marine engine repairer, and the Sydney agent of the second defendant. The second defendant, in turn, was the Australian agent for the particular brand of marine engine in the plaintiff's vessel. The first defendant performed report works to the vessel's engines. There was no issue that the repair work was carried out negligently and that the engines were extensively damaged. On the facts of the case, the second defendant was found to be a party to the contract for the performance of the repairs works. Both defendants were found liable for the damage suffered to the engines, and it was necessary for Palmer J to assess the proportionate degrees of liability attaching to each defendant.

[196] It is instructive to refer to his Honour's reasons on this aspect:

> "[97] As I have observed, s 34 CLA makes it clear that both a contract breaker and tortfeasor may be concurrent wrongdoers liable for the same loss or damage in a apportionable claim. The duty to avoid loss imposed by contract is as weighty as the duty to avoid loss imposed by the common law. However, the Court is required to go beyond the legal character of the duties imposed upon concurrent wrongdoers and to examine the practicalities of responsibility. Accordingly, the Court should apportion liability according to considerations such as (but not limited to):

- which of the wrongdoers was more actively engaged in the activity causing loss;
- which of the wrongdoers was more able effectively to prevent the loss happening.

[98] I do not accept, as Mr McHugh submits, that MAN Australia's breach of contract was not an 'omission' causing Mr Yates' loss. The contract imposed an obligation on MAN Australia to ensure that the work was done properly. It 'omitted' to perform a contractual duty which, if performed, would have prevented the loss. In my opinion, a breach of contractual duty to ensure that work is done property by others, whether employees, agents or independent contractors, is an 'omission' within s 34(2) CLA such as may make a contract breaker a concurrent wrongdoer within the operation of Pt IV CLA.

[99] It follows that Mr Yates' claim against MAN Australia is an apportionable claim within Pt IV so that I must assess the comparative responsibility for Mr Yates' loss as between MAN Australian and Mobile Marine.

[100] Mobile Marine has admitted that it was negligent in carrying out the work on the *Eagle's* engines. As far as the evidence goes, all that MAN Australia did was to make the contract with Mr Yates and, presumably, pay half the cost of the repairs.

[101] However, this is not a case in which MAN Australia undertook contractual responsibility for proper workmanship in an area in which it had no knowledge or expertise whatsoever and had, of necessity, to rely entirely on the skill of Mobile Marine. MAN Australia was the supplier of the engines. It doubtless had its own employees who were capable of overseeing or checking what Mobile Marine had done. It had access to experts within MAN AG, which had actually manufactured the engines. At the very least, MAN Australia might have asked questions as to the process which Mobile Marine proposed to follow in carrying out the repair work. The expert evidence suggests that Mobile Marine's intention to sand-blast before repainting was inherently risky and likely to cause the very damage that occurred.

[102] In my opinion, although Mobile Marine was more actively engaged, if not solely engaged, in the physical activity which caused Mr Yates' loss, nevertheless, MAN Australia was not in a position where it was unable effectively to prevent the loss occurring. Because it had its own expertise, it could not disregard its responsibility under the contract to ensure that Mobile Marine had carried out the work properly.

[103] In my opinion, the liability Mr Yates' loss should be apportioned equally between Mobile Marine and MAN Australia. Judgment should be entered against them accordingly."

[197] In the present case, MCPL contended that Global should bear 100 per cent of the liability for these damages. That submission manifestly ignores the practicalities of the responsibilities for the causation of these damages in this case. It is clear that ITF was actively engaged in the activity causing loss – it was, after all, the trade contractor which performed the defective form working. Indeed, I would consider it

contrary to both justice and common sense not to find that ITF a significant degree of responsibility for the damages.

[198] Global's position in the present case was analogous to that of the second defendant in *Yates v Mobile Marine Repairs*. In a real and practical sense, the responsibility which Global bears arises not so much from the performance of the defective work but from Global's failure to perform the duties it owed MCPL which, if performed, would have prevented the loss. Given its position as construction manager, with contractual responsibilities to monitor ITF's work and recommended causes of action in the event of ITF's failure to perform and given also the fact that Global's failures extended over a significant period of time during the construction of the buildings (meaning that the extent of the defective works became progressively worse as the buildings were further constructed), I consider that Global should also bear a significant proportion of responsibility for the damages.

[199] Having made these assessments of the extent of their respective responsibilities for the damage, I therefore conclude that it is just and equitable for each of Global and ITF to bear 50 per cent of the rectification costs and the direct delay costs.

Summary

[200] In summary, then, the judgment to be entered against Global in respect of its breaches of obligations concerning the ITF defective work will comprise:

50 per cent of the rectification costs	$113,303
50 per cent of the direct delay costs	55,606
Local authority rates	8,600
QS Costs	5,365
Additional insurance	2,031
Additional interest and finance charges	372,261
	$557,166

The overpayment claim

[201] As a separate claim, independent from the claim for damages arising from ITF's defective work, MCPL contends that it has overpaid Global in respect of management fees payable under the Contract. MCPL argued that, in breach of the Contract, Global overcharged for the "costs of works" which were properly payable to Global. For its part, Global contended that the amounts which were charged by it, and which were paid by MCPL, were properly due under the terms of the Contract and that there has been no overpayment.

[202] Clause 16(b) of the general conditions of the Contract provided:

> "The Principal shall pay for the Costs of the Works and the Costs of the Works shall include those items listed in Schedule 9."

[203] The term "Cost of the Works" was defined in Clause 1(a) to mean "costs and expenses incurred by the Construction Manager and by the Principal in connection with the construction of the Works".

[204] Schedule 9 to the Contract was marked as "deleted".

[205] For the purposes of justifying its retention of the monies paid for management services, however, Global pointed to Schedule 10. That schedule stated:

> "**SCHEDULE 10**
>
> List the salaries and titles of employees of the Construction Manager who are stationed at the Construction Manager's main or branch offices (ie: not at the Site office) and for whom its is intended that the Construction Manager should be reimbursed. refer Clause 16(a).
>
> ***TBA***"

[206] Global also pointed to Schedule 14, which provided:

> "**SCHEDULE 14 – ON SITE PERSONNEL**
>
> List the title and name of employees of the *Construction Manager* who it is intended will be stationed at the site to carry out all on-site management, administration and supervision services which will not be separately paid for by the Principal and are provided for within the Construction Manager's management fee (refer to clause 15)
>
> ***Title*** ***Name***
>
> ***TO BE ADVISED***"

[207] Global then pointed to subsequent correspondence, which it claimed supports the rates which it charged to MCPL for the provision of onsite management.

[208] Global's reliance on these schedules is, with respect, misconceived. Schedule 10 had nothing to do with the obligation to pay for the cost of the works under Clause 16(b). Indeed, so far as I can see there is no express reference to Schedule 10 at all in the text of the general conditions of the Contract. By its terms, however, Schedule 10 related to Clause 16(a), which provided:

> "(a) The construction Manager shall during the construction stage, submit to the Principal, each calendar month on the date stated in Schedule 7 a statement showing –
>
> (i) all costs of the Works incurred during that period; and
>
> (ii) its estimate of the fees then due to the Construction Manager for management services provided during the construction stage in accordance with Clause 15."

[209] Clause 15 provided for the calculation of the Construction Manager's fee for construction management duties, and specifically provided that "the Principal shall pay the Construction Manager one only of the fees set out in Clause 15(a) or 15(b) or 15(c)" (underlining added).

[210] Those subclauses then provided the following alternative methods for the calculation of these fees:

> Clause 15(a) – a lump sum fee as set out in Schedule 6 to the Contract, to be paid by monthly instalments;

Clause 15(b) – a fee calculated as a percentage of the Cost of Works (excluding the Construction Manager's fee set out in Schedule 6); or

(c) a fee paid on a monthly basis and based on any hourly rates for the hours (or part thereof) worked by the Construction Manager and employees of the Construction Manager and the classification of those employees and the rate per hour as set out in Schedule 6.

[211] In the Contract as executed by the parties, Schedule 5 (which was to specify the fees payable to the Construction Manager for preconstruction duties under Clause 14) and Schedule 6 were combined and relevantly provided:

"**SCHEDULE 5 & SCHEDULE 6**
The fee to be paid to the *Construction Manager* for pre-construction services (refer Clause 14) and for management services during the construction stage (refer to Clause 15)

The *Construction Manager* shall be paid the following fees and disbursements:

Management Fee

Management fee (clause 2 of the formal instrument of agreement)

An amount of $470,000.00 (excluding GST)

Payment claim	**Payment claim date**	**Payment due**
Jun-05 Value Management/Early Works Tender	15 July 2005	$27,647.00
Jul-05 Balance of Trade Tenders/Construction Phase	15August 2005	$27,647.00
Aug-05 Construction Phase	15September 2005	$27,647.00
Sept-05 Construction Phase	15October 2005	$27,647.00
Oct-05 Construction Phase	15November 2005	$27,647.00
Nov-05 Construction Phase	15December 2005	$27,647.00
Dec-05 Construction Phase	15January 2006	$27,647.00
Jan-06 Construction Phase	15February 2006	$27,647.00
Feb-06 Construction Phase	15March 2006	$27,647.00
Mar-06 Construction Phase	15April 2006	$27,647.00
Apr-06 Construction Phase	15May 2006	$27,647.00
May-06 Construction Phase	15June 2006	$27,647.00
Jun-06 Construction Phase	15 July 2006	$27,647.00
Jul-06 Construction Phase	15August 2006	$27,647.00
Aug-06 Construction Phase	15September 2006	$27,647.00

Sep-06 Construction Phase	15October 2006	$27,647.00
Oct-06 Construction Phase	15November 2006	$27,648.00
		$470,000.00

[212] The combined Schedules 5 and 6 then provided for payment of the defect liability period fee.

[213] It follows that the content of the combined Schedules 5 and 6 circumscribe the calculation of the fees to be paid pursuant to Clause 14 and Clause 15 of the Contract. There is nothing in that combined schedule which allowed for the payment and recovery of the fees which are now disputed. It is also clear that neither Schedule 10 nor Schedule 14, or correspondence said to be made pursuant to those schedules, can be relied on for the purposes of justifying those charges.

[214] The quantum of the amount which MCPL was overcharged was calculated in another expert report by Ms Bundesen. Global challenged the basis upon which Ms Bundesen made these calculations, referring to what it claimed to be its contractual entitlement in that regard. No challenge was made, however, to the correctness of Ms Bundesen's mathematical calculations. The amount calculated by her as having been overcharged by Global, and overpaid by MCPL, is $138,504.11.

[215] In submissions, Global made the point in passing that this claim ought properly have been brought as a restitutionary claim by MCPL. That may well be, but the fact remains that, in breach of the terms of the Contract, Global charged for more than it was entitled to receive. On any basis it is appropriate that there be an order that Global pay to MCPL the amount of the overpayment.

The counterclaim

[216] The defendant's counterclaim was for damages alleged to have been suffered by reason of the alleged repudiation of the Contract by MCPL. It was (quite properly) not suggested by counsel for Global that it should succeed on its counterclaim in the event that MCPL established that Global had breached the obligations it owed to MCPL under the Contract and at law. The counterclaim will, accordingly be dismissed.

Conclusion

[217] There will be the following orders:

1. That there be judgment for the plaintiff against the first defendant in the sum of $557,166;

2. Further, that the first defendant pay to the plaintiff the sum of $138,504.11;

3. That the counterclaim is dismissed;

4. I will hear the parties as to interest and costs.