SUPREME COURT OF QUEENSLAND

CITATION:	*Thiess Pty Ltd & Anor v Arup Pty Ltd & Ors* [2013] QCA 65
PARTIES:	**THIESS PTY LTD** ABN 87 010 221 486 (first appellant) **JOHN HOLLAND PTY LTD** ABN 11 004 282 268 (second appellant) **v** **ARUP PTY LIMITED** ABN 18 000 966 165 (first respondent) **PARSONS BRINCKERHOFF AUSTRALIA PTY LIMITED** ABN 80 078 004 798 (second respondent) **BDO (QLD) PTY LTD** ABN 45 134 242 434 (third respondent)
FILE NO/S:	Appeal No 7571 of 2012 SC No 4441 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	13 February 2013
JUDGES:	Margaret McMurdo P, Muir and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed to the limited extent of varying the declarations made by the primary judge on 16 August 2012 by the deletion of paragraph 3.** **2. The appellants pay the costs of the first and second respondents.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – CUSTOM AND USAGE – DEFINITION – where the appellants engaged the respondents as consultants – where the appellants and the respondents entered into a Collaborative Consultancy Agreement – where Schedule 7

establishes a '3-Element' compensation model – where the first element provides that the respondents are to be reimbursed at 'actual cost' for Collaborative Agreement Work– where the primary judge found, and the respondents contend, that clause S7-3 defines, in relation to staff rates, the way in which 'actual cost' within the meaning of Element 1 is to be determined – where the appellants submit that S7-3 has application only for the purpose of calculating notional 'actual costs' for the purposes of progress claims and payments – whether, upon the proper construction of Collaborative Consultancy Agreement, S7-3 defines 'actual costs' for the purposes of S7-1 or whether S7-3 is limited in its application to progress claims and payments

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – CUSTOM AND USAGE – DEFINITION – where clause 20.3(a) of the Collaborative Consultancy Agreement provides that BDO, as the Collaborative Agreement Auditor, would have access to the personnel and records of the first and second respondents – where the primary judge refused the appellants' application for declarations requiring the first and second respondents to give the Collaborative Agreement Auditor access to their records and personnel – where the appellants submit that the provisions of the Collaborative Consultancy Agreement support a broad approach to the Auditor's right of access – where the respondents contend that BDO sought the documents for a purpose irrelevant to the exercise of its functions under the Agreement – whether the primary judge erred in exercising his discretion against the grant of declaratory relief

Corporations Act 2001 (Cth), s 290(1), s 310(a)

Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99; [1973] HCA 36, cited
Berlei Hestia (NZ) Ltd v Fernyhough [1980] 2 NZLR 150, cited
Commissioners of Inland Revenue v Maple & Co (Paris) Ltd [1908] AC 22, cited
Edman v Ross (1922) 22 SR (NSW) 351, cited
Fountain v Alexander (1982) 150 CLR 615; [1982] HCA 16, cited
Oceanic Life Ltd & Anor v Chief Commissioner of Stamp Duties (1999) 168 ALR 211; 154 FLR 129; [1999] NSWCA 416, cited
Origin Energy Electricity Ltd & Anor v Queensland Competition Authority & Anor [2012] QSC 414, cited
Oswal v Burrup Holdings Ltd (2011) 84 ACSR 65; (2011) 281 ALR 432; [2011] FCA 609, cited

Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900; [2011] UKSC 50, cited
Re Geneva Finance Ltd: Quigley v Cook (1992) 7 WAR 496, cited
Re Tai-Ao Aluminium (Australia) Pty Ltd v Cordukes (2004) 51 ACSR 465; [2004] FCA 1488, cited
Thiess Pty Ltd & Anor v Arup Pty Ltd & Ors [2012] QSC 185, related

COUNSEL: A Myers QC, with P O'Shea SC, and T Bradley, for the appellants
J D McKenna SC, with J P O'Regan for the first and second respondents
T P Sullivan SC for the third respondent

SOLICITORS: Herbert Smith Freehills for the appellants
Schweikert Harris for the first and second respondents
Clayton Utz for the third respondent

[1] **MARGARET McMURDO P:** This appeal primarily concerns the construction of the term "actual cost" in the Commercial Framework (Schedule 7) of the Collaborative Consultancy Agreement (CCA) into which the appellants and the first and second respondents entered for the planning, design, construction and commission of the Brisbane Airport Link, Northern Busway (Windsor to Kedron) and East West Arterial Gateway projects.

[2] The appellants' contentions persuasively demonstrate that the determination of the objective intention of the parties as to the basis on which the first and second respondents were entitled to payment under Schedule 7 is no easy task. There are confusing and arguably conflicting provisions. But I am ultimately persuaded that, when Schedule 7 is read as a whole and in its context as part of the CCA, the better view is that contended for by the respondents.

[3] I agree with Muir JA's reasons for accepting the primary judge's construction.[1] This sits better with one of the parties' agreed key purposes of the CCA, namely to avoid disputation and to promptly resolve differences.[2] The CCA provided for progress payments to be made to the first and second respondents in accordance with a detailed agreed formula. It is extremely unlikely that the parties intended that these progress payments be subject to revision six or more years later, through what would almost certainly be a complex and costly investigation of the costs the first and second respondents in fact incurred in meeting their contractual obligations. Further, cl S7-1, as its heading states, is an overview and general provision and must be construed as such. It is subject to the remainder of Schedule 7, including S7-3, which supports the first and second respondents' construction.

[4] I also agree with Muir JA's reasons for concluding that the primary judge did not err in exercising his discretion to refuse the appellants' application for declarations requiring the first and second respondents to give the Collaborative Agreement Auditor (the third respondent) access to their records and personnel. It follows that

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1 *Thiess Pty Ltd & Anor v Arup Pty Ltd & Ors* [2012] QSC 185, [57]-[70].
2 CCA, cl 1(c).

the primary judge did not err in making declaration 1(e) in his orders of 16 August 2012.[3] I agree, however, with Muir JA that the primary judge should not have made para 3 of the declarations contained in the order of 16 August. It was inconsistent with the clear role which the parties gave the third respondent under the CCA and with the significant power and authority generally held by auditors. It should be deleted.

[5] I would allow the appeal to the limited extent of deleting para 3 of the declarations contained in the order of the primary judge of 16 August 2012. I would otherwise dismiss the appeal. In my view, the appellants' modest success does not disentitle the largely successful first and second respondents to a favourable costs order. The third respondent appeared only briefly at the appeal hearing, indicated it would abide the orders of the Court and did not ask for costs. In those circumstances, no order should be made as to its costs. It follows that I agree with the orders proposed by Muir JA.

[6] **MUIR JA**: **Introduction** This appeal concerns the construction of a Collaborative Consultancy Agreement dated 16 May 2008 under which the first and second appellants, Thiess Pty Ltd and John Holland Pty Ltd (the appellants), engaged the first and second respondents, Arup Pty Ltd and Parsons Brinckerhoff Australia Pty Ltd (the respondents), as consultants for the design of the Airport Link, Northern Busway and East-West Arterial Gateway Projects in Brisbane.

[7] The principal issue on appeal is whether, as the respondents contend and the primary judge found, clause S7-3 of the Agreement stipulates the way in which "the actual cost of personnel performing the Collaborative Agreement Work", within the meaning of Element 1 of clause S7-1.1.1 is to be determined, or, as the appellants contend, S7-3 has application only for the purpose of calculating notional "actual costs" for the purposes of progress claims and payments.

[8] In order to make the subsequent discussion comprehensible, it is necessary to refer to the relevant contractual provisions.

[9] The target completion dates for design and construction of the project infrastructure were, respectively, 30 June 2010 and 30 December 2012. A defects correction period of 18 months commenced on the date of practical completion. A final payment was to be made after the "Date of Final Completion" and the issue by the Collaborative Agreement Leadership Team of a Certificate of Final Completion. The contemplated duration of the Agreement was thus to the order of six years.

[10] In the following provisions of the Agreement, "Consultant" means the respondents and "TJH" means the appellants. "CLT" means the "Collaborative Agreement Leadership Team", comprising three representatives of the appellant and two representatives of the respondents. "CMT" means the Collaborative Agreement Management Team. The duties of the CLT included:

> "(a) Set policy and give philosophical and strategic direction for the collaborative arrangement established by and within the boundaries set out in this Agreement.
>
> (b) Establish with the Collaborative Agreement Manager and the CMT clearly defined objectives, outcomes and deliverables for the Collaborative Agreement Work.

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3 *Thiess Pty Ltd & Anor v Arup Pty Ltd & Ors* [2012] QSC 185, [85].

…

(i) Resolve any differences and issues that are referred to it, including dealing with any Collaborative Agreement Disagreement."

[11] The "Collaborative Agreement Manager" was nominated in the Agreement but could be removed and replaced by the CLT and was answerable to the CLT.

Relevant contractual provisions

16. Compensation to the Consultant

16.1 Commercial Framework

The compensation set out in the Commercial Framework will be the sole compensation to the Consultant for the complete fulfilment of all their obligations under this Agreement.

16.2 TJH right to offset generally

Where the CLT decides that the Consultant is required to pay monies to TJH pursuant to this Agreement, subject to compliance with GST Legislation, TJH will have the right to offset or deduct the amount due (from the Consultant to TJH) against monies that TJH is otherwise obliged to pay the Consultant under this Agreement.

…

18. Invoices and Payments

18.1 Claims and payments

(a) By the last business day of each month (or such other date as decided by the CLT), the Collaborative Agreement Manager will, with input from the Participants, prepare and submit a Payment Certificate to TJH which includes:

(i) costs incurred individually by each Participant, separated into the Airport Link, Northern Busway, and East-West Arterial Gateway (EWAG) elements of the Collaborative Agreement Work; and

(ii) entitlements of the Consultant to Fees (if applicable) Performance Adjustments.

(b) The amounts to be included in the various Payment Certificates will be calculated in accordance with the Commercial Framework.

(c) A valid Tax Invoice from the Consultant for work undertaken on the Airport Link, Northern Busway and East-West Arterial Gateway (EWAG) elements of the Collaborative Agreement Work must accompany each Payment Certificate.

(d) At the frequency specified in the C.A.M.P. [Collaborative Agreement Management Plan] or as determined by the CLT, Certificates must be accompanied by a statement by the Collaborative Agreement Auditor confirming that the amounts shown in the certificate are in accordance with the terms of this Agreement.

(e) All CLT Members must sign Payment Certificates for payments made after the Date of Practical Completion.

(f) TJH will pay the Consultant the amounts specified in the Payment Certificates as payable by TJH within 15 business days of the receipt of the Payment Certificate.

(g) where a Payment Certificate states that an amount is owing by the Consultant to TJH, the Consultant must pay that amount to TJH within 15 business days of the date of the Payment Certificate.

18.2 Payments Act

We agree that:

(a) a Payment Certificate is not a payment claim for the purposes of the Payments Act;

(b) nothing in this Agreement restricts the right of the Consultant to lodge a payment claim pursuant to the Payments Act;

(c) any separate payment made by TJH to the Consultant in response to a payment claim or adjudication determination under the Payments Act must be taken into account in the next Payment Certificate to be issued pursuant to this clause.

18.3 General provisions

(a) A Participant who owes money to another Participant pursuant to this Agreement will pay the other Participant interest at the rate of 10% per annum calculated on monthly rests for any time the payment (including interest) remains overdue.

(b) Progress payments by TJH will not be evidence of the value of work, or an admission of liability, or that the work has been executed satisfactorily, but will be deemed to be provisional payments on account and subject to a final verification audit by the Collaborative Agreement Auditor.

(c) The payments made in respect of the Final Payment Certificate will be deemed to be in full and final settlement of all entitlements to compensation arising pursuant to the Commercial Framework except to the extent that:

(i) further payment becomes due under clause 15.8; or

(ii) matters have been deliberately or fraudulently concealed by a Participant.

…

20. Audit of Financial Transactions

20.1 General

(a) We acknowledge that it is of paramount importance that all commercial aspects of this Agreement are administered in a transparent manner that demonstrates to both Participants that all payments made under this Agreement are in accordance with the terms of this Agreement.

20.2 Collaborative Agreement Auditor

(a) A Collaborative Agreement Auditor will be appointed by the TJH and we will accept that person or company as the Collaborative Agreement Auditor. The CLT may replace the Collaborative Agreement Auditor at any time.

(b) TJH will obtain from the Collaborative Agreement Auditor an executed confidentiality deed as reasonably required by the Consultant, and which is consistent with clause 27.1.

(c) The Collaborative Agreement Auditor's overriding brief is to carry out audits, to audit and verify Consultant Collaborative Agreement Costs incurred by Participants and to ensure that in respect of all payments made pursuant to this Agreement that the Consultant receives its exact entitlement as set out in Schedule 7.

(d) The Collaborative Agreement Manager will ensure that all reports or advice from the Collaborative Agreement Auditor are brought to the attention of the CLT at the next CLT meeting.

20.3 Audit of Participants' Records

(a) Until all payments under this Agreement have been made, the Collaborative Agreement Auditor will have access at all reasonable times to the personnel and Records of the Participants that are related to Consultant Collaborative Agreement Costs pursuant to this Agreement.

(b) Subject to clause 27, the Collaborative Agreement Auditor may, with the consent of the relevant Participant, reproduce any of the Records referred to in clause 20.3(a).

20.4 Retention of Records

(a) We will preserve and maintain in good condition and in an easily accessible filing and retrieval system all Records for at least seven years after the Date of Final Completion.

…

Schedule 7 – Commercial Framework

S7-1. Overview and General Provisions

S7-1.1 The "3-Element" compensation model

S7-1.1.1 Subject to clause S7-1.1.2, the Consultant will be compensated for participating in carrying out Collaborative Agreement Work in accordance with the following '3-Element' model, where:

Element 1 = The following costs incurred directly by the Consultant on the Collaborative Agreement Work will be reimbursed at actual cost subject to audit:

(i) the cost of personnel performing the Collaborative Agreement Work, including, mistakes, rework and wasted effort, but not including costs incurred as a result of, or in committing, remedying or addressing a Wilful Default;

(ii) Project-specific overheads related to the Collaborative Agreement Work; and

(iii) actual costs of Project-specific plant and materials (being items the Consultant would not be required to procure if located in their respective home locations).

Reimbursement to the Consultant under Element 1 must not include any recovery of non Project-specific overheads or profit or costs arising under clause 22.4(b)(ii).

Element 2 = A fee ("the Fee$") to cover normal profit and a contribution towards recovery of non Project-specific overheads. The entire

Element 2 fee paid or payable to the Consultant for all work under this Collaborative Consultancy Agreement is "at risk" based on outcomes of Element 3, in accordance with this Commercial Framework.

Element 3 = A share of 'gain' or 'pain' depending on how our collective actual performance compares with pre-agreed targets in various cost and non-cost key result areas (KRA).

…

S7-1.1.4 We will develop procedures and systems to implement the intent of these terms of compensation and which meet the requirements of the Collaborative Agreement Auditor and we will ensure that those procedures and systems require that costs are allocated to separate cost codes as necessary so that the intent of this **Schedule 7** can be implemented and validated by the Collaborative Agreement Auditor.

…

S7-1.3 All Payments Subject to Validation

S7-1.3.1 Within one month of the Commencement Date of this Collaborative Agreement the Collaborative Agreement Auditor will conduct investigations ("Compliance Audits") on the Consultant's financial records:

(a) to clarify the basis of reimbursement under Element 1; and

(b) to ensure that the demarcation between items reimbursable under Element 1 and items that are deemed to be covered under Element 2 (and therefore not directly reimbursable) is clear.

S7-1.3.2 All payments made pursuant to this Collaborative Agreement are subject to investigation by the Collaborative Agreement Auditor and are subject to validation by the Collaborative Agreement Auditor that they are in accordance with the terms of compensation set out in this **Schedule 7** and the principles of reimbursement determined during the Compliance Audits or those principles as amended by the Collaborative Leadership Team (**CLT**).

S7-1.3.3 TJH will only be liable to reimburse costs to the Consultant to the extent such costs are verified by the Collaborative Agreement Auditor. Any payment made by TJH shall be on account only until verified by the Collaborative Agreement Auditor.

S7-2. Target Estimate (TE) & Target Outturn Cost (TOC)

S7-2.1.1 Prior to the Commencement Date we agreed to Target Estimate (**TE**) for each component part of the Works under the CCA as comprised ALNB, CPS, $EWAG_{design}$ and $EWAG_{cps}$ is calculated as follows:

- **$Consultant_{Staff}$ + $Consultant_{OTS}$ + Fee$**, where:

  $Consultant_{Staff}$ = Consultant staff costs, for the purposes of the **TE** calculated as:

  - **$Hours_{Est\ (portionofworks)}$ x $/hr $_{Elem1}$** where:

    $Hours_{Est}$ = The number stated in Table S7.1, being our estimate of the total number of Consultant hours required to perform the Work under the Collaborative Agreement. $Hours_{Est}$ is a summation of the hours estimated for the ALNB, CPS and EWAG Works.

    $Hours_{Est}$ = The number stated in Table S7.1, being our

$_{(portionofworks)}$ estimate of the total number of Consultant hours required to perform the part of the Work under the Collaborative Agreement. e.g. ALNB, CPS, $EWAG_{design}$ & $EWAG_{cps}$.

$\$/hr_{Elem1}$ = The number stated in Table S7.1, being our estimate of the average Element 1 cost per hour of Consultant staff involved in performing the Work under the Collaborative Agreement.

$Consultant_{OTS}$ = Consultant costs other than staff

Fee$ = The Fee payable under section S7-5, ignoring any adjustments under section S7-7.

S7-2.1.2 The initial Target Outturn Cost (**initial TOC**) is the amount stated in Table S7.1, being the sum of all items contained within each TE. The TOC is subject to adjustment in accordance with clause S7-7.2.

S7-2.1.3 For ALNB design works we agreed a higher target, the initial "Risk-Free Target" (**initial RFT**) below which the Consultant would not be required to bear any share of the cost overruns. The initial RFT is stated in Table S7.1. The RFT is subject to adjustment in accordance with clause S7-7.5. There is no RFT for either the CPS or EWAG compensation model.

S7-2.1.4 The TE (and hence the TOC) is deemed to include allowances for all Changes, risks and opportunities apart from those which we have expressly agreed will be grounds for a Target Adjustment as provided for in clause 17.

S7-3. Element 1 – staff rates

S7-3.1.1 For the purposes of establishing the TOC and Fee$ we have agreed to use $\$/hr_{Elem1}$ as detailed in Table S7.1.

S7-3.1.2 Actual Element 1 rates for the Consultant's staff, Consultant's contracted staff, and sub-consultants' staff will be calculated as 'multiplier' x "Raw Rate", with the "Raw Rate" to be confirmed during the Compliance Audit.

	Raw Rate	*Element 1 Multiplier*
Consultant Full Time Staff	*= Total Salary Package / 1950 = $hrs*	*= 2.8*
Consultant Staff (other than Full Time) including Permanent Part Time Staff, and In-House Contract Staff	*= Hourly rate to be determined by CCA Auditor*	*= to be determined by CCA Auditor*
Consultant Contract Staff (staff employed by and integrated into the Consultant team for ALNB or EWAG works only)	*= agreed hourly rate*	*= 1.5*
Consultant's Sub-consultants	*= agreed hourly rate*	*= 1.1*

S7-3.1.3 Without limiting clause S7-4.1.1, items not included in the Raw Rate include project specific hardware and software, travel 'allowables' to and from project design office from home office, out-of-town specialist travel and accommodation costs (by agreement with Collaborative Agreement Manager), vehicles for CPS, personnel protective equipment (PPE), etc.

S7-3.1.4 Actual items included in the Element 1 staff rates comprise (without limitation) salary and salary related overheads, sick leave and the like, tax including superannuation, holiday leave and pay, training not specifically project related, work tools (including hardware and software normally used), staff procurement

costs, home office administration support, bonuses, promotions (including salary increases associated with same), mobile phone (including costs), etc.

S7-4. Element 1 – reimbursement of costs

S7-4.1.1 The following table provides a high-level summary of what is reimbursable under Element 1. The bases of reimbursement in each category will be as set out in the Compliance Audit Report. Comments provided below are intended to clarify/support the principles / bases set out in the Compliance Audit Report. If there is any misalignment between the following table and the Compliance Audit Report, the Compliance Audit Report will take precedence.

Category	Reimbursable	Qualifications/clarifications
General	Items of expenditure that are under the control and direction of the Collaborative Agreement Manager or the CLT.	Corporate charges for "services" and support not requested by the CLT or the Collaborative Agreement Manager or specifically mentioned in the Compliance Audit Report are not reimbursable. Expenses associated with CLT Members fulfilling their duties as CLT Members will only be reimbursable to the extent that the travel is away from the person's base location.
Costs /payments to 3rd party	3rd party costs incurred in carrying out the Collaborative Agreement Work are reimbursed (at cost) to the extent that the expense: a) is incurred in performing the Collaborative Agreement Work; and b) is not already allowed for or recovered elsewhere.	Includes purchase of materials, services, sub-consultants fees, subcontract costs, external hire of plant, travel and accommodation expenses and other out-of-pocket expenses, etc.
Personnel	Wages, salaries and related on-costs for personnel engaged on the Collaborative Agreement Work, in a full or part-time basis.	Under certain circumstances recruitment, relocation, rental assistance and redundancy costs incurred specifically for the Project are reimbursable.
	Personnel undertaking work that indirectly supports the Collaborative Agreement Work.	Time spent by the CLT Members discharging their duties as a CLT Member is not reimbursable.
The Consultant's plant & equipment	The Consultant's plant and equipment while engaged on the Collaborative Agreement Work and which the Consultant would not be required to purchase if located in its (respective) home office locations.	
Legal costs	Legal costs incurred by the Consultant that are related to the Collaborative Agreement Work and would be a project charge in the Consultant's normal custom and practice are reimbursable, other than costs associated with advice on issues between the Consultant and TJH.	
Insurance	Refer clause 15 and the Compliance Audit Report.	

S7-5. Element 2 – Fee

S7-5.1.1 TJH will pay the Consultant a Fee (**Fee$**) to cover corporate overheads and normal profit associated with each component part of the Collaborative Agreement Work after the Commencement Date, calculated as follows:

- **($Hours_{portionofworks}$ x $\$/h_{Elem2}$)** where:

  $\$/hr_{Elem2}$ = The number stated in Table S7.1, being our agreed Element 2 hourly rate calculated as Fee% x $\$/hr_{Elem1}$

  Fee% = The % figure stated in Table S7.1.

S7-5.1.2 The Fee$ will be subject to adjustment in accordance with clause S7-7.4.

…

S7-9. Quantum of payments

S7-9.1 Prior to Practical Completion

S7-9.1.1 Subject to clause S7-9.1.2, progress payments pursuant to clause 18 prior to the Date of Practical Completion will allow amounts for the Consultant calculated as follows:

- **[**$(E1_{TD} + E2_{TD}) - \Sigma Paid$**]** , *where*

$E1_{TD}$ = the Consultant Collaborative Agreement Costs to date (i.e. to the cut-off date for the progress claim), i.e. items reimbursable to the Consultant under Element 1, based on:

a) internal costs that have already been incurred, and

b) in respect of out-of-pocket costs, actual cost of items which have already been invoiced to and/or paid by the Consultant.

$E2_{TD}$ = a dollar amount of the Fee$ based on $E1_{TD}$ x Fee% to the limit of Fee$

ΣPaid = The total amount previously paid, excluding GST previously paid up to that time under this Agreement.

S7-9.1.2 The CLT may direct that an interim payment of gain/pain be made under Element 3.

S7-9.2 Upon Practical Completion

S7-9.2.1 The first payment after the Date of Practical Completion will allow amounts for the Consultant calculated as follows:

- **[**$(E1_{TD} + E2_{TD} + E3_{Prov}) - \Sigma Paid$**]** , *where*

$E3_{Prov}$ = A provisional estimate of the net amount of gain/pain under Element 3.

S7-9.3 Final Payment

S7-9.3.1 The payment after the Date of Final Completion will allow amounts for the Consultant calculated as follows:

- **[**$(E1 + E2 + E3) - \Sigma Paid$**]** , *where*

E1 = Total cost of items reimbursable under Element 1 based on actual cost of items already invoiced to and/or paid by the Consultant. Accruals are not acceptable.

E2 = Fee$ = the total (Element 2) Fee$ payable to the Consultant pursuant to clause S7-5.

E3 = The total (Element 3) gain/pain payable to/from the Consultant pursuant to clause S7-6.

The appellants' construction argument

[12] The principal focus of the appellants' argument was on the words "costs incurred", "reimbursed" and "actual cost" in the following part of S7-1.1.1:

> "The following costs incurred directly by the Consultant on the Collaborative Agreement Work will be reimbursed at actual cost subject to audit."

[13] It was submitted that the words in question are ordinary words which have a clear meaning in the context of clause S7-1.1.1. The primary judge's construction, it was submitted, produces the improbable result that "actual cost subject to audit" in S7-1.1.1 means "deemed or assumed costs" which are not subject to audit. Element 1 specifically addresses "costs incurred directly" and their reimbursement "at actual cost subject to audit". If the primary judge's construction is adopted, the respondents' compensation in respect of matters within item (i) of Element 1 (where "Consultant Full Time Staff" are concerned) is not for actual costs but is payment of a sum derived from the application of the formula in S7-3 to hours worked. For "Consultant Contract Staff" and "Consultant's Sub-consultants" the "reimbursement" is at an agreed hourly rate with a multiplier of 1.5 for the former and 1.1 for the latter. The hourly rate for "Consultant Staff (other than Full-Time)" is to be at an agreed hourly rate with a multiplier determined by the auditor.

[14] The appellants submit that a construction which equates the application of these formulae with the determination of "actual costs" is not "consistent with business common sense".[4]

[15] Another contention at the forefront of the appellants' argument was that clause S7-3 is concerned with staff "**rates**" not "costs" or "actual costs". A "rate" is something that may be charged or paid and is distinguishable from a "cost", which may be incurred. "Rates" should not be confused with "costs"; let alone "actual costs", which are "existing or real".

[16] The principle that the respondents "be reimbursed at actual cost subject to audit" is implemented through S7-1.1.4 which provides for the allocation of costs to "separate cost codes as necessary so that the intent of this **Schedule 7** can be implemented and validated by the Collaborative Agreement Auditor". The appellants allege that the allocation of the respondents' costs to separate cost codes is not consistent with an interpretation that most of those costs (that is, "the cost of personnel performing the work") need not be allocated to cost codes, and cannot be the subject of any audit. It is inconsistent also with S7-1.3.1 which provides for "Compliance Audits":

> "(a) to clarify the basis of reimbursement under Element 1; and
>
> (b) to ensure that the demarcation between items reimbursable under Element 1 and items that are deemed to be covered under Element 2 (and therefore not directly reimbursable) is clear."

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4 *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at 2908–2911.

[17] If the "basis of reimbursement under Element 1" is simply "Raw Rate" x "multiplier", there is nothing to "clarify" nor is there any need for the Auditor's assistance to clarify the "demarcation between items reimbursable under Element 1 and items that are deemed to be covered under Element 2", because the "reimbursement" under Element 1 is at a rate that is deemed to be "actual cost" and therefore deemed to exclude any profit or non project-specific overheads. Under the primary judge's findings, the respondents' actual expenditure on the work (whether more or less than the amounts paid as staff rates) is irrelevant.

[18] The role which S7-3.1.2 – S7-3.1.4 play is to calculate "rates" to be paid from time to time for the purposes of progress payments. Clause 18.3(b) provides that progress payments are subject to a final verification audit. Progress payments are provisional payments on account and the rates in S7-3 are a means of calculating a provisional measure of actual costs, not the actual costs of performing the work. For payments before the Date of Practical Completion, S7-9.1.1 provides for an Element 1 component defined as:

> "$E1_{TD}$= the Consultant Collaborative Agreement Costs to date (i.e. to the cut-off date for the progress claim), i.e. items reimbursable to the Consultant under Element 1, based on:
>
> a) internal costs that have already been incurred, and
>
> b) in respect of out-of-pocket costs, actual cost of items which have already been invoiced to and/or paid by the Consultant."

[19] The same meaning applies for the Element 1 component of the first payment after the Date of Practical Completion.

[20] These payments are progress payments, to be paid on account of whatever the respondents' true entitlement may be. They are "based on" two components: "internal costs"; and "out-of-pocket costs". There is an obvious correlation between the "staff rates" in S7-3.1.2 and the "internal costs" in S7-9.1.1.

[21] As might be expected, the Agreement contemplates that the appellants will make payments to the respondents that might differ from the respondents' entitlement under Schedule 7. For example, S7-1.3.2 and S7-1.3.3 provide:

> "S7-1.3.2 All payments made pursuant to this Collaborative Agreement are subject to investigation by the Collaborative Agreement Auditor and are subject to validation by the Collaborative Agreement Auditor that they are in accordance with the terms of compensation set out in this **Schedule 7** and the principles of reimbursement determined during the Compliance Audits or those principles as amended by the Collaborative Leadership Team (**CLT**).
>
> S7-1.3.3 TJH will only be liable to reimburse costs to the Consultant to the extent such costs are verified by the Collaborative Agreement Auditor. Any payment made by TJH shall be on account only until verified by the Collaborative Agreement Auditor."

[22] The appellants' liability "to reimburse costs to the Consultant to the extent such costs are verified" by the Auditor is quite distinct from the obligation to pay any monthly payment claim, as the other sentence in S7-1.3.3 demonstrates.

[23] If the primary judge's findings are accepted, the provisional nature of progress payments is removed through equating the rates in S7-3.1.2 charged by the respondents as progress payments, with the respondents' entitlement to recover their actual costs. The error arises through reading S7-3.1.2 as if it dealt with reimbursement of costs rather than with rates of payment. S7-4 deals with "reimbursement of costs" and specifically with "what is reimbursable under Element 1", not S7-3. S7-4 is the first of a sequence of provisions (S7-4 – S7-6) dealing with Elements 1, 2 and 3 respectively. S7-4.1.1 provides the following "high-level summary" of what is "reimbursable":

Personnel	Wages, salaries and related on-costs for personnel engaged on the Collaborative Agreement Work, in a full or part-time basis.	Under certain circumstances recruitment, relocation, rental assistance and redundancy costs incurred specifically for the Project are reimbursable.
	Personnel undertaking work that indirectly supports the Collaborative Agreement Work.	Time spent by the CLT Members discharging their duties as a CLT Member is not reimbursable.

[24] It also sets out other costs, identifying the extent to which they are reimbursable and noting qualifications or clarifications.

[25] If, as the primary judge found, the "detailed provisions of cl S7-3" govern the respondents' "entitlement to be reimbursed the actual cost of personnel performing the Collaborative Agreement Work", then S7-4 would be unnecessary.

[26] In finding that the parties would not have "committed themselves to a broad-ranging inquiry into the actual costs incurred by [the respondents] … followed by litigation … if the amount could not be agreed", the appellants contend that the primary judge was led into error by the respondents' submissions. The respondents submitted that without equating "staff rates" with "actual costs" the Agreement would not be "commercially sensible" because it left "such a fundamental point, namely the amount of compensation payable, undetermined until an audit some time after the work has been undertaken". The error appears from the fact that, notwithstanding the primary judge's declaration, the Agreement still leaves the amount of compensation "undetermined" because it depends upon the number of hours to be worked and the hourly rates for each worker to be verified by an audit sometime after the work has been undertaken.

[27] The primary judge failed to observe that the parties chose not to enter into a lump sum or fixed rate contract, with the varying degrees of certainty they might have provided. Instead they adopted a "relationship-based" or "soft-contracting" agreement with a three-limb compensation model. The choice of contract structure was deliberate. It should be understood in light of the evident incentive purpose of the three element compensation model.

Consideration of the appellants' construction argument

[28] S7-1.1.1 of the Agreement cannot be construed in isolation from the rest of the Agreement and, in particular, Schedule 7. As Gibbs J said in *Australian*

Broadcasting Commission v Australasian Performing Right Association Ltd, in a frequently cited passage:[5]

> "It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another."

[29] S7-3.1.2 makes specific provision for "**Actual** Element 1 rates" (emphasis added) for staff. S7-3.1.2, (which is concerned only with the Consultant's staff and the Consultant's sub-consultants) together with S7-4, sets out a detailed scheme for what is "reimbursable under Element 1".

[30] There is no contextual support for the appellants' construction. S7-1.1.1 has the appearance of a general provision intended to establish principles to be worked out in more detail elsewhere. Elements 2 and 3 in S7-1.1.1 are couched in very general terms. They propound general principles or concepts and are incapable of application without further clarification and elaboration. Such elaboration is provided, in part, in the case of Element 2, by S7-5 and, in the case of Element 3, by S7-6.

[31] It is apparent also that Element 1 was not intended to stand by itself. As the respondents submitted, its general wording leaves a great many potential issues and problems to be resolved: the apportionment of an employee's salary and related overheads; the treatment of sick leave, annual leave, redundancy and recruitment costs; apportionment of rent, power, plant, equipment and technology costs and so on. An interesting, and presently relevant, discussion of the uncertainty often inherent in the meaning of "costs" and related words in a contractual context is to be found in *Origin Energy Electricity Ltd & Anor v Queensland Competition Authority & Anor*.[6]

[32] S7-1.1.4, which applies to Elements 1, 2 and 3, contemplates that the parties "will develop procedures and systems to implement … these terms of compensation". Under S7-1.3.1, the Collaborative Agreement Auditor was to conduct "Compliance Audits" to "clarify the basis of reimbursement under Element 1" and "to ensure that the demarcation between items reimbursable under Element 1 and items that are deemed to be covered under Element 2 … is clear".

[33] The location in the Agreement of the provisions relating to remuneration, to use a neutral term, in respect of Element 1 does not assist the appellants' construction. Also there is nothing about S7-3 or S7-4 which suggests that those provisions were not in supplementation or clarification of S7-1. S7-3 prescribes "Element 1 **rates**" (emphasis added) but such rates are plainly applicable for the purposes of determining the respondents' reimbursement for Collaborative Agreement Work. It follows, as the appellants' argument accepts, that S7-3 applies to the determination of the appellants' reimbursement for costs within item (i) of Element 1 either for all purposes or for a limited purpose. The appellants' principal difficulty, in my view, is the limited support to be found in S7-3 and in the Agreement for any confinement

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5 (1973) 129 CLR 99 at 109; [1973] HCA 36.

6 [2012] QSC 414 at [63]–[74].

of the application of S7-3. In short, the fact that S7-3 refers to "rates" rather than "actual costs" does not, of itself, advance the appellants' construction argument.

[34] The use of the word "actual" in S7-3.1.2 before "Element 1 rates" was not explained in the appellants' argument. If it is correct that the staff rates in S7-3.1.2 are not concerned with reimbursement of "actual cost[s]" it is difficult to see why the word "actual" would have been used. It is apparent from the words of S7-3.1.1 that it was applicable to the calculation of Target Outturn Cost within the meaning of S7-2. That does not support the conclusion that it is implicit that the remainder of S7-3 is confined in its application to progress claims/payments.

[35] There is force in the respondents' argument that the fact that one of the components of the rates in S7-3.1.2 is to be determined by the Auditor and two others are to be agreed is more indicative of a rate generally applicable for the term of the contract for the purposes of determining ultimate payments to be made than a rate limited to progress payments only.

[36] The provision in S7-1.3.3 that: "Any payment made by [the appellants] shall be on account only until verified by the Collaborative Agreement Auditor", is contrary to the appellants' contention that all payments are "on account" until an overall audit is completed at the end of the project. The "final verification audit" referred to in cl 18.3(b), properly construed, refers to the process for validating payments in S7-1.3. This is consistent with the fact that payments made under cl 18.1(b) will be calculated in accordance with the Commercial Framework and is contrary to the appellants' contention that the reimbursement of costs under S7-1.3.3 would be quite distinct from the obligation to pay monthly payment claims under cl 18.

[37] S7-9 provides for the calculation of the final payment to the respondents after practical completion. The total amount of progress payments is to be subtracted from the total cost of: "items reimbursable under Element 1 based on actual cost of items already invoiced to and/or paid by the [respondents]"; the "total (Element 2) Fee$ payable to the [respondents] pursuant to clause S7-5"; and the "total (Element 3) gain/pain payable to/from the [respondents] pursuant to clause S7-6".

[38] S7-9 contains no indication that S7-3.1.2, although applicable to determining cost for progress claims purposes, is not applicable to the determination of actual cost for the purposes of S7-9. If the appellants' construction was intended, it is surprising that the limited application of the S7-3 staff rates formulae was not expressly stated in S7-9 and, of course, in S7-3.

[39] The improbability that the progress payment mechanism would be ignored in the calculation of actual cost for final payment is accentuated by the fact that, in respect of all progress claims, the Collaborative Agreement Manager, with input from the parties, was required to prepare and submit a payment certificate to the appellants. The amounts included in such certificates were to be calculated in accordance with "the Commercial Framework", i.e. in accordance with Schedule 7, not merely S7-1.1.

[40] Contrary to the appellants' submissions, the words "subject to audit" in the definition of Element 1 are not made otiose by the primary judge's construction. The raw rates and the multipliers (with the possible exception of the matters to be determined by the auditor) were fixed; but that left for possible examination and review by the Auditor questions such as, whether persons claimed to be sub-

consultants or staff met that description, the hours actually worked by such persons, whether they were engaged on Collaborative Agreement Work and what was properly within the "raw rate". The Auditor's task was also to demarcate between items covered by Element 1 and Element 2 in order to clarify which cost items could be separately claimed as a disbursement under Element 1.

[41] S7-3.1.4 also serves a purpose by specifying that any cost listed in it is reimbursed by means of the staff rate and is not separately claimable as a disbursement (that is, "Project-specific overheads" or "actual costs of Project-specific plant and materials") under Element 1.

[42] Contrary to the appellants' submissions, there is scope, on the primary judge's construction, for the allocation of costs to "separate cost codes as necessary". Cost codes are applicable to separate categories of employee as well as to separate categories of cost.

[43] The fact that, as the primary judge held and the appellants no longer contest, the agreed multipliers applied throughout the term of the Agreement (at least until practical completion) and were not subject to audit further detracts from the appellants' argument.

[44] S7-1.1.4 provides for the development of "procedures and systems to implement the intent of these terms of compensation". As the respondents' pointed out, S7-1.1.4 refers to the implementation and validation by the Collaborative Agreement Auditor, not of the intent of "this Schedule 7-1.1.1", but of "this Schedule 7". S7-1.3.2 also refers to the terms of compensation in "this Schedule 7".

[45] No persuasive reason was put forward for the use of the rates in S7-3 for the purpose of determining progress payments in respect of costs within Element 1, whilst treating them as irrelevant for the purposes of determining the final adjustment of payments on or after practical completion. It can, I think, be safely assumed that whatever the scope of application of S7-3, its formulae were determined with care and intended by the parties to closely approximate the actual cost of each of the matters with which it deals.

[46] There is no apparent rational basis for devising a scheme under which progress payments were to be made on a basis which would inevitably lead to a substantial overpayment or underpayment to the respondents which would need to be refunded or remedied after practical completion. In the case of overpayment, the appellants would have lost the use of the overpaid monies over the term of the contract and be left with the possibility of having to recover the overpaid monies through litigation. It would have been apparent to the parties that there would be a far from remote possibility that the respondents' financial circumstances at the end of the life of the Agreement may be such that full or even partial recovery was impossible.

[47] There is also the oddity, remarked on by the primary judge, of devising a system in a contract such as this, whereby a separate costing regime is established for the purposes of progress payments. If the parties had adopted such a novel approach, it is remarkable that S7-3.1.2 was not expressly identified as establishing a regime applicable only to progress payments. The commencing words of S7-3.1.3, "[w]ithout limiting clause S7-4.1.1" provide a further indication that S7-3 does not

have the limited application for which the appellants contend. S7-4 is obviously not confined in its application to progress payments.

[48] If the appellants' construction is correct, not only would progress payments be determined by reference to an artificial rate which would inevitably differ from actual cost to some extent but, because the wording of S7-3.1.3 and S7-3.1.4 does not coincide with the wording of S7-4.1.1, costs claimable for provisional costs purposes may not be claimable as actual costs on the conclusion of the Agreement. It is improbable that this was intended.

[49] S7-9.3 provided for payment after the Date of Final Completion of the "[t]otal cost of items reimbursable under Element 1 based on actual cost of items already invoiced to and/or paid by the Consultant", plus the Element 2 fees payable to the respondents pursuant to clause S7-5 plus or minus the "(Element 3) gain/pain payable to/from the [respondents] pursuant to clause S7-6" less the total of progress claims paid.

[50] On the appellants' construction, the only relevance of progress payments over the many years of the Agreement and their method of calculation to the calculation of final payment was to provide a figure to be deducted from the total of the three components of the final payment.

[51] As the respondents submitted, it does not make sense, let alone commercial sense, to have progress payments calculated by the application of an agreed formula which is discarded for the purpose of determining actual cost at the conclusion of the Agreement. If the appellants' construction is accepted, the determination must involve the submitting of a claim for the whole of the actual cost of all of the work of "personnel performing the Collaborative Agreement" up to the date of practical completion. The exercise which the appellants' contention requires, as well as being time consuming, has an obvious potential to give rise to disputes as to what may properly be included in actual cost. Why, one asks, would the parties set detailed rules and guidelines about their provisional liability but make virtually no provisions at all (except for that provided by the words "actual costs") about ultimate liability?

[52] The claim for such actual costs is "subject to audit" but it was not disputed that the Auditor did not have the power to make a determination of actual costs which was binding on the parties. A role of the Auditor was to provide a statement "confirming that the amounts shown in the [payment certificates required to be prepared and submitted monthly by the Collaborative Agreement Manager] are in accordance with the terms of [the] Agreement".

[53] Although it is provided that the payments are on account only until verified by the Auditor, on the appellants' argument even after verification, the payments are "on account" on an unstated basis that might be the subject of a broad ranging inquiry covering many issues followed by litigation or arbitration. The appellants' construction requires measuring the costs of a significant project against only two words: "actual costs". On the appellants' interpretation, the determination of "actual costs" of the project would involve examining all personnel costs under Element 1 for the four and a half year period of the contract. Some of the costs encompassed within the multiplier are costs (such as internal office costs, salary continuance insurance, staff life assurance) which would require an apportioning exercise concerning which there would be an obvious potential for dispute.

[54] Contrary to the appellants' submissions, S7-4 would not be unnecessary if the primary judge's construction is correct as:

- S7-3.1.2 deals only with personnel/staff costs (including on-costs); it does not deal with other types of costs reimbursable under Element 1, such as project-specific overheads and plant equipment; at the very least S7-4 has a role to perform in relation to those other costs;

- S7-4 gives guidance as to what personnel/staff costs are recoverable; for example, time spent by the respondents' CLT Members in discharging their CLT Members' duties is not reimbursable;

- S7-4 also states the primary roles played by the Compliance Audit in determining the basis of reimbursement.

[55] I am unpersuaded by the appellants' contention that the primary judge's construction endangers the "incentive" purpose of a three-limb compensation model. How that was said to be the result of the primary judge's construction was not explained.

[56] For the above reasons, I have concluded that the appellants have failed to demonstrate that the primary judge erred in finding that S7-3 was not limited in its application to progress claims and payments.

The Access to Records issue

[57] There is a subsidiary issue for determination on the appeal. The primary judge declared:

> "1. …
>
> (e) the Collaborative Agreement Auditor is not entitled to access to the personnel and Records (as that term is used in the CCA) of [the respondents] so as to verify:
>
> (i) the figure of 2.8 specified in S7-3.1.2 as the Element 1 multiplier for consultant full time staff;
>
> (ii) the figure of 1.5 specified in S7-3.1.2 as the Element 1 multiplier for consultant contract staff;
>
> …
>
> 3. On the proper interpretation of the CCA, clause 20.3 of the CCA does not permit the Collaborative Agreement Auditor to access personnel and Records (as that term is used in the CCA) of PBA related only to the multipliers specified in S7-3.1.2 or determined by Easdown [the initial auditor] pursuant to S7-3.1.2 of the CCA."

[58] The appellants' seek to have those declarations replaced by a declaration:

> "…that in the events that have occurred, the [respondents] are required to respond to the outstanding requests of [BDO], by

> providing [BDO] with access to their personnel able to respond to those requests and access to the Disputed Records the subject of those requests."

[59] The "outstanding requests of [BDO]" refers to requests by BDO to the respondents to provide "access to the personnel and Records of [the respondents] as identified in the column headed 'BDO's request for access to personnel and Records' in the Schedule of Issues annexed to [the appellants'] Counter Claim (the **Disputed Records**)". BDO, the third respondent, was appointed by the appellants in October 2010 as the Collaborative Agreement Auditor following the resignation of Easdown on 23 July 2010.

The appellants' argument on the Access to Records issue

[60] The appellants submitted that the primary judge must have failed to have regard to clause 20.3(a) of the Agreement which stipulated that BDO, as Collaborative Agreement Auditor, would "have access … to the personnel and Records of the Participants that are related to the Consultant Collaboration Agreement Costs pursuant to this Agreement". The term "Consultant Collaborative Agreement Costs" is defined in S7-9.1.1 as "items reimbursable to the Consultant under Element 1".

[61] Further submissions advanced on behalf of the appellants were to the following effect.

[62] The primary judge's declarations impose limitations on BDO's rights of access not warranted by cl 20.3(a). There is no expression more general or far-reaching than "relating to".[7] It should not be read down without compelling reason.[8]

[63] The documents to which BDO seeks access are:

- those identifying the "actual costs, including employer superannuation contributions" paid by the respondents and claimed by them "as either Element 1 costs or Element 2 costs";
- those showing "which cost items" the respondents have incurred that are "included in the Element 1 multiplier of 2.8 that has been applied to the employees' raw salary rates";
- records showing "the percentage claimed for each salary on-cost including pay-roll tax and workers compensation".

[64] All of the above are records related to the Consultant Collaborative Agreement Costs.

[65] There are other provisions of the Agreement which support a broad approach to the Auditor's right of access. In cl 20.1(a), the parties acknowledged the "paramount importance" of "all commercial aspects" of the Agreement being "administered in a transparent manner" and in cl 1(e) they bound themselves to "honest, open and timely sharing of information with respect to the Collaborative Agreement Work". They undertook "to act reasonably and to do all things properly and reasonably

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7 *Inland Revenue Commissioners v Maple & Co (Paris) Ltd* [1908] AC 22 at 26 per MacNaughton LJ, cited with approval in *Oceanic Life Ltd & Anor v Chief Commissioner of Stamp Duties* (1999) 168 ALR 211 at 224–225; 154 FLR 129 at 143 [56] (NSWCA, Fitzgerald JA).

8 *Fountain v Alexander* (1982) 150 CLR 615 at 629 per Mason J.

within our power that are necessary to give effect to the spirit and intent of this Agreement" and "to act in good faith in conducting all activities arising out of this Agreement". The auditor has an "overriding brief to carry out audits, to audit and verify Consultant Collaborative Agreement Costs incurred by Participants" and all payments are "subject to investigation … and validation by the Collaborative Agreement Auditor". The seriousness with which the parties viewed the auditor's right of access to records may be gauged by the fact that a refusal of reasonable access for an audit is a "wilful default" under the Agreement.

[66] Clause 20.3(a) of the Agreement is similar to the statutory provisions for directors' and auditors' access to company records.[9] Generally, the courts presume that a director intends to act in a way consistent with his or her duties and not to abuse the confidence reposed in him or her by using information for an improper purpose; thus, the director need not demonstrate a need to know or furnish reasons before exercising a right of access to documents.[10] The Court may refuse access to documents where there is clear proof of misuse of power but the onus is on those who assert it.[11] There was no suggestion that BDO was motivated by or has acted in bad faith.

[67] The Auditor should be entitled to access the disputed records for the purposes of establishing demarcation cost items within elements or between elements so as to avoid possible double-dipping by the respondents. Clause 20.3 did not require an auditor to specify a purpose for access to documents; all that was required was that the Auditor identify the documents sought as ones relating to Consultant Collaborative Agreement Costs.

[68] In oral submissions, counsel for the appellants referred to paragraph [85] of the reasons, in which the primary judge held that, although BDO was:

> "… not entitled to access the records of [the respondents] in order to determine 'that the Element 1 multiplier of 2.8 comprises actual Element 1 costs' … The Collaborative Agreement Auditor is entitled to know the items that are included within the multiplier of 2.8 so as to ensure a demarcation between the items reimbursable under Element 1 and items that are deemed to be covered under Element 2 … If, however, the Collaborative Agreement Auditor remains in doubt concerning the items that are included within Element 1 staff rates, items that are reimbursable as project-specific overheads and items that are deemed to be covered under Element 2, then the Collaborative Agreement Auditor may need to undertake inquiries and investigations so as to clarify these matters."

The respondents' argument on the Access to Records issue

[69] The respondents' argument focused on the purpose for which BDO was seeking the "disputed records" namely to:

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9 *Corporations Act* 2001 (Cth), s 290(1), s 310(a).

10 *Geneva Finance Ltd, Re; Quigley (Receiver and Manager Appointed) v Cook* (1992) 7 WAR 496 at 507 [39] per Owen J, cited with approval in *Oswal v Burrup Holdings Ltd* (2011) 84 ACSR 65 at 69 [8]; 281 ALR 432 at 436 per Barker J; *Edman v Ross* (1922) 22 SR (NSW) 351 at 361 per Street CJ in Eq.

11 *Geneva Finance Ltd, Re; Quigley (Receiver and Manager Appointed) v Cook* (1992) 7 WAR 496 at 513 [32], approved in *Oswal v Burrup Holdings Ltd* (2011) 84 ACSR 65 at 70 [11]; *Berlei Hestia (NZ) Ltd v Fernyhough* [1980] 2 NZLR 150 at 163 per Mahon J, cited with approval in *Re Tai-Ao Aluminium (Australia) Pty Ltd v Cordukes* (2004) 51 ACSR 465 at 467 per Finkelstein J.

> "… enable BDO to determine:
>
> 1. that the Element 1 multiplier of 2.8 comprises actual Element 1 costs;
>
> 2. whether the PB claims for consultant staff costs represent only the actual Element 1 costs incurred by PB – and no margin for non project-specific overhead costs or profit which should only be claimed in an Element 2 claim; and
>
> 3. that the PB employer superannuation costs which BDO has verified are included in the raw rate, to which the Element 1 multiplier is applied, have not been claimed twice by then also being included in the Element 1 multiplier itself."

[70] This formula was repeated, in substance, three more times in the schedule of issues.

[71] Counsel for the respondents submitted orally that the purpose for which BDO was seeking the subject documents was not one relevant to the exercise of its functions under the Agreement; BDO's purpose was, "broadly speaking … [to] audit the multiplier to find out … what costs actually lay behind the multiplier". At no time, it was contended, were the disputed records sought for the purpose of auditing "actual cost". The primary judge's construction of the agreement is correct and, by definition, the multiplier comprises only Element 1 costs and there is nothing for BDO to verify. The disputed records are not "related to the Consultant Collaborative Agreement Costs pursuant to this Agreement" and BDO thus has no entitlement to their production.

Consideration of the Access to Records issue

[72] The primary judge held that the agreed multipliers in S7-3.1.2 were "not subject to audit so as to verify that the figures of 2.8, 1.5 and 1.1 are reflective of actual costs" and that BDO is not entitled to access the records of the respondents in order to determine "that the Element 1 multiplier of 2.8 comprises actual Element 1 costs". These findings were not challenged.

[73] The primary judge gave the parties the opportunity of making further submissions on the access to records dispute after publication of his 10 July 2012 reasons. At the hearing in this regard, which took place on 16 August 2012, BDO relied on both oral and written submissions. The written submissions gave the following further explanation of what was meant by "double-dipping" and BDO's purpose in seeking information in relation to it:

> "4.4 The 'double dipping' task referred to above is not concerned with whether, in a given case, the multiplier of 2.8 results in compensation which is higher or lower than the actual costs incurred for constituent parts. Rather, the task is concerned with whether particular reimbursable items are effectively claimed twice, by reference to the constituent parts of the multiplier of 2.8, and other claimable items.
>
> …
>
> 5.2 If, on the proper interpretation of the CCA, BDO is not entitled to inquire as to what are the constituent parts of the

> multiplier, then the type of audit process identified as the 'double dipping' task will not be able to be undertaken. That will simply be reflected in the ultimate audit report which is produced by BDO."

[74] In the course of oral argument, counsel for BDO identified "two real issues arising from this double-dipping task". One was a "demarcation issue" in relation to superannuation which was "… whether there may have been an allowance in the multiplier of 2.8 as a constituent part for superannuation". The primary judge drew attention to the provisions of S7-3.1.4 which expressly included superannuation in Element 1 staff rates. He stated, implicitly if not expressly, that it was not permissible for BDO to go behind the parties' agreement.

[75] In response to counsel for the BDO relying on paragraph [85] of the primary judge's reasons in support of his contention that the Auditor may be able to enquire into the composition of the 2.8 multiplier, his Honour observed:

> "… but 7.3.1.4 is non-exhaustive and so, in that regard if [the respondents] are claiming that some other items that aren't expressly stated in 7.3.1.4 constitute part of the total salary package or something, then the auditor would be entitled to consider that matter. But when we're dealing with superannuation we're dealing with a matter that is expressly included in the staff rates, not in the multiplier."

[76] Although it is far from clear, the second issue identified by BDO's counsel appeared to be a "potential dispute" as to whether "things which are, in fact, claimed in [Element 1] (ii) 'Reimbursables'" may have been allowed for within the 2.8 multiplier. Counsel submitted that "… unless you know what's in 2.8, you can't point to a specific matter. You can't say that there is an issue … whether there has been, prima facie, double-dip".

[77] There was then extensive debate about how the multipliers came into existence. It was made clear, or at least relatively so, that BDO's objective in seeking many of the subject documents was to determine the constituent parts of the 2.8 multiplier. It was next submitted that a similar issue arose in relation to distinguishing the claims which came under Element 1 on the one hand and Element 2 on the other. Resolution of this, in so far as BDO was concerned, appeared to depend on the ascertainment of the constituent parts of the 2.8 multiplier.

[78] In relation to other matters raised in the Schedule, counsel informed the primary judge that "at the moment there's [no] difficulty with what's been occurring".

[79] In the course of argument, the primary judge expressed concern about being requested to give opinions on matters in respect of which there was "no practical problem". Counsel who appeared for the respondents before the primary judge submitted, in effect, that the primary judge was being invited to embark "on a new round of contract interpretation" in the absence of pleadings and evidence and that there was no "real tangible dispute". In particular, it was submitted that the constituent parts of the multiplier was not an issue which had been litigated.

[80] In reply, counsel for BDO again made it plain that the practical issue in so far as his client was concerned depended on whether his client was entitled to be informed of

the constituent parts of the 2.8 multiplier. It was submitted, in effect, that without that information BDO would be unable to do the task for which it was seeking the documents and it was far from clear that BDO's predominant purpose was not to go behind the provisions of S7 of the agreement in respect of Element 1 costs for staff and sub-consultants.

[81] In his reasons, delivered ex tempore on 16 August 2012, the primary judge concluded that it was not the function of the Collaborative Agreement Auditor to require either party to nominate a list of matters that were said to be comprehended within the Element 1 multiplier. He said that there was no contest about that matter. These conclusions were not disputed on the hearing of the appeal. His Honour concluded that:

> "Had the parties had some present, real, identifiable dispute that was appropriate for resolution as part of the Access to Records Dispute, then I would have been prepared to resolve that dispute today … having heard from the parties, there is no present real dispute which is appropriate to be determined by way of a further declaration.
>
> …
>
> It seems to me that whatever issues were once in dispute, and there were many at the time, the Access to Records Dispute evolved and culminated in the formulation of the schedule of issues. That Access to Records Dispute has been largely resolved, if not completely resolved. There is no clearly defined issue in dispute that requires my further determination of the so-called Access to Records Dispute."

[82] With this in mind, the primary judge declined to give the declaratory relief sought by the appellants. In my respectful opinion, the primary judge has not been shown to have erred in exercising a discretion against the grant of declaratory relief. The above summary of the arguments advanced before the primary judge, particularly by counsel for BDO, tends to show that BDO had no interest in seeking the disputed records unless its entitlement to documents to enable it to determine the constituent parts of the 2.8 multiplier, which was an issue for the parties rather than for BDO, was resolved against the respondents.

[83] Counsel for the appellants submitted that the declaration numbered 3 made by the primary judge was "at odds with his reasons", referring to paragraph [85].

[84] I think it likely that the primary judge intended to make it clear that BDO was not entitled to obtain documents for the purposes of going behind or challenging the composition or application of the multipliers specified in S7-3.1.2 or determined by Easdown pursuant to S7-3.1.2. I accept, however, that the meaning and possible breadth of the declaration is unclear.

[85] It is thus desirable that the declarations made by the primary judge on 16 August 2012 be varied by deleting paragraph 3.

Conclusion

[86] For the above reasons, I would order that:

- the appeal be allowed to the limited extent of varying the declarations made by the primary judge on 16 August 2012 by the deletion of paragraph 3; and

- the appellants pay the costs of the first and second respondents.

[87] **GOTTERSON JA:** I agree with the orders proposed by Muir JA and with the reasons given by his Honour.