SUPREME COURT OF QUEENSLAND

CITATION:	*Gladstone Area Water Board & Anor v AJ Lucas Operations Pty Ltd* [2014] QSC 311
PARTIES:	**GLADSTONE AREA WATER BOARD** (first plaintiff) and **GLADSTONE REGIONAL COUNCIL** (second plaintiff) v **AJ LUCAS OPERATIONS PTY LTD** ACN 087 777 633 (defendant)
FILE NOS:	BS9296/13
DIVISION:	Trial
PROCEEDING:	Trial
DELIVERED ON:	19 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	3, 4 and 5 June 2014; 18-20 August 2014
JUDGE:	Jackson J
ORDERS:	**The judgment of the Court is:**

1. **Declare that on 16 November 2012 the plaintiffs and the defendant entered into a contract on the terms of the document entitled "Deed of Settlement No 1" ("Deed of Settlement") signed by Allan Campbell on behalf of the defendant and sent by facsimile transmission from Allan Campbell to Ross Landsberg at 4:31 pm.**
2. **Declare that Item No 6 in the table under clause 2.2(b) of the Deed of Settlement is not limited to the claim for the value of $177,362.00 made in final payment claim No 13 for "Other heads of claim" and extends to the total claim value of $17,923,150.00 for "Other heads of claim" made in payment claim No 12 and final payment claim No 13.**
3. **Declare that Item No 5 in the table under clause 2.2(b) of the Deed of Settlement is not limited to the claim for the value of $1,359,050.00 made in final payment claim No 13 for "Extension of time cost claims" and extends to the claim value of $7,863,075.00 for "Extension of time cost claims" made in payment**

claim No 12 and final payment claim No 13.

4. Liberty to apply.

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – where a contract was alleged to have been made following settlement negotiations – where a first meeting was held to discuss the settlement – where the commercial terms were agreed orally at the first meeting - where a second meeting was held to document the agreement – where the representatives at the second meeting settled on an agreed document in the form of a deed – where one party sought to withdraw from the contract before the deed was executed – whether there was a concluded contract

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where the identification of the claims to be settled by the deed of settlement referred to item numbers – where the item numbers were not sequential and related to earlier identifications of the claims proposed to be settled – whether there was ambiguity in the contract so as to allow the admission of evidence of extrinsic facts to identify the items.

Corporations Act 2001 (Cth), s 127
Local Government Act 2009 (Qld), s 9, s 11
Property Law Act 1974 (Qld), s 46
Water Act 2000 (Qld), s 550, s 1084

Bolton Partners v Lambert (1889) 41 Ch D 295, considered
Boss v Hamilton Island Enterprises Limited [2010] 2 Qd R 115, cited
Commission for the New Towns v Cooper (GB) Ltd [1995] 2 All ER 929, referred to
Coldelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337, applied
Davison v Vickery's Motors Ltd (in liq) (1925) 37 CLR 1, referred to
Denham Bros Ltd v W Freestone Leasing Pty Ltd [2004] 1 Qd R 500, cited
Electricity Generation Corp v Woodside Energy Ltd (2014) 251 CLR 640, considered
Federal Commissioner of Taxation v Sara Lee Household & Body Care (Aust) Pty Ltd (2000) 201 CLR 520, cited
Fleming v Bank of New Zealand [1900] AC 577, cited
Hughes v NM Superannuation Pty Ltd (1993) 29 NSWLR 653, referred to
Mainteck Services Pty Ltd v Stein Heurty SA (2014) 310 ALR 113, considered
Masters v Cameron (1954) 91 CLR 353, applied
McEvoy v Body Corporate for No 9 Port Douglas Road

[2013] QCA 168, cited
Newey v Westpac Banking Corporation [2014] NSWCA 319, referred to
Northcorp Ltd v Allman Properties (Australia) Pty Ltd (unreported, QCA, No 7 of 1995, 14 June 1996), referred to
Parker v Alessi [2011] NSWSC 947, referred to
Retirement Services Australia (RSA) Pty Ltd v 3143 Victoria St Doncaster Pty Ltd (2012) 37 VR 486, referred to
Royal Botanic Gardens and Domain trust v South Sydney City Council (2002) 240 CLR 45, applied
Sindel v Georgiou (1983) 154 CLR 661, referred to
Victoria Park Golf Club Inc v Brisbane City Council (2001) 118 LGERA 107, cited
Western Export Services Inc v Jireh International Pty Ltd (2011) 86 ALJR 1, considered

COUNSEL: S Doyle QC and S Webster for the plaintiffs
M Ashurst SC and D MacFarlane for the defendant

SOLICITORS: Minter Ellison Lawyers for the plaintiffs
Vincent Young Lawyers for the defendant

[1] **JACKSON J:** At the end of a day of commercial negotiations, the representatives of the parties reached agreement as to the terms to settle part of a commercial dispute. As arranged earlier in the day, the chairman of directors and chief executive of one of the disputants signed a final document expressing his assent to the terms.

[2] The final document provides that it is to be executed as a deed. One party is a company. The other parties are governmental corporations. The final document stated that for the company, execution was to be under s 127 of the *Corporations Act* 2001 (Cth) ("CA"). For the other corporations, the final document stated that execution was to be by individual office holders. The final document was not executed as a deed by the company before it sought to resile from the agreement as to the terms reached up to that time, by adding further terms.

[3] The governmental corporations are the plaintiffs. They claim declaratory relief that on 16 November 2012 they entered into a contract with the defendant to settle part of the dispute, on the terms of the final document entitled "Deed of Settlement No.1". The company is the defendant. It defends the proceeding on the ground that there was no concluded contract. The defendant sets up more than one basis for that ground. Alternatively, if a contract was made, the defendant counterclaims that the contract, on its proper construction, did not settle all of the part of the dispute alleged by the plaintiffs. A further alternative counterclaim is that if there is a contract, and if that contract settled all of the part of the dispute alleged by the plaintiffs, it was made as the result of common or unilateral mistake and should be rectified.

Prior to 16 November 2012

[4] On 7 September 2011, the first and second plaintiffs entered into an agreement for a joint project to provide water and sewerage pipeline infrastructure and access roads between the City of Gladstone and Curtis Island. They agreed that the first plaintiff would act as disclosed agent for the second plaintiff to engage the defendant to

construct the project. Curtis Island is the location of liquefied natural gas plants and facilities associated with the recent development of a number of Queensland gas field projects and pipelines.

[5] On 12 September 2011, the first plaintiff and the second plaintiff, as "Principal", entered into a contract with the defendant, as "Contractor", entitled "Formal instrument of agreement: Curtis Island Water and Sewerage Infrastructure – Packages 1 and 3" ("Construction Contract").

[6] On 7 or 8 June 2012, the parties entered into a contract entitled "Deed of Termination" ("Deed of Termination"). The Deed of Termination brought the Construction Contract to an end on 8 June 2012. Clause 9 of the Deed of Termination provides, in effect, that the defendant's claims in Schedule 2 to the Deed survived the termination and should be dealt with according to the Deed of Termination. Clause 10 provides, in effect, that Schedule 2 contains a list of the claims which the defendant has against the plaintiffs. The defendant warranted that it had no other such claims.

[7] Schedule 2 provides:

> "The *Contractor* claims:
>
> (a) the amount due to the *Contractor* and unpaid in respect of:
>
> (i) the 3 May 2012 payment claim No.11 for work up to and including 25 April 2012, as particularised in the Adjudication Application under the *Building and Construction Industry Payments Act 2004 (BCIPA)* filed on 1 June 2012;
>
> (ii) the May 2012 payment Claim No. 12, under clause 37.1A of the *Contract*, for work up to and including 25 May 2012; and
>
> (iii) the final payment claim No. 13 under clause 37.4 of the *Contract*, as at the Effective Date.
>
> (b) The final payment claim will include details and particulars of other claims not included in the progress claim under clause 37.1A, being:
>
> (i) other variations, not exceeding $2 million in addition to the variations listed in payment claim No.11 and NO.12 in the AJ Lucas estimate column on the Variation Summary Register
>
> (ii) for work executed off-site by subcontractors and suppliers (such subcontractors and suppliers falling under clause 38 of the *Contract*) prior to the Effective Date, being:
>
> (A) the amount which would have been payable if the Contract had not been terminated and the *Contractor* had been entitled to and had made a payment claim in a payment period following; and

(B) is subject to verification of the claim being made by the relevant subcontractor or supplier in accordance with the relevant subcontract or supply agreement and the claim being settled by payment of the amount claimed;

(iii) the cost of materials reasonably ordered by the *Contractor* for the *WUC*, which the *Contractor* is liable to accept, but only if the materials become property of the *Principal* upon payment;

(iv) costs reasonably incurred by the *Contractor* in the expectation of completing the whole of the *Works* and not included in any payment by the *Principal;*

(v) the demobilisation schedule of rate item with a credit back to the *Principal* for demobilisation costs not incurred or other savings made by the *Contractor* as a result of the hand-over of *Temporary Works* and *Constructional Plant* in situ for the completion of the *Works* by the *Principal*;

(vi) extension of time claims in respect of the 17 November 2012 *date for practical completion* shown on the latest issued program for the *WUC* including claims for delays affecting the carrying out and performance of the *WUC* in accordance with the program and the additional costs thereby incurred by the *Contractor;* and

(vii) other heads of claim on the grounds of ambiguity, inaccuracy, sequencing errors, changes to programming and variations, particularised in a similar manner as for payment claim No. 11.

Nothing in this Deed, including this schedule, is intended to or does prejudice the ability of the Contractor to argue for the matters claimed in paragraphs (a) and (b) under any principle of law.

Notwithstanding anything included in this Deed, the Contractor agrees and warrants that the maximum value of the Claims that the Contractor has against the Principal under or in relation to the Contract will not exceed $53,000,000 in the aggregate."

[8] At 8 June 2012, payment claim No 12 for work up to 25 May 2012 and the final payment claim No 13 had not been submitted.

[9] On 14 June 2012, the defendant issued payment claim Nos 11 and 12 for work up to 25 May 2012 as follows:

"…

GLADSTONE AREA WATER BOARD
CURTIS ISLAND WATER & TRADE WASTE INFRASTRUCTURE
Contract EX2011-005-C1 and C3 Work Packages 1 & 3 – Pipeline and Pumping Station Construction

Progress Claim #12 (Deed of Termination notes May Claim as Progress Claim #12; references in supporting documents to Progress Claim #11 apply to this claim. Progress Claim #11 and Progress Claim #12 are the same claim).

We submit herewith our May Progress Claim for construction works completed up to and including the 25th May 2012 for the above Contract, calculated as follows:

Work Complete to		**25-May-12**
Contract Sum (Excl GST)		$37,525,974.64
Add Approved Variations		$5,651,092.91
Revised Contract Sum		**$43,177,067.55**
Contract Works Complete to Date		$19,343,102.19
Less Retention		$ -
Quantity Overuns to date		$969,220.27
Variations Completed to Date		$8,097,348.78
Extensions of Time Costs		$6,504,025.00
Other Heads of Claim costs		$17,745,788.00
Total Work Completed to Date		**$ 52,659, 484.24**
Certified to date	$23,084,559.00	
Payment received 12/06/2012	$7,272,727.27	
Paid adjustment figure	-$63,272.60	
Less Previously Paid (Excl GST)		$30,294,013.67
Amount Due this Claim		$22,365,470.57
Add GST (@10%)		$2,236,547.06
Payment Due this Claim		**$ 24,602,017.63**

…"

[10] On 15 June 2012, the defendant issued final payment claim No. 13 as follows:

"**GLADSTONE AREA WATER BOARD**

CURTIS ISLAND WATER & TRADE WASTE INFRASTRUCTURE
Contract EX2011-005-C1 and C3 Work Packages 1 & 3
Pipeline and Pumping Station Construction

Progress Claim #13/Final Payment Claim

We submit herewith our June 2012 Progress Claim & Final Payment Claim for construction works completed up to and including the 8th June 2012 for the above Contract:

ADJUSTED CONTRACT (excluding pending & disputed claims)

Contract Sum (Excl GST)	$	37,525,974.64
Add Approved Variations	$	5,651,092,91
Revised Contract Sum	**$**	43,177,067.55

SUMMARY BREAKUP OF FINAL PAYMENT CLAIM

	Value	May Payment Claim (work up to 25th May)	Final Payment Claim (additional work to May Claim)
Contract schedule of rates work – Work Completed (excluding demob)	$ 19,966,90.84	$19,343,102.19	$623,888.65
Contract schedule of rates work – quantity overruns	$969,220.27	$969,220.27	$ -
Variations specifically listed – Work completed (excluding unfixed materials)	$8,987,410.75	$6,631,559.62	$2,355,851.13
Variations specifically listed – Unfixed materials on site	$2,477,708.84	$1,465,789.16	$1,011,919.68
Extension of Time cost claims (Preliminaries Component)	$7,863,075.00	$6,504,025.00	$1,359,050.00
Other Heads of Claim (arising from clauses 8.1, 8.2, 26.2, 32 and 36 of the Contract)	$17,923,150.00	$17,745,788.00	$177,362.00
Additional Claims & Alternate Claims (may & Final Claim)			

Claim values as noted in particulars. Alternate Claims will exceed $M 50.

It is not appropriate to add the claim values into this summary, given many of these claims are alternate claims for the same work as claimed above in Heads of Claims and Extension of time cost claims.

			Lucas reserves their rights to claim these additional & alternate claims.
Other Variations	$2,000,000.00	not claimed in May	$2,000,000.00
Work Executed offsite	$838,612.00	not claimed in May	$838,612.00
Cost of material reasonable ordered	$2,406,027.00	not claimed in May	$2,406,027.00
Costs reasonable [sic] incurred	$500,000.00	not claimed in May	$500,000.00
Demobilisation schedule of rates items (items 3a & 5)	$318,625.55	not claimed in May	$318,625.55
Credit to Principal for Demobilisation work not required.	-$ 30,000.00	not claimed in May	-$ 30,000.00
Less paid	-$30,294,013.67	-$30,294,013.67	not applicable
May Payment Claim Total (unpaid amount) excluding GST		**$22,365,470.57**	
Final Payment Claim Total (unpaid amount, over & above May claim) excluding GST			$11,561,336.01

Note: this claim has intentionally NOT been submitted as a payment claim under the B & C.I Payments Act, in order to allow this claims resolution process under the Deed of Termination to proceed as intended.

[11] Clause 10.3 of the Deed of Termination provides, inter alia, that representatives of the parties with authority to settle the defendant's claims would meet and negotiate in good faith in order to reach agreement to settle them.

[12] On 12 July 2012, although not in accordance with the time period provided under cl 10.3, the meeting took place between Jim Grayson and David Murchland on behalf of the plaintiffs and Peter Williams and Kevin Lester on behalf of the defendant. Mr Grayson was the chief executive officer of the first plaintiff. Mr Murchland was a consultant. Mr Williams was a consultant to the defendant, although he had been an employed general manager in the defendant's group previously. Mr Lester was an employee of the defendant's group.

[13] Clause 10.4 of the Deed of Termination provides for an agreed mediation process.

[14] On 27 to 29 August 2012, although not in accordance with the time limits provided under cl 10.4, the parties held a mediation. It was attended by the same personnel as for the 12 July meeting, as well as lawyers from Minter Ellison for the plaintiffs and a lawyer from Vincent Young for the defendant.

[15] In the course of the mediation, documents embodying or summarising offers and responses made by the parties were produced or exchanged. It will be necessary to refer to some of them in due course.

[16] On 19 September 2012, a further meeting was held between Mr Grayson, Mr Murchland, Mr Williams and Mr Peter Thomas.

[17] A point to note is that the second plaintiff was represented at the cl 10.3 meeting, the cl 10.4 mediation and the 19 September meeting by the representatives of the first plaintiff, Mr Grayson and Mr Murchland.

[18] Clause 10.5 of the Deed of Termination provides that if the parties cannot reach agreement in relation to, inter alia, the defendant's claims, the defendant may refer its claims to expert determination.

[19] On 22 October 2012, the parties entered into a contract with members of an expert panel entitled "Expert Determination Agreement" for the expert panel to provide services for an expert determination of the disputes between them, including the defendant's claims under the Deed of Termination.

[20] On 5 November 2012, Mr Grayson sent an email to Allan Campbell, the chairman of directors and chief executive of the defendant, attaching a letter of that date. Mr Grayson stated that it had been discussed at the meeting on 19 September that to carry the full scope of all claims into the expert determination process would be costly, time consuming and generally unworkable. The letter continued, in effect, that the (Principal) plaintiffs offered a lump sum of $25,074,918.62 (ex GST) in settlement of all of the (Contractor) defendant's claims under the Deed of Termination except for identified exclusions. The letter referred to the preliminary conference for the expert determination scheduled for 19 November 2012 and requested a "formal response before 3pm AEDT on Thursday 15th November 2012" and stated that "this offer will remain open until that time." Despite the suggestion by the defendant to the contrary, objectively viewed, it was an offer capable of acceptance so as to make a contract.

[21] As events transpired, the offer was not accepted before it lapsed, although the parties had arranged to meet to discuss it on the day after it lapsed.

[22] The 5 November email also attached a draft deed headed "Deed of Settlement No. 1" ("5 November draft deed") which the letter stated had been drafted to reflect the offer for Mr Campbell's consideration.[1] There were two versions of the document attached. One was a "tracked changes" version, showing the differences by addition and deletion from an earlier form of a similar sort of document. The other was a "clean" version, not showing the tracked changes.

[23] The 5 November draft deed attached a document described as Schedule 1. Schedule 1 was a copy of Schedule 2 from the Deed of Termination, with some additions. Clause 2.2(b) of the 5 November draft deed provided that the items from the Contractor's claims identified in Schedule 1, as set out in a table below the clause, were not to be resolved by the Deed. The items in the table were identified under columns headed "Item No", "Schedule 2 reference" and "Description". The item number in each case was taken from numbering used in the offers exchanged in the mediation, as was the description. These item numbers were also used in the discussion between the parties in a later meeting held on 16 November 2012. That discussion is relied on by the

[1] An email sent by Mr Grayson to Mr Campbell on 13 November 2012 updated the 5 November draft deed, but none of the amendments made were material, so I will refer to the 5 November draft deed without differentiating for that version.

plaintiffs as constituting the oral contract made at the meeting. It will be necessary to consider these facts more closely at a later point in these reasons.

[24] On 7 November 2012, Mr Campbell responded to Mr Grayson saying that Mr Williams and Terry Grace (a lawyer) were reviewing Mr Grayson's "proposal" and would revert to Mr Grayson shortly.

[25] On 8 November 2012, Mr Grayson sent an email to Mr Campbell saying that before he committed more time to dealing with Mr Williams he required Mr Campbell's explicit commitment that any agreement with Mr Williams would bind the defendant.

[26] On 8 November 2012, Mr Williams sent an email to Mr Grayson requesting a breakup of the offer amount. Mr Grayson responded on the same day, declining to do so.

[27] On 10 November 2012, Mr Williams sent an email to Mr Grayson suggesting a break up of the offer amount into individual items or claims and seeking confirmation as to how the offer amount was composed.

[28] On 12 November 2012, Mr Grayson sent an email to Mr Williams declining to discuss matters further until he received confirmation from Mr Campbell that any agreement with Mr Williams would bind the defendant.

[29] On 12 November 2012, Mr Campbell sent an email to Mr Grayson, in effect declining to give the requested assurance, but confirming that Mr Williams' had authority to represent the defendant.

[30] On 13 November 2012, Mr Grayson sent an email to Mr Campbell and Mr Williams, inter alia, clarifying errors in the 5 November offer. He asked Mr Campbell to clearly advise as to how agreements could be reached that would bind the defendant. He said:

> "What remains unclear is the extent of that agency; whether and how [Mr Williams] is authorised to reach agreements that bind AJ Lucas."

[31] As to his own authority he added that:

> "…I have entered all negotiations and mediation with AJ Lucas with a clear understanding of my authorisation and have operated within that constraint.
>
> My practical requirement is to understand how I can know that an agreement reached will bind AJ Lucas. In a dispute such as this the CEO would usually participate in negotiations so that they can be effective. …"

[32] On 13 November 2012, Mr Campbell's response was that "My suggestion, therefore, is that you, Peter and I do this together. Therefore, there will be no misunderstanding: unless lawyers play games. This would give us both the best chance of reaching a quick conclusion." Mr Grayson responded promptly, suggesting a meeting on Friday 16 November. Mr Campbell replied that afternoon, saying "Peter and I will be there. Morning would be best – to give us time **to do a deal and document it**. Place and

time?" (emphasis added). The meeting was arranged for 10 am on 16 November 2012 at the first plaintiff's office at Hope St, South Brisbane.

[33] Also on 13 November 2012, Mr Grayson responded to Mr Williams' email of 10 November, but on the basis that the information provided was strictly without prejudice to the offer of 5 November or its documentation.

The first meeting

[34] On 16 November 2012, the meeting was held as arranged ("first meeting"). It was attended by Mr Grayson and Mr Murchland on behalf of the plaintiffs and Mr Campbell and Mr Williams on behalf of the defendant. It lasted for over three hours, although there were two breaks.

[35] All of the attendees gave evidence at the trial. Three of them made notes at the meeting or afterwards. There was also a "white wall" in the room on which some of them wrote. Mr Murchland took a photograph of the white wall ten days after the first meeting. Otherwise, the evidence of the meeting was oral.

[36] As might be expected, the attendees' individual recollections differed. Some of the differences are material; others are unimportant. As to the matters of importance, there were five that stood out, in my view:

(a) first, whether there was any agreement that claims identified as item 7 and item 8 would be treated as coming within a claim identified as item 6;
(b) second, whether the red writing made by Mr Grayson on the white wall was made during the meeting;
(c) third, whether Mr Murchland and Mr Williams went over Mr Murchland's handwritten changes to his copy of the 5 November draft deed and agreed to them for the purposes of reaching agreement before the first meeting ended;
(d) fourth, whether at the end of the first meeting Mr Campbell orally agreed to the deal reached on the basis of those agreed changes, so that a concluded agreement was reached, on those terms, or whether the first meeting concluded on the basis that the required changes to the 5 November draft deed were to be settled at the second meeting; and
(e) whether Mr Grayson said that he needed to get the approval of his board of directors.

[37] Relevantly, the table under cl 2.2(b) of the tracked changes 5 November draft deed provided, in part:

Item No.	**Schedule 2 reference**	**Description**
3	…	

5	b(vi)	Extension of time cost claims
6	b(vii)	Other heads of claim
~~7~~	~~a(ii)~~	~~Additional and alternate claims~~
~~8~~	~~b(i)~~	~~Other variations~~

[38] At the first meeting, Mr Williams wrote the Item Nos 1 through to 13 on the white wall. Mr Williams circled the Item Nos 5, 6, 7 and 8 and wrote the word "Expert" nearby and drew an arrow pointing to the word. There was some discussion about what was to happen about Item Nos 7 and 8.

[39] Two relevant notes were made about Item Nos 7 and 8. Mr Grayson made the red writing on the white wall. The defendant challenged whether he did that at the first meeting. However, his note included Item Nos 7 and 8 in the "A-g compromise items". I infer that "A-g" was shorthand for "agree". Mr Campbell's note said of Item No 7 – "is actually part of 6" – and of Item No 8 – "disregard and include in a settlement".

[40] There were different versions of the conversations about Item Nos 7 and 8 from each of the witnesses. It is unnecessary, in my view, to analyse them all. That is because although I accept that there was some discussion about the scope of Item No 6, Item No 7 and Item No 8, I do not find that there was any agreement reached or expressed at the meeting, as the defendant alleged in the defence, that Item Nos 7 and 8 would be treated as being made in Item No 6.

[41] There may be overlap, but it cannot be suggested sensibly that the items are coextensive. The form of the table appearing under cl 2.2(b) of the 5 November draft deed provided for the deletion of Item No 7 and Item No 8 from the list of items to be excluded from the proposed settlement. That is, they were to be excluded from the list of items to be preserved for the expert determination. Given that Item No 7, as originally claimed, was an ambit alternate claim for an amount of $50 million, it would not be expected that the parties would deal with it by excluding it from the list of items to be preserved for the expert determination, on the orally agreed understanding that it could be raised under another item which was being preserved. Such an approach would have defeated the attempts made by the 5 November draft deed and by those present at the first meeting and second meeting to identify in the writing precisely which of the items were being settled and on what basis.

[42] The oral evidence does not lead to a different conclusion. The defendant's pleaded case was that Item Nos 7 and 8 were orally agreed to be part of Item No 6. But Mr Williams' evidence did not support that conclusion. He said that Item No 8 was agreed to be part of Item No 6 but that Item No 7 was not discussed. He did not recall discussing Item Nos 7 and 8 with Mr Campbell on the side or during a break. Mr Campbell said that there was such a discussion. He also said that Mr Murchland said that Item No 7 was to be included in Item No 6. In my view that is highly unlikely.

[43] Second, I find that the red writing made by Mr Grayson on the white wall was made by him at the first meeting, not afterwards. The contrary conclusion would require a finding that, at the least, both Mr Grayson and Mr Murchland mistakenly believed the

contrary and have, as a result, reconstructed a substantially false version of the events of the first meeting. The alternative view is that both Mr Campbell and Mr Williams are mistaken in their failure to recollect Mr Grayson making that writing and what he said at the time of doing so. That is the view I prefer. Mr Campbell and Mr Williams would not have seen the photograph taken of the white wall until about seventeen months after the first meeting.

[44] Third, I do not find that Mr Williams and Mr Murchland went over Mr Murchland's additions to the 5 November draft deed and agreed that they were the changes to be made to the 5 November draft deed before the first meeting ended. I accept that Mr Murchland made notes and changes on his copy of the 5 November draft deed. But that does not answer the question whether the changes were agreed with Mr Williams and acknowledged by Mr Campbell as the agreement. Mr Murchland said that he showed the changes to Mr Williams "so that it was clear all of those changes were the changes that had been agreed to be made". But the agreed changes were not noted or initialled in that way. Further, this part of Mr Murchland's evidence was not contained in his summary of evidence served before the trial. I consider that it is based on reconstruction.

[45] Mr Grayson said that Mr Murchland and Mr Williams at the first meeting "were writing in the revisions of the document that reflected the agreement that had been reached" and that they "attended the premises of Minter Ellison for the purpose of inserting the… revisions into the document".

[46] I reject Mr Grayson's characterisation. If all that had to be done was to insert agreed amendments, that mere typing task could have been done by sending a copy of the agreed changes electronically to someone to produce a fair copy. The second meeting was clearly intended to be more than that. In my view, it was for the purpose of documenting the matters that had been agreed at the first meeting, but not on the basis that it was a mere insertion of agreed revisions.

[47] Mr Williams did not recall being shown Mr Murchland's annotated copy so as to agree the necessary changes. While in some respects, Mr Williams' evidence is not as reliable as other evidence, on this point I prefer his answer that it never happened.

[48] I also note that the plaintiffs did not plead that the oral agreement that they allege was made on the terms of the 5 December draft deed bearing Mr Murchland's additions.

[49] However that may be, as the first meeting adjourned on the footing that Mr Murchland and Mr Williams were shortly to go to Minter Ellison's offices to settle the necessary amendments, there was no need to have agreed to the changes Mr Murchland was making before doing so. As well, if those changes had been agreed, it seems unlikely that they would not have been used as the agreed starting point for the discussion at the second meeting, but that is not how it proceeded, on balance, on the evidence given of that meeting.

[50] Fourth, while I accept that Mr Campbell said at the conclusion of the first meeting that there was a deal or that he accepted the plaintiffs' offer, I do not find that was in the context that the required changes to the draft deed had been agreed. Instead, I find that that at the end of the first meeting on 16 November 2012, the expressed intention of the parties was that they had reached an agreement which was then to be reduced to a final written form at the meeting to take place at Minter Ellison at 2:30pm. Their agreement

was that Mr Murchland and Mr Williams were to go to Minter Ellison's offices where the required changes would be made and the final Deed of Settlement produced for signing by Mr Campbell that afternoon.

[51] Fifthly, I reject the allegation that Mr Grayson said that he would take the final document to be signed by Mr Campbell back to his board for approval, or needed to do so.

The second meeting

[52] The second meeting proceeded at approximately 2:30 pm to 3:00 pm. It was attended by Mr Landsberg, another solicitor from Minter Ellison, and Mr Murchland for the plaintiffs. Mr Williams and Mr Grace attended for the defendant.

[53] Mr Landsberg was told before the meeting that Mr Murchland had notes of what the deal was and announced to the meeting that the purpose of the second meeting was to mark up changes to the document that had been agreed at the first meeting.

[54] The parties at the second meeting considered and discussed a series of proposed amendments to the 5 November draft deed. Mr Grace had sent to Mr Landsberg an amended version shortly before the meeting ("Mr Grace's draft deed"). Mr Landsberg requested that the discussion proceed from the starting point of the 5 November draft deed, not Mr Grace's draft deed. But there was more than one pass made through some of the proposed changes.

[55] There were two more iterations of the draft Deed of Settlement as amendments were made and discussed. The task, broadly speaking, was to make amendments to reflect what had been agreed at the first meeting. However, other drafting points were also dealt with. The parties did so by reference to an electronic version of the document on the screen. At a couple of points, hard copies were printed.

[56] A point of contention discussed at the meeting was a proposal made by Mr Grace to include a form of words described as the "avoidance of doubt" clause from Mr Grace's draft deed. Mr Landsberg resisted the proposal. The avoidance of doubt clause was not included.

[57] The parties to the second meeting agreed on an amended form for the draft Deed of Settlement ("final document"). And at the end of the meeting, as Mr Landsberg recalled, the parties agreed that the final document was a version that Mr Williams and Mr Grace were prepared to send to Mr Campbell as a version that he should execute.

[58] There was a discussion between Mr Landsberg and Mr Grace about the execution of the final document. Mr Landsberg inquired whether Mr Grace could (presumably with Mr Campbell) execute the document under s 127 of the CA. Mr Grace said that he could not. He said that he would arrange for the company secretary of the defendant to counter-sign the document on Monday. Mr Grace and Mr Landsberg agreed that counterparts would be exchanged at that time.

[59] I reject the defendant's allegation that Mr Landsberg said that the approval of either of the plaintiffs' boards of directors was required.

[60] The final document was then sent by facsimile transmission to Mr Campbell at the Brisbane Airport for his signature and return by facsimile. The parties to the second

meeting waited for him to do so. Mr Campbell spoke to Mr Grace about the contents of the document. He then signed the document and at 4:31 pm sent the signed document to Mr Landsberg at Minter Ellison by facsimile.

16 November to 19 November

[61] On 16 November 2012, Mr Grayson spoke to the chair of the first plaintiff. He informed her of the agreement that he had made. She confirmed her approval. He signed a counterpart of the final document either that afternoon or early the next morning. Over the weekend before 19 November 2012, Mr Randle of the second plaintiff also signed a counterpart.

[62] On 19 November 2012, Mr Landsberg and Mr Grace attended the scheduled preliminary conference with the expert panel. Before the preliminary conference Mr Grace had informed Mr Landsberg that the defendant wanted further wording added to the final document before the exchange. They did not inform the panel that any of the defendant's claims referred to expert determination had been settled.

Mr Campbell's signature and return as an acceptance

[63] It is important to identify the purpose for which the final document was sent to Mr Campbell for signature and return.

[64] In my view, there was no agreement that the document was sent to Mr Campbell so that he could sign it as an offer by the defendant which the plaintiffs then might or might not accept. That characterisation of the facts is inconsistent with the parties' oral exchange at the first meeting. It is also not supported by what was said or done at the second meeting.

[65] Mr Grayson said that Mr Campbell said at the first meeting that he was "happy to sign… as its prepared here…", but requested that Mr Grace's words (scil on Mr Grace's draft deed) be inserted. Mr Murchland said that when Mr Grayson called Mr Landsberg to arrange the meeting at Minter Ellison, he said Mr Williams and Mr Murchland would be making changes to the 5 November draft "so that it can be signed by Mr Campbell that day." On Mr Murchland's evidence Mr Campbell, Mr Williams and Mr Murchland were in the room when that call was made. Mr Grayson said, however, that Mr Campbell and Mr Williams were not present.

[66] In my view, the appropriate characterisation of the facts is that the final document was sent to Mr Campbell to sign and return as confirmation of acceptance on behalf of the defendant of the agreement made that day. That Mr Campbell might bind the defendant was the very reason that the plaintiffs, by Mr Grayson, required that Mr Campbell be at the first meeting in the first place.

[67] The defendant also submitted that there was a material difference between the text of the table under cl 2.2(b) of the final document, and what had been orally agreed or written by Mr Murchland in his handwritten changes to the 5 November draft deed, so that the final document was not capable of operating as a mere record of the oral agreement that was made at the first meeting. I deal with this point further later in these reasons.

[68] Accordingly, the defendant submitted that Mr Campbell's signature and return could only be characterised as a counter-offer, which was not accepted before withdrawal on 19 November 2012.

[69] In my view, that is not the only possible characterisation, or the correct characterisation, of the effect of the changes made between the terms of the final document and what was orally discussed or contained in the prior draft. Assuming that the changes were material, they were agreed to at the second meeting between Mr Murchland, Mr Landsberg, Mr Williams and Mr Grace. Mr Campbell and Mr Grayson had agreed at the end of the first meeting who would attend the second meeting and that the purpose of the second meeting was to make the changes necessary to give effect to the agreement reached at the first meeting so as to document the agreement. Mr Grayson spoke to Mr Landsberg authorising his involvement in that process. Mr Landsberg and Mr Murchland were delegated the task of doing so by Mr Grayson, so that the final document could be provided to Mr Williams for his acceptance and signature. It was not suggested that what was agreed at the second meeting was outside the scope of making changes necessary to give effect to the agreement reached at the first meeting so as to document the agreement.

[70] So far as any change to the 5 November draft deed might have altered its effect, there is no reason why sending the document to Mr Campbell for signature could not operate as an offer which was accepted by him on signing the document and returning it to Mr Landsberg. Mr Campbell's contemporaneous remark on the facsimile cover sheet he sent was "herewith executed deed". He continued that "original with me: - will send on Monday". In other words, he would send the original document on Monday to the plaintiffs. Nothing in that language suggested that the signed final document was an offer being communicated by the defendant to the plaintiffs for the purposes of acceptance. In my view, Mr Campbell's action in signing and returning the final document was an acceptance of the plaintiffs' offer of contract on those terms, in accordance with what had been discussed and proposed.

Exchange of counterparts of a deed

[71] Another basis of the defence that no concluded contract was made is that the parties only intended to be bound on the exchange of executed counterparts of the final document as a deed.

[72] In support of that contention, the defendant relies on several points. First, the parties had a history of making contracts by the method of exchange of counterparts in the form of a deed. Second, the form of the proposed instrument, both as proffered by the plaintiffs before the meetings on 16 November 2012 and as agreed and settled by the final document on that day, provided for execution by all parties as a deed. Third, a binding contract was not made at first meeting. Fourth, the parties' discussions at the second meeting ended with an agreement that the contract would be made by an exchange of counterparts of the deed on Monday 19 November 2012. Fifth, the terms of any offer made by the plaintiffs orally at the first meeting did not correspond precisely with Mr Campbell's assent to the form of the final document on which they rely. Sixth, Mr Grayson did not have authority to make the contract provided for by the final document on 16 November 2012.

Prior contracts by exchange or deed

[73] There were a number of prior formal agreements made between the parties.

[74] The Construction Contract was in writing. It was not in the form of a deed. It did provide for execution in counterparts. One counterpart was signed by the first plaintiff and the defendant. Another counterpart was signed by the second plaintiff.

[75] The Deed of Termination was expressed to be executed as a deed. It also provided for execution in counterparts. It was executed by counterparts. One counterpart was executed by Mr Grayson on behalf of the first plaintiff and by Mr Randle, on behalf of the second plaintiff. Another counterpart, in effect, was executed by the defendant in accordance with s 127 of the CA.

[76] On 8 June 2012, the parties agreed to the payment of an amount on account on certain terms and conditions contained in a letter from Minter Ellison to the defendant. The letter was signed by Minter Ellison on behalf of the plaintiffs on instructions from the first plaintiff. It was countersigned by Mr Lester on behalf of the defendant. The defendant's acceptance of the terms of the letter was according to its terms to be made "by returning a signed copy to Jim Grayson".

[77] The Expert Determination Agreement had parties additional to the plaintiffs and the defendant. That contract was not in the form of a deed. It was executed in counterparts, signed by Mr Grayson on behalf of the first plaintiff, Mr Randle on behalf of the second plaintiff and Mr Campbell on behalf of the defendant. It was also executed by the experts on a separate signing page.

[78] As at November 2012, Mr Grayson was the chief executive officer of the first plaintiff. Mr Randle was the chief executive officer of the second plaintiff. Minter Ellison were the lawyers acting for the plaintiffs in the dispute. Mr Campbell was the chairman of directors and chief executive officer of the defendant.

[79] In my view, the history of prior contracts between the parties does not establish a course of dealing of contracts made only upon the exchange of counterparts or in the form of a deed.

[80] In any event, by the letter from Mr Grayson to Mr Campbell dated 5 November 2012, Mr Grayson addressed "the following offer directly to you as Chairman of the Company". He attached a "draft deed **reflecting this offer** … for your consideration, in the form of both a 'clean' copy and a 'compare' copy to the last draft following mediation" (emphasis added). The letter concluded:

> "Accordingly I would appreciate your **formal response** before 3pm AEDT on Thursday 15 November 2012 and this **offer will remain open until that time.**" (emphasis added)

[81] The attached 5 November draft deed was expressed to be an agreement "to resolve the Preserved Contractor's Claims as set out in this Deed" and included a page providing for execution of the deed by signing by an authorised officer in the presence of a witness on behalf of the first plaintiff, signing by an authorised officer in the presence of a witness for the second plaintiff and execution by the defendant in accordance with s 127 of the CA.

[82] Nothing was said about exchange of any counterparts in the letter of offer. The letter of offer was communicated on behalf of both plaintiffs. The money sum offered by the plaintiffs was $25.07M, an amount that exceeded prior amounts offered in negotiations, although it is necessary in any comparison to look at both price and subject matter. It was open to the defendant by Mr Campbell to accept it by parol, meaning orally or by writing. Since Mr Grayson had made the offer by email, Mr Campbell would have been able to respond accepting the offer by email.

[83] Further, the email correspondence exchanged between the Mr Grayson and Mr Campbell between 5 November 2012 and 13 November 2012 showed clearly that a matter of central concern to Mr Grayson was that he wished to deal with a person who could make an agreement that "will bind Lucas". That was the point of Mr Grayson's approach to Mr Campbell, instead of Mr Williams, with whom he had been dealing up to that time.

[84] In the light of those exchanges, in my view, the fact that the plaintiffs had proffered a draft deed, to embody and reflect Mr Grayson's offer of 5 November 2012 on behalf of the plaintiffs, did not mean that the offer was made on the footing that there would be no binding contract until there was an exchange of counterparts executed in the form of a deed.

Execution by all parties as a deed

[85] The defendant's allegation that the intention of the parties was that the contract was only to be made by exchange of counterparts in the form of a deed raises another point, because both the 5 November draft deed and the final document on 16 November provided that they were to be "executed as a deed" above the provision made for execution by signing. At the risk of unnecessary exposition, it is appropriate to make some observations about the significance or lack of significance of making a contract of the present kind by deed. Traditionally, a deed was made in writing or printed on paper or parchment and executed or made conclusive as between the parties by being signed, sealed and delivered. There was some doubt as to whether signature was really necessary in former times. As was said in Anson's Law of Contract:

> "In modern times, seals were often very much of a legal fiction, being no longer wax impressions of a man's crest or coat of arms, but merely in an adhesive wafer attached to the document or even a printed circle containing the letters 'LS' (*locus sigilli*). The party executing the deed is supposed to place his finger on the seal and utter the words 'I deliver this as my act and deed … 'delivery' in this context does not signify handing over to the other party, but means an act done so as to evince an intention to be bound … any acts or words which show that it is intended to be executed by the party is his deed binding upon him will suffice."[2]

[86] Common law or statute sometimes required a deed for the validity of an instrument. An example is the conveyance of the legal estate held in "old system" land. The common law also requires a seal to make a binding promise in some cases. The paradigm is a promise for which there is no consideration moving from the promisee. However, the subject matter of the contract in the present case did not require that it be

---

2 AG Guest, Anson's Law of Contracts, 25th (Centenary) edition, p 70-71.

made under seal, either at common law or by statute, except for the circumstance that it was a contract made by corporations.

[87] As to that, there was a requirement at common law that a contract by a corporation aggregate, including a company, should be made under the corporate seal. However, s 127 of the CA alters the common law requirement for a company within the meaning of that Act. The defendant is a company. Therefore, it could have executed the Deed of Settlement as a deed in accordance with s 127(3). It was the intention of the parties at the end of the second meeting that the defendant would do so.

[88] However, neither of the plaintiffs is a company. Thus, unless there is a statutory provision that authorises the execution of the Deed of Settlement as a deed by an individual signatory, the form of execution of the final document as a deed on behalf of the plaintiffs may have been ineffective.

[89] The first plaintiff is a water authority under the *Water Act* 2000 (Qld) ("WA"). Prior to the repeal of the *Gladstone Area Water Board Act* 1984 (Qld), it was constituted under that Act. Section 1084 of the WA provides that the first plaintiff "continues in existence, subject to this Act, and is taken to be a water authority established under this Act…".

[90] As a water authority, the first plaintiff "is a body corporate… has a seal; and… may sue and be sued in its corporate name".[3] As well, it has "all the powers of an individual and may… enter into contracts…".[4] Further, the first plaintiff "may, in writing, delegate its powers to a director or an appropriately qualified employee…".[5] There is no reason why the usual general law principles for the appointment of an agent do not apply to the first plaintiff.

[91] The second plaintiff is a local government under the *Local Government Act* 2009 (Qld) ("LGA"). As a local government, the second plaintiff "is a body corporate with perpetual succession… has a common seal and… may sue and be sued in its name".[6] As well, "a local government has the power to do anything that is necessary or convenient for the good rule and local government of its local government".[7] Although this "plenary" form of grant of power owes its origins to legislative power, it is a grant of power to the corporation of a local government to do things. An obvious analogy is with the power of the State of Queensland, although that polity is not a corporation. There is a geographical limit, because the subject is the good rule and government of the local government area. But since "a local government can only do something that the State can validly do" the analogy with the contracting power of the polity of the State is clear enough.

[92] The common law rule as applied to a local government was discussed by McPherson JA in *Victoria Park Golf Club Inc v Brisbane City Council*.[8] It was there said:

> "The common law rule is that a corporation is, subject to recognised exceptions, incapable of contracting or doing any other act except by

---

3 WA, s 550(1).
4 WA, s 550(2).
5 WA, s 579(1).
6 LGA, s 11.
7 LGA, s 9.
8 (2001) 118 LGERA 107, 110-111 [10]-[11].

> or under its common seal: see *Mayor of Ludlow v Charlton* (1840) 6 M&W 815 at 817-8; 151 ER 642 at 643, where Parke B said:
>
> > 'I doubt whether any case has gone so far as to shew that a corporation can bind itself by such a contract as this, not under seal. The old cases permitted as to certain small things, which must of necessity be done without that formality, and this exception has been extended by the modern cases to things which the corporation, by the nature of its constitution, must do to carry on its concerns: but that principle does not apply to the case of a municipal corporation; it cannot be necessary for the purposes of its constitution, that it should part with so much of its property.'
>
> None of those exceptions are applicable or relevant in this case. The rule that the common seal must be used was applied in *A R Wright & Son Ltd v Romford Borough Council* [1957] 1 QB 431…
>
> At common law the requirement of sealing extends to appointing an agent to the corporation.…"

[93] Section 46 of the *Property Law Act* 1974 (Qld) ("PLA") applies to the execution of a contract under seal.[9] Section 46(1) of the PLA authorises the execution of a deed by a corporation aggregate by the affixing of its seal in the presence of and attestation by its clerk, secretary or other permanent officer, or his or her deputy, and a member of the board of directors, council or other governing body of the corporation. Section 46(2) of the PLA provides that the board of directors, council or other governing body of a corporation aggregate may by resolution appoint an agent generally or in any particular case to execute on behalf of the corporation any agreement or other instrument not under seal.

[94] There was no evidence that the board of directors of either of the plaintiffs appointed their chief executive officer to execute the Deed of Settlement.

[95] Thus, although the 5 November 2012 draft deed provided for the contract to be "executed as a deed" by signature by an officer on behalf of the first plaintiff or the second plaintiff, that form of execution may not have been an execution by those parties under seal.

[96] However, whether or not it was intended that a deed might ultimately be executed does not answer the relevant question whether the parties were to be bound by a contract made before that step. Nothing in law prevents parties from making a contract and being bound by its terms even though they intend that later the contract will be embodied in the form of a deed. An example is *Parker v Alessi*.[10] In that case, Bergin CA in Eq said:

> "The parties' use of the language 'we accept' and 'glad to have this sorted', in the context of their conduct in proceeding with the first

---

9 WA, s 550(3).

10 [2011] NSWSC 947.

> loan from SCF soon after these emails, persuades me that they were content to be bound immediately by the terms they had agreed even though the formalisation of the contract by deed (which they both anticipated) was yet to occur: *Masters v Cameron* (1954) 91 CLR 353."

[97] In the lexicon used for cases falling within the principle of *Masters v Cameron*, such an agreement is a "second class" case.[11]

[98] In those circumstances, in my view, whether or not the parties were intending to be bound by a contract in the form of the Deed of Settlement, either in the form of the draft at the first meeting on 16 November 2012 or in the final form settled at the second meeting and executed by Mr Campbell on that day depends on the effect of their oral exchanges on that day.

No binding contract at first meeting

[99] The plaintiffs allege that a binding contract was made at the first meeting because Mr Campbell stated that "It's a deal" and shook Mr Grayson's hand. Mr Campbell and Mr Williams said that Mr Campbell had not said "It's a deal", but had said he would accept the plaintiffs' last offer made at the first meeting.

[100] However, there was no dispute that at the point when the commercial negotiation over the amount of money to settle the relevant items had been concluded, the parties agreed that the relevant representatives would go to the second meeting at Minter Ellison to document the required changes.

[101] In my view, analysed objectively, it is unlikely that they intended to be immediately bound at that point, whether or not agreement was reached as to the terms of the final document. If they did intend to be immediately bound, what was the reason to get the document done that day and to get Mr Campbell to sign it as accepted?

[102] This conclusion is reinforced by the fact that Mr Campbell requested that the plaintiffs consider Mr Grace's suggested additions to the document. Accepting that Mr Campbell said that if the plaintiffs did not accept those suggestions he would sign the document anyway, that statement does not signify that the point of contract was already reached. It is equally capable of being characterised as an assurance of Mr Campbell's bona fides, in an environment where previously there had been considerable mistrust on both sides in the past.

Agreement for exchange

[103] When Mr Landsberg asked Mr Grace at the second meeting whether he could execute the Deed of Settlement under s 127 of the CA (with Mr Campbell), and Mr Grace said that he could not, they discussed and agreed that exchange of the Deed of Settlement would be made on Monday 19 November 2012.

[104] The defendant submits that the agreed exchange is a fact negativing any intention to contract by Mr Campbell's signing and returning the final document.

---

11 (1954) 91 CLR 353, 360-361.

[105] That they agreed upon exchange is consistent with the form of the final document as an intended deed to be executed in counterparts. They made no arrangements for the execution of a single document. Monday was the next business day. It might be thought unusual that the time was so short. However, the preliminary conference was scheduled to take place on Monday afternoon.

[106] In any event, there is nothing inconsistent with the arrangement for exchange and the plaintiffs' case that a concluded contract was reached, on the footing that this is a second class *Masters v Cameron* contract. That is, the parties intended to make a contract by Mr Campbell signing and returning the agreed final document but also intended that the Deed of Settlement would be executed in counterparts as a deed and those parts exchanged.

[107] These facts are distinguishable from a case where the parties agree to contract by an exchange of parts, in a context where the usual method of concluding the contract or "jural act" is the fact of the exchange. Thus, the description of the usual practice in a particular context for an "exchange of contracts" in cases such as *Commission for the New Towns v Cooper (GB) Ltd*[12] and *Sindel v Georgiou*[13] does not answer the question in the present case whether the parties intended to be bound before the exchange of the counterparts of the deed.

[108] In my view, analysed objectively, the arrangement made between Mr Landsberg and Mr Grace for the exchange of counterparts of the Deed of Settlement on Monday 19 November 2012 was not intended to and did not have the effect that the parties were not to be bound upon Mr Campbell's signature and return of the final document.

Correspondence of the terms of the final offer and the agreement made at the first meeting

[109] The defendant submits that another reason why no concluded agreement was made by Mr Campbell signing and returning the final document was that the terms of the document did not correspond to the oral agreement made at the first meeting.

[110] However, the defendant did not plead this as a ground of defence and did not identify in its written submission what the relevant differences were, other than it related to the references to variation claims AJL104 and AJL29. Given, as I have found, that the parties did not agree at the first meeting that the rough notes made by Mr Murchland on his copy of the 5 November draft deed were the only changes required, it is necessary for the relevant alleged differences to be identified before they can be meaningfully examined.

[111] The defendant submits that the substance of the oral agreement at the first meeting was that they differed from the 5 November 2012 offer in the following ways: "[f]irstly the quantum for the 'agreed valuation' items had increased… to $26,200,000. Secondly claim items 9, 10 and 11 had been included as items that would be determined by expert determination but only to the extent the amount claimed for those items was greater than $750,000 and thirdly variation claims AJL 104 and AJL 29 had been added to the list of claims that would be determined by the expert panel."

---

12 [1995] 2 All ER 929, 950-952.

13 (1983-1984) 154 CLR 661, 665-666.

[112] That summary of the matters orally agreed at the first meeting may be compared with the terms of the final document. In my view, there is no difference which leads to the conclusion that the terms of the final document did not correspond to the oral agreement made at the first meeting.

Authority

[113] The defendant alleges a lack of authority by Mr Grayson to conclude the alleged contract. In my view, both the defence and the defendant's submissions on this question elide two different concepts. The first is whether Mr Grayson purported to make a contract which was binding on behalf of the plaintiffs. As appears from the discussion above, in my view, he did. The second is whether Mr Grayson in fact had the relevant authority.

[114] The question of authority is one which turns on the corporate powers of the plaintiffs, previously mentioned. That is, what is required for each of the plaintiffs to authorise an individual to contract on their behalf?

[115] As to Mr Grayson's actual authority on behalf of the second plaintiff, the plaintiffs rely on the agreement made between the first plaintiff and the second plaintiff dated 7 September 2011. In the conditions of contract of the Construction Contract, the "Principal" was identified as the first plaintiff alone. That was because, by the 7 September agreement, it was agreed that, as between the first and second plaintiffs, while they would both execute the Construction Contract, the first plaintiff was to manage the project as disclosed agent of the second plaintiff, so that "so far as the contractors are concerned, [the first plaintiff] will be the 'principal', and point of contact under these contracts".

[116] As to Mr Grayson's actual authority on behalf of the first plaintiff, the plaintiffs rely on a resolution passed at a special meeting of directors of the first plaintiff on 24 August 2012, appointing Mr Grayson as representative for the plaintiffs for the purpose of the mediation under cl 10.4 of the Deed of Termination. In my view, that resolution did not confer authority on Mr Grayson to enter into the Deed of Settlement.

[117] They further rely on the general delegation of the powers of the first plaintiff to Mr Grayson pursuant to cl 4.1.2 of the Authorities and Delegations Manual of the first plaintiff. Paragraph 2(n) includes the settlement of any claims made against the first plaintiff. That was a power expressed to be "subject to approval by the board". In my view, it did not confer unconditional authority on Mr Grayson to enter into the Deed of Settlement.

[118] They further rely upon express ratification of the Deed of Settlement, made in December 2012, February 2013, and on 30 May 2013 by the board of directors of the first plaintiff. A number of other acts are also relied upon as ratification of Mr Grayson's authority. However, in my view, it is not necessary to go beyond the email from Mr Landsberg to Mr Grace sent on 22 November 2012 at 7:21 am. By that email, Mr Landsberg said "as I foreshadowed, my instructions are my client is of the view that a binding agreement was reached and it is not prepared to entertain a further after the fact alteration to the agreement". Mr Landsberg and Minter Ellison had acted for the plaintiffs throughout the prior dealings. That email was also sent after the first plaintiff by its chief executive officer and the second plaintiff by its chief executive officer had signed counterparts of the Deed of Settlement.

[119] Could Mr Landsberg's email operate as a ratification of Mr Grayson's authority on 16 November 2012? In *Bolton Partners v Lambert*[14] a director of a company accepted an offer for an agreement for lease without actual authority. The other party withdrew from the contract, relying on an alleged misrepresentation. The board of directors later ratified the contract and the company sued on it. It was held that the ratification operated retrospectively to when the contract was made by the director.

[120] That ratification generally operates retrospectively has been accepted as "a well settled rule of common law"[15] as follows:

> "where a principal ratifies the earlier act of a person acting as agent without authority, the ratification relates back to the date of the unauthorised act, and the principal is bound as if the agent had had authority at the earlier time".[16]

[121] But the particular question about whether there can be ratification after withdrawal by the other contracting party is not so clear. As early as 1900, it was recognised in the House of Lords that *Bolton Partners* "presents difficulties".[17] The difficulty lies in the proposition that by definition an agent without authority does not bind his principal. If the principal is not yet bound, on what principle can the other party be bound so that they cannot withdraw, in a synallagmatic contractual relationship? In *Davison v Vickery's Motors Ltd (in liq)*,[18] Isaacs J in the High Court clearly thought that *Bolton Partners* was wrongly decided on this point. The NSW Court of Appeal described Isaacs J's criticism as trenchant in *Hughes v NM Superannuation Pty Ltd*.[19]

[122] Had the defendant withdrawn from the contract embodied in the Deed of Settlement before 22 November 2012, on the pleadings there would have been a question whether *Bolton Partners* is not good authority that the plaintiffs' ratification of the contract by Mr Landsberg's email on 22 November 2012 bound the defendant. But the defendant in final submissions made it clear that it did not challenge the authority of *Bolton Partners.* Accordingly, I find that the plaintiffs ratified the contract made by Mr Grayson on the plaintiffs' behalf, as previously considered.

[123] Accordingly, I find that on 16 November 2012 the plaintiffs and the defendant entered into a contract on the terms of the Deed of Settlement signed by Allan Campbell on behalf of the defendant and sent by facsimile transmission from Allan Campbell to Ross Landsberg at 4:31 pm.

Construction of Item No 6 and the settlement of Item No 7 and Item No 8

[124] The Deed of Settlement operates, in general, by reference to the claims which were set out in Sch 2 of the Deed of Termination. The parties define a category of "Settled Contractor's Claims" as being those claims "other than the items and claims listed in clause 2.2".

---

14 (1889) 41 Ch D 295.

15 *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Aust) Pty Ltd* (2000) 201 CLR 520, 533.

16 See also *McEvoy v Body Corporate for No 9 Port Douglas Road* [2013] QCA 168, [39].

17 *Fleming v Bank of New Zealand* [1900] AC 577, 587.

18 (1925) 37 CLR 1, 18-19.

19 (1993) 29 NSWLR 653, 665.

[125] Clause 2.1 of the Deed of Settlement provides, in effect, that the parties agree the value of that part of the work which is included in the Settled Contractor's Claims at $26,200,000; that they will not further dispute the valuation of the work for those matters; and that their agreement on those matters does not give rise to any obligation to make progress claims. Instead, the valuation of that part of the work is to be taken into account in the final reconciliation.

[126] Clause 2.2 identifies the items and claims in dispute which remain to be resolved by expert determination. It expressly provides that the relevant items "are not resolved by this deed". The relevant items are "the following items from the Contractor's claims identified in Schedule 1" set out in the table under cl 2.2 ("the table").

[127] Schedule 1 states in a note that it is a copy of Schedule 2 from the Deed of Termination. It also states in a note that the Deed of Settlement does limit the defendant's ability to pursue some of the claims. In the context of Sch 1, the word "claims" is used with the same meaning as defined in the Deed of Termination.

[128] Relevantly, the table provided, in part:

Item No.	**Schedule 2 reference**	**Description**
3	…	
5	b(vi)	Extension of time cost claims
6	b(vii)	Other heads of claim
9,10, & 11	…	

[129] Paragraph (b) of Sch 2 of the Deed of Termination stated that final payment claim No. 13 was to include (up to the effective date): "(vii) other heads of claim on the grounds of ambiguity, inaccuracy, sequencing errors, [and] changes to programming…." Item No 6 of the table in cl 2.2(b) of the Deed of Settlement, under the column headed "Schedule 2 reference" referred to "b(vii)" and under the column headed "Description" stated "[o]ther heads of claim". It will be necessary to consider those parts of Item No 6 further, later in these reasons.

[130] However, an anterior point is that the table did not include two items previously claimed by the defendant. Subparagraph (a)(ii) of Sch 2 of the Deed of Termination provided that the defendant claimed the amount due in respect of: "the May payment claim No. 12 under clause 37.1A of the *Contract*, for work up to and including 25 May 2012…".

[131] In final progress claim No 13, the defendant had included an item as follows: "Additional Claims & Alternate Claims (May & Final Claim)" and the statement "Alternate Claims will exceed $M 50"..

[132] In the tracked changes version of the 5 November draft deed, a line appeared in the table under Item No 6 as follows:

Item No.	**Schedule 2 reference**	**Description**
..	…	
~~7~~	~~a(ii)~~	~~Additional and alternate claims~~

[133] The line for Item No 7 did not appear in the "final" version of the 5 November draft deed.

[134] That way of dealing with Item No 7 made it clear that the proposal for settlement deleted Item No 7 from the defendant's claims that were not to be resolved. It was not dealt with in a different way in any subsequent draft.

[135] In my view, on the proper construction of cl 2.2(b) of the Deed of Settlement, the items and claims resolved by the Deed of Settlement included the claim described as Item No 7 with the Schedule 2 reference "a(ii)" for "Additional and alternate claims", whether for $50,000,000 or another amount.

[136] The same reasoning applies, *mutatis mutandis*, to another item previously claimed by the defendant described as Item No 8, Schedule 2 reference "(b)(i)" for "Other variations" for an amount of or not exceeding $2,000,000. Because that item is not referred to as an item in the table, it is not an item which was agreed not to be resolved by the Deed of Settlement.

[137] The defendant alleged that during the first meeting Mr Murchland on behalf of the plaintiffs stated that any reference to Item No 7 and Item No 8 should be deleted in the proposed Deed of Settlement because any claims the defendant had previously made in those items could be made as part of the Item No 6 claim. Mr Murchland denied having made the statements. I accept his evidence on this point. But even if I had not accepted his evidence it would not matter.

[138] In accordance with authority as to the proper construction of a written contract consequent upon the decision of the High Court in *Codelfa*, as I discuss below, evidence of matters constituting prior negotiations to a written contract are admissible only in limited circumstances and to a limited degree. The first requirement is that there must be a relevant ambiguity in the meaning of the provision of the contract to be construed. In my view, there was no ambiguity as to whether or not Item No 7 or Item No 8 are included in Item No 6. They are not. Each was made as a separate, even if overlapping or alternate, claim.

[139] In final submissions, the defendant did not press its counterclaim that on the proper construction of the Deed of Settlement, Item No 7 and Item No 8 were to be included in Item No 6. Accordingly it is unnecessary to go further.

Construction of item 6 – is it limited to the difference between final payment claim No 13 and payment claim No 12?

[140] The plaintiffs contend that the claim in the table for Item No 6 is confined to the claim for the amount due in respect of final payment claim No 13. They contend that it does not include any claim for the amount due in respect of payment claim No 12. That is, they contend that it does not include the total value in final payment claim No 13 for "Other heads of claim", namely $17,923,150, but is limited to the value of $177,362 which was added by final payment claim No 13 to the prior amount of the claim for "Other heads of claim" in payment claim No 12.

[141] The defendant submits that the proper construction of sub-paragraph (b)(vii) attached as Sch 1 to the Deed of Settlement is that the text of (vii) operates independently of the words which introduce it, namely: "the final payment claim will include details of particulars of other claims not included in the progress claim under cl 37.1A, being: …". The parties called those words the "chapeau".

[142] The recitals to the Deed of Settlement refer to the Deed of Termination, the mediation and to the parties having "agreed to resolve a number of items and claims included in the Settled Contractor's Claims as set out in this Deed". The definition of "Settled Contractor's Claims" refers to "those claims described in Schedule 1 (being a copy of what is set out in Schedule 2 of the Deed of Termination) other than the items and claims listed in clause 2.2".

[143] The defendant's submission may be analysed in a number of steps. First, looked at by itself, the structure and operation of Sch 2 in the Deed of Termination is relatively clear. The words "The *Contractor* claims" introduce two paragraphs. Paragraph (a) refers to the amount due and unpaid to the contractor in respect of three identified payment claims. In each instance, they are identified by reference to a particular claim number and relevant date. The third instance is "the final payment claim No. 13 under clause 37.4 of the *Contract,* as at the Effective Date". The Effective Date was defined to be 8 June 2012.

[144] One approaches par (b) of Sch 2 in that context. It provided for what the final payment claim would include as follows: "The final payment claim will include details and particulars of other claims not included in the progress claim under clause 37.1A, being …".

[145] Seven classes of claim are identified in the following sub-paragraphs. They are aptly described as "claims". The first class is "other variations", being variations in addition to those listed in payment claim No. 11 or payment claim No. 12. The seventh class is "other heads of claim on the grounds of ambiguity, inaccuracy, sequencing errors, changes to programming and variations, particularised in a similar manner to payment claim No. 11."

[146] Although those sub-paragraphs identify seven classes of claims, the classes themselves are not independent classes of claim that can be made after final payment claim No .13. On the contrary, the contractor's claims were to be limited to those in payment claim No. 11, payment claim No. 12 and final payment claim No. 13. Under the Deed of Termination, those were the only claims that were to survive the termination of the Construction Contract. To survive the termination of the contract under final payment

claim No. 13, an item or claim had to appear in that final payment claim and be within one of the classes identified in the sub-pars (b)(i) to (b)(vii).

[147] Moving from the Deed of Termination to the Deed of Settlement, the text which raises the plaintiffs' contention appears in the table as follows:

Item No.	**Schedule 2 reference**	**Description**
…	…	…
6	b(vii)	Other heads of claim
…	…	**...**

[148] In effect, the plaintiffs submit that the reference to "b(vii)" is a reference to "the final payment claim" being a claim "not included in the progress claim under clause 37.1A" in accordance with the chapeau. The only progress claim under cl 37.1A referred to in Schedule 2 of the Deed of Termination is payment claim No. 12. Thus, the plaintiffs submit that the claim in the table for Item No 6 for Schedule 2 reference "b(vii)" is confined to the claim for the amount due in respect of final payment claim No. 13. It is not for the total value of payment claim No. 13 for "Other heads of claim".

[149] The corollary of the plaintiffs' submission is that no amount claimed under payment claim No. 12 survives the Deed of Settlement. That consequence flows from the circumstance that the definition of "Settled Contractor's Claims" extends to items and claims other than the items and claims listed in cl 2.2. The list of relevant items from the Contractor's claims appears in the table under cl 2.2(b). Thus, if a claim made by payment claim No 12 is not included in the list of items, it is a Settled Contractor's Claim agreed not to be further disputed.

[150] I observe that the plaintiffs' contention seems to arise because there is no Schedule 2 reference to "a(ii)" as well as "b(vii)" in the table under the column headed "Schedule 2 reference" for Item No 6.

[151] The defendant submits that the entry in the table of "b(vii)" under the column headed "Schedule 2 reference" does not have such a confining effect. In effect, it relies on the column headed "Item No" and the item number "6" as well as the column headed "Description" and the description "Other heads of claim" in the table as supporting the conclusion that Item No 6 in the table from the contractor's claims identified in Schedule 1 to the Deed of Settlement refers to the text of sub-par (vii) shorn of the limiting words of the chapeau to b(vii).

[152] There is a similar dispute between the parties about the proper construction of Item No 5 in the table. It is not necessary to consider that argument separately from the dispute about the proper construction of Item No 6.

Admissibility of extrinsic evidence as an aid to construction

[153] There was a substantial dispute between the parties as to the extent of any admissible extrinsic evidence on these questions of construction of the Deed of Settlement. The plaintiffs objected to the admission of approximately 20 documents on the disputed questions of construction. However, there was no debate in submissions as to the law on that question.

[154] The plaintiffs submitted that the statement of Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*,[20] is now accepted as authoritative, relying on *Western Export Services Inc v Jireh International Pty Ltd*.[21] However, in recent cases, the controversy over when extrinsic evidence is admissible in aid of the construction of a written contract has been revived: *Mainteck Services Pty Ltd v Stein Heurty SA*,[22] *Stratton Finance Pty Ltd v Webb*[23] and *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd*.[24]

[155] In *Mainteck*, the NSW Court of Appeal held that:

> "To the extent that… *Jireh* supports a proposition that 'ambiguity' can be evaluated without regard to surrounding circumstances and commercial purposes or objects, it is clear that it is inconsistent with what was said in *Woodside* at [35]. The judgment confirms that not only will the language used 'require consideration' but so too will the surrounding circumstances and the commercial purpose or objects. Although the High Court in *Woodside* did not expressly identify a divergence of approach, *Jireh* was notoriously controversial in precisely this respect."

[156] In other words, the reasoning is that the decision in *Electricity Generation Corp v Woodside Energy Ltd* ("*Woodside*") is inconsistent with *Jireh*, so that *Jireh* is to be treated as overruled. As a matter of stare decisis, in my view, there are some difficulties with this approach. First, the question in *Woodside* was not about the extent of admissible extrinsic evidence. So it is difficult to see why it is treated as any authority, let alone binding authority, on that question. Second, the injunction issued in *Jireh* was that "[u]ntil this Court embarks upon that exercise and disapproves or revises what was said in *Codelfa*, intermediate appellate courts are bound to follow that precedent". *Jireh* may have been unusual as a judgment given on a special leave application. But that is hardly a basis either for ignoring it or finding implied inconsistency in another judgment which was not about the admissibility of extrinsic evidence at all. In any event, *Jireh* was not the only like statement by the High Court.

[157] *Royal Botanic Gardens and Domain Trust v South Sydney City Council*[25] was a case where the extent of the relevant or admissible extrinsic evidence in aid of the construction of a long term lease was in question, and the High Court heard argument about some of the House of Lords cases which show a wider approach to admissibility than *Codelfa*. The plurality (four members of the Court) said:

---

20 (1982) 149 CLR 337, 347, 352.
21 (2011) 86 ALJR 1, 2-3 [3]-[4].
22 (2014) 310 ALR 113, 130-134 [69]-[86].
23 [2014] FCAFC 110, [36]-[41].
24 [2014] WASCA 164, [45] and [216].
25 (2001-2002) 240 CLR 45.

> "It is unnecessary to determine whether their Lordships took a broader view of the admissible 'background' than was taken in *Codelfa* or, if so, whether those views should be preferred to those of this Court. Until that determination is made by this Court, other Australian courts, if they discern any inconsistency with *Codelfa*, should continue to follow *Codelfa*." (citations omitted)

[158] I note that in *Mainteck*, Leeming JA briefly dealt with whether his view as to admissibility is consistent with *Codelfa*. His Honour held that whether a contractual text has a plain meaning is a conclusion that "cannot be reached until one has regard to the context". This is difficult to comprehend. The requirement that there must be ambiguity, before extrinsic evidence of surrounding circumstances is admissible, operates as a threshold or barrier to the reception of such evidence. It is circular to say that, in general, it is necessary to tender the evidence to work out whether there is an ambiguity in the first place. To do so defeats the purpose of the requirement. An exception exists where there is a latent ambiguity because the parties have adopted their own dictionary. The considerations affecting whether context is to be considered in deciding whether there is ambiguity are not found only in linguistic or logical analysis of the meaning of ambiguity or the concept of plain meaning. They include that in the conduct of trials in busy courts, legal principle and the rules of evidence combine to restrict the rights of parties to introduce, complicate and slow down the proceeding by tendering material intended to affect the meaning of the written contract to which they have agreed. They include also the legal reality that contracts are assignable as instruments of commerce. An assignee may not have been a party to the nuances of meaning sought to be introduced by the extrinsic evidence, which is not signalled by the text of the contract.

[159] The judgment in *Mainteck* proceeds on the implied footing that the High Court made the relevant determination towards a broader view of the admissible evidence in *Woodside*, even though, to put it bluntly, *Woodside* did not consider and is not an authority on when evidence is admissible or the scope of the evidence that is admissible.

[160] It is challenging, as a trial Judge, to be confronted by an intermediate appellate court decision that appears to be in conflict with a direct statement made in a joint or plurality judgment of the High Court. Summarising, the position is complex, in this case because:

(a) *Mainteck* appears to doubt whether *Jireh* is binding authority but ignores both *Royal Botanic Gardens* or any detailed consideration of *Codelfa*;
(b) *Mainteck* finds that *Woodside* is impliedly inconsistent with *Jireh*;
(c) as a matter of ratio, the judgment in *Woodside* did not decide anything about admissibility of extrinsic evidence – it did not even mention it; and
(d) in both *Jireh* and *Royal Botanic Gardens* the High Court, in considered dicta, said that until it deals with the admissibility of extrinsic evidence as stated in *Codelfa*, intermediate appellate courts and trial judges are to follow *Codelfa*.

[161] The question of the approach to the evaluation of ambiguity and the role and admissibility of evidence about surrounding circumstances was further considered by the NSW Court of Appeal in *Newey v Westpac Banking Corporation.*[26]

[162] By the doctrine of precedent, I am obliged to follow a decision of the High Court on a question as to the common law of Australia which forms part of the ratio of a decision of that Court which has not been overruled. However, if there is no binding High Court case, I am also obliged to follow a decision of an intermediate Court of Appeal as to the common law of Australia, even though it is not the Court of Appeal Division of this Court, unless I am convinced that the decision is plainly wrong.[27]

[163] In my view, *Codelfa* has not been affected by *Woodside* on the question of the admissibility of extrinsic evidence. There can be no doubt that *Royal Botanic Gardens* affirms that *Codelfa* must be followed until the High Court departs from or overrules it. The judgment of Mason J in *Codelfa*, however, is not necessarily a part of the ratio of the judgment in *Codelfa*. Although Wilson J agreed with Mason J's reasons, neither Aickin J nor Brennan J associated themselves with Mason J's requirement that "evidence of surrounding circumstances" is "not admissible to contradict the language of the contract when it has a plain meaning", but is admissible "if the language is ambiguous or susceptible of more than one meaning".[28] Still, too many subsequent cases that bind me have proceeded on the basis that a lack of plain meaning or ambiguity is required.

[164] For example, in *Northcorp Ltd v Allman Properties (Australia) Pty Ltd*,[29] Macrossan CJ in the Court of Appeal referred to *Codelfa* and the need that the "vital phrases… exhibit a certain level of ambiguity". The plurality reasons considered *B & B Constructions (Aust) Pty Ltd v Brian A Cheeseman and Associates Pty Ltd*[30] and referred to the statement of Kirby P: "At least if on the face of the written agreement, the words appear ambiguous, the parties may call evidence to clear up the ambiguity."[31] No member of the Court of Appeal took up the wider approach of Mahoney JA or Priestley JA in *B & B Constructions*.

[165] In *Denham Bros Ltd v W Freestone Leasing Pty Ltd*,[32] Holmes JA in the Court of Appeal, with whom MacPherson JA agreed, said:

> "As to the proposition that extrinsic evidence should be considered, ambiguity or no, I do not think that Mahoney J.A.'s dalliance with a more flexible approach in *B & B Constructions* provides a solid footing for Mr Lilley's submission. True, Ipp A.J.A. in the *Brambles Holdings* case said that there was 'much to be said for this approach'; but he added that there was in that case no need to rely on what he acknowledged would be an 'extension of the established rule'. That established rule was set out by Heydon J.A. in his judgment in the same case, citing *Codelfa Construction Pty Ltd v. State Rail*

---

26 [2014] NSWCA 319, [86]-[91], [110]-[126].

27 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 152 [135].

28 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1981-1982) 149 CLR 337, 352.

29 (unreported, QCA, No 7 of 1995, 14 June 1996).

30 (1994) 35 NSWLR 227, 235.

31 (1994) 35 NSWLR 227, 235.

32 [2004] 1 Qd R 500.

> *Authority of NSW*: 'pre-contractual conduct is only admissible on questions of construction if the contract is ambiguous'. The early twentieth century English cases cited as exemplifying further inquiry hardly bear out an exception, arising on allegation of prejudice, to that rule." (footnotes omitted)

[166] And in *Boss v Hamilton Island Enterprises Limited*,[33] Fraser JA, with whom the other Judges agreed, proceeded on the basis that ambiguity was required.[34]

[167] There is also a careful recent exposition of the relevant principles in accordance with *Codelfa* by the Victorian Court of Appeal in *Retirement Services Australia (RSA) Pty Ltd v 3143 Victoria St Doncaster Pty Ltd*.[35] It is too lengthy to summarise without detracting from the clarity of the analysis.

[168] Accordingly, for present purposes, I proceed on the basis that I am bound by Mason J's statement of principle in *Codelfa* and not to follow *Mainteck* or cases which follow *Mainteck* to the extent of any inconsistency.

Ambiguity

[169] The plaintiffs submit that the defendant's case was confined to the meaning in the table of the words (and numerals):

…	**Schedule 2 reference**	**Description**
…	b(vi)	Extension of time cost claims
…	b(vii)	Other heads of claim

[170] In other words, the plaintiffs submit that the defendant should not be permitted to rely on the column headed "Item no" or the numbers in that column. I reject that approach as too narrow. Paragraphs 26 to 29 of the defence are not so confined.

[171] In my view, there is an obvious ambiguity in the table. The text of cl 2.2(b) provides that the things that are not resolved by the Deed of Termination are "the following **items from** the Contractor's claims identified in Schedule 1" (emphasis added). The items are what is not resolved. The column headed "Item No" refers to item numbers 3, 5, 6, 9, 10, 11 and 12. The numbers are not an apparently complete or continuous sequence. The plaintiffs submit that they are of no significance at all in identifying the claims not resolved by the Deed of Settlement.

[172] This contention should be assessed against the background that the plaintiffs' primary case is of an oral contract made principally on the terms of a draft written contract at the first meeting. The draft, however, was changed at the second meeting. The physical draft relied on by the plaintiffs was Mr Murchland's draft on which he made

---

33 [2010] 2 Qd R 115.

34 [2010] 2 Qd R 115, 141 [64].

35 (2012) 37 VR 486, 512-518 [86]-[113].

handwritten alterations at the first meeting. Mr Murchland's additions added item numbers 9, 10, 11 and 12 in the table. The final document contained those additions.

[173] Those additions were made by reference to the discussion at the first meeting. The discussion proceeded by reference to the writing on the white wall by Mr Williams and Mr Grayson. Both those gentlemen wrote on the white wall by reference to item numbers. The item numbers were listed in the first place by Mr Williams to the left of a column headed "Mediation Submission". Some of the item numbers had a dollar value given to them. Item No 6 did not. But I find that Mr Williams or Mr Grayson placed an arrow next to it and wrote "Expert" alongside the head of the arrow to signify it was going to the expert determination.

Surrounding circumstances

[174] The Expert Determination Agreement did not identify any such item numbers. As previously discussed, more numbered items did appear on the tracked changes version of the 5 November draft deed. The deletion of various items signified that they were to be included in the lump sum offer and were not to be excluded from the Settled Contractor's Claims by cl 2.2.[36]

[175] The origin of the item numbering came from the exchange of the parties' positions for the purposes of the mediation. Thus, a document produced by the defendant at the mediation was headed, in part, "Reconciliation Offer 2". It set out a table identifying the defendant's claims, including:

Deed reference Schedule 2	**Description**	**Total value of work**	**…**	**…**	**Amount to be conceded by Lucas**	**Amounts to Settle in Expert Determination**
…	…	…				
b(vii)	Other heads of claim (arising from clauses …)	$17,923,150.00				$17,923,150.00
…	…	...				

[176] A further document produced by the defendant at the mediation headed, in part, "Reconciliation Offer 3" described that item in a similar way, but added an "Item" column at the left hand side of the list and numbered the items sequentially starting from "1". The relevant item was numbered "6". The "Reconciliation Offer 3" document also added a column that the amount of the item to be settled at mediation

[36] An obvious drafting error in the 5 November draft deed was that it described the claims to be settled as "Preserved Contractor's Claims", but the intention that the items or claims in cl 2.1 were to be settled and those in cl 2.2 were to be not resolved or preserved was clear.

was $15,000,000 and deleted the entry in the column that the amount was to be settled in expert determination, as follows:

Item	**Deed reference - Schedule 2**	**Description**	**Total value of work**	**…**	**Additional amounts to be settled in mediation**	**…**	**Amounts to Settle in Expert Determination**
…	…	…	…	…	…	…	…
6	b(vii)	Other heads of claim (arising from clauses …)	$17,923,150.00		$15,000,000.00		
…	…	…	**...**	…	…	…	…

[177] A responsive document to the defendant's "Reconciliation Offer 3" document, produced for the plaintiffs at the mediation, described the item in a similar way. It gave the item the number "6" in the left hand "Item" column. It gave the "Deed Reference – Schedule 2" column description as "b(vii)". It omitted the "Total Value of Work" column and amount. But it included an amount of $15,000,000, as follows:

Item	**Deed reference - Schedule 2**	**Description**	**...**	…	…	…	…	…	…	…	**Difference**
…	…	…	…	**..**	…	…	…	…	…	…	…
6	b(vii)	Other heads of claim (arising from clauses …	…	…	…	…	…	…	…	…	$15,000,000
…	…	…	**...**	…	…	…	…	…	…	…	…

[178] This was the context when the plaintiffs produced the 5 November draft deed referring to Item No 6, as previously described.

[179] Further, as previously mentioned, Mr Grayson sent an email to Mr Williams on 13 November 2012. Mr Grayson said, on the one hand, that the email was in no way intended to become part of the offer or its documentation. However, in describing the

offer made by his letter of 5 November and the 5 November draft deed, he excluded item 6 from the column of what was included in the offer of $25,074,918.62. Item 6 appeared under the column headed "Proposed to remain for Expert Determination". That column had the amount of "$17,923,150.00" entered, which was among the amounts in that column stated to be "specified values per Peter Williams, 10 Nov 2012, are unrelated to the offer being made". The last reservation, as I read it, was intended to make it clear that those claimed amounts were not accepted. But there was no suggestion that the offer of 5 November was intended to resolve any of the amount claimed for item 6.

[180] In my view, the ambiguity in the table as to the item numbers allows the admission of evidence of the extrinsic facts set out above. In the light of those facts, it is clear that from the time of the Offer 2 document, the defendant introduced the potentially confusing and factually incorrect description of the item as "b(vii)" when the amount of the claim was plainly referable to the total of progress claim No. 12 and final progress claim No. 13 under the description "Other heads of claim…" To correctly describe the claims for those amounts, in accordance with Schedule 2 to the Deed of Termination, the "Deed Reference Schedule 2" column should have identified both "b(vii) and "(a)(ii)".

[181] The plaintiffs submit, and I accept, that the proper construction of the contract is to be "determined by what a reasonable business person would have understood those terms to mean".[37] So, for this purpose, it is not what Mr Grayson or Mr Murchland, or Mr Williams or Mr Campbell actually thought that matters. But the surrounding circumstances, background and context do permit the reasonable business person to know what has objectively passed between the parties.

[182] There can be a tension between the proposition that surrounding circumstances are admissible and the proposition that prior negotiations, in general, are not. Mason J in *Codelfa*, sad that "[o]bviously the prior negotiations will tend to establish objective background facts which were known to both parties and **the subject matter of the contract**" (emphasis added).[38] Guidance on the extent to which the prior negotiations may be looked at emerges, for example, from the materials considered by the High Court in *Royal Botanic Gardens*.[39] The plurality referred to correspondence passing between the parties well before the lease containing the provision to be construed was made, setting out the prior offers made, and took those dealings into account in concluding that the contention of one of the parties as to the meaning of the relevant provision of the lease was:

> "the way in which the arrangements between the parties had been agreed some twenty years before the execution of the deed… There is nothing to suggest that in the intervening period the parties had conducted themselves on any [other] basis...".[40]

[183] The plaintiffs submit that the defendant wishes to rely on its own confusion, or subjective state of mind, to produce latent ambiguity. I reject that submission. The reasonable business person who sat in the rooms on 16 November 2012 for the first

---

37 *Electricity Generation Corporation (trading as Verve Energy) v Woodside Energy Ltd* (2014) 251 CLR 640 [35].

38 (1981-1982) 149 CLR 337, 352.

39 (2002) 240 CLR 36, 55-60 [18]-[30].

40 (2002) 240 CLR 45, 62 [36].

and second meetings, aware of what had passed between the parties previously in trying to settle the relevant items, but without any consideration of their subjective beliefs, would have had no difficulty in appreciating that the reference in the table to "b(vii)" under the column headed "Schedule 2 reference" did not signify that Item No 6 was confined to the amount of the additional work claimed under the final payment claim No. 13. Further, in my view, this is not a true case of latent ambiguity. But it is not necessary to consider that argument further.

[184] Can the item be construed as the defendant contends? The defendant submits that the Court ought declare that on the proper construction of the Deed of Settlement "a reference to 2(b)(vi) or 2(b)(vii) is a reference to those clauses simpliciter and not [to] the chapeau to clause 2(b) of Schedule 2 to the Deed of Termination".

[185] The plaintiffs submit that the defendant's claim and submission imposes on the Deed of Termination a construction which involves robbing the opening words of cl (b) in Schedule 2 of meaning of effect.

[186] In my view, the declaration sought does not address the precise question of construction which should be answered. The dispute is about the operation of the entry in the table of the relevant "item from the Contractor's Claims identified in Schedule 1". More particularly, it is about the meaning of the entry "b(vii)" in the column headed "Schedule 2 reference". The precise question is whether the effect of the reference "b(vii)" is to identify the item as limited to the claim for the value of additional work from payment claim No. 12 made in final payment claim No.13 for "Other heads of claim".

[187] In my view, the answer to that question is "no". The declaration sought does not precisely answer that question. The declaration to be made should do no more than that. In my view, the declaration should be that Item No 6 in the table is not limited to the claim for the value of $177,362 made in final payment claim No 13 for "Other heads of claim" and extends to the value of $17,923,150 for "Other heads of claim" made in payment claim No. 12 and final payment claim No. 13.

[188] The same reasoning I have applied to the proper construction of Item No 6 of the Deed of Settlement applies, *mutatis mutandis*, to Item No 5. It should also be declared that Item No 5 in the table is not limited to the claim for the value of additional work from payment claim No. 12 made in final payment claim No. 13.

[189] I decline to make any wider declaration as to the operation of the chapeau. In particular, it seems to me that the construction questions on this case are not about, and never were properly about, the meaning and operation of Schedule 2 to the Deed of Termination in any general way. They are only about the meaning of and, therefore, the scope of the subject matter of, the relevant items in the table under cl 2.2(b) of the Deed of Settlement.

Rectification

[190] Because of the findings I have made as to the proper construction of Item No 5 and the proper construction of Item No 6, it is unnecessary to consider the defendant's alternative claim for rectification of the Deed of Settlement.

[191] Against the possibility that I have erred on the questions of construction, I make the following further findings.

[192] There was in fact no confusion between the parties as to the subject matter of Item No 6. In their email exchanges in the days before 16 November 2012, by Mr Grayson on behalf of the plaintiffs and Mr Williams on behalf of the defendant, both parties proceeded on the footing that Item No 6 was the total value amount claimed under that description in final progress claim No 13, namely $17,923,150.

[193] I find that, at the time of making the Deed of Settlement, there was no awareness on the part of the plaintiffs, whether by Mr Grayson or anyone else, that the entry "b(vii)" in the column of the table headed "Schedule 2 reference" for Item No 6 might have the effect that the item on its ordinary meaning, or its proper construction, was limited to the claim for the value of additional work from payment claim No. 12 made in final payment claim No. 13 for "Other heads of claim", namely $177,362.

[194] I find that, at the time of making the Deed of Settlement, there was no awareness on the part of the defendant, whether by Mr Williams or anyone else, that the entry "b(vi)" in the column of the table headed "Schedule 2 reference" for Item No 6 might have the effect that the item on its ordinary meaning, or its proper construction, was limited to the claim for the value of additional work from payment claim No 12 made in final payment claim No 13 for "Other heads of claim".

[195] If Item No 6 had that ordinary meaning, or that meaning on its proper construction, both parties were to that extent mistaken about it at the time of entering into the Deed of Settlement.

[196] The same findings should be made, *mutatis mutandis*, about Item No 5.

[197] The defendant submits that the parties "were treating items 5 and 6 not as references to only the amounts claimed for these items in the final payment claim". I take that submission to mean not as references to only the additional amounts in final payment claim No 13 over and above the total amount claimed in payment claim No 12.

[198] The defendant alleges in the defence that the parties shared the "common intention… that [the] reference… [to b(vi)]… was a reference to the [d]efendant's combined payment claims # 12 and # 13 and not just a reference to payment claim 13". This allegation is imprecise, but captures the substance of an allegation that the parties shared that common intention about Item No 5 and Item No 6 in the table.

[199] In my view, they did share that common intention.

Conclusions

[200] The plaintiffs are entitled on the claim to a declaration that on 16 November 2012 the parties made a contract on the terms of the Deed of Settlement.

[201] The defendant is entitled on the counterclaim to declarations that neither Item 5 nor Item No 6 in the table is limited to a claim for the value of the additional amount claimed in final payment claim No. 13 and that the item extends to the total value of the amounts claimed in payment claim No. 12 and final payment claim No. 13 relating to that item.

[202] I will hear the parties on costs.