SUPREME COURT OF QUEENSLAND

CITATION:	*Monadelphous Engineering Pty Ltd & Muhibbah Construction Pty Ltd trading as Monadelphous Muhibbah Marine v Wiggins Island Coal Export Terminal Pty Ltd* [2015] QSC 160
PARTIES:	**MONADELPHOUS ENGINEERING PTY LTD & MUHIBBAH CONSTRUCTION PTY LTD TRADING AS MONADELPHOUS MUHIBBAH MARINE** ABN 76 609 605 632 (plaintiffs) **v** **WIGGINS ISLAND COAL EXPORT TERMINAL PTY LIMITED** ABN 20 131 210 038 (defendant)
FILE NO/S:	SC No 12118 of 2014
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	16 March 2015; 17 March 2015
JUDGE:	Philip McMurdo J
ORDER:	**The plaintiffs' claim is dismissed.**
CATCHWORDS:	CONTRACTS – BUILDING ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – SECURITY AND RETENTION FUNDS – where the defendant contracted the plaintiffs' firm to perform construction work under several contracts in relation to the construction of a coal export terminal – dispute over whether the defendant was entitled to call upon four bank guarantees provided by the plaintiff as security for its performance, amounting to 10 per cent of the contract price – where the defendant called upon the guarantees, claiming it was entitlement damages for the plaintiffs' delay in performance – where the contract entitled the defendant to have recourse to the securities where the defendant had a bona fide claim against the plaintiff – where the plaintiffs claimed that the terms of the contract were qualified by s 67K of the *Queensland Building and Construction Commission Act* 1991

(Qld) which limited the retention amounts and securities for a builder's performance to 5 per cent of the contract price and and s 67J, which provided a contracting party may only use a security to obtain an amount owed where it has given written notice to the contracted party – whether the contract was a "building contract" within the meaning of s 67J and 67K – a building contract is a contract *for* carrying out building work – whether items of work fell within excluded items in s 5 and Sch 1AA of the Regulation – where the plaintiff failed to establish that work in respect of items pleaded was for "building work" – contract was not a "building contract" for the purpose of the Act

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – PARTICULAR WORDS AND PHRASES – whether the contract between the defendant and plaintiffs was a "building contract" within the meaning of s 67J and 67K of the *Queensland Building and Construction Commission Act* 1991 (Qld) or its predecessor – onus on the plaintiff to prove the contract was a building contract – a building contract is a contract *for* carrying out building work – whether items of work fell within excluded items in s 5 and Sch 1AA of the Regulation – the approach to characterisation of relevant works with a "broad and practical interpretation" of the items within the Regulation without it being necessary that the work be precisely described by the item – contract was not a "building contract" for the purpose of the Act

Peter Butt, *Land Law* (Lawbook, 6th ed, 2010)

Queensland Building and Construction Commission Act 1991 (Qld), s 67AAA, s 67K, s 67J, Sch 2
Queensland Building and Construction Commission Regulation 2003 (Qld), s 5, Sch 1AA
Queensland Building Services Authority Act 1991 (Qld)
Queensland Building Services Authority Regulation 2003 (Qld)

Australian Provincial Assurance Co Ltd v Coroneo (1938) 38 SR (NSW) 700, cited
J & D Rigging Pty Ltd v Agripower Australia Ltd [2013] QCA 406, cited
Monadelphous Engineering Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd [2014] QCA 330, applied
Morton Engineering Company Pty Ltd v Stork Wescon Australia Pty Ltd (1998) 15 BCL 192, considered
Ooralea Developments Pty Ltd v Civil Contractors (Aust) Pty Ltd [2013] QSC 254, cited
Stork Wescon Australia Pty Ltd v Morton Engineering Company Pty Ltd (1999) 15 BCL 278, considered

TEC Desert Pty Ltd v Commissioner of State Revenue (WA) (2010) 241 CLR 576, cited

COUNSEL: T Matthews QC, with G Beacham for the plaintiffs/applicants
A C Crowe QC, with P W Telford for the defendant/respondent

SOLICITORS: CDI Lawyers for the plaintiffs/applicants
Minter Ellison for the defendant/respondent

[1] At the Port of Gladstone, a coal export terminal is being constructed for the defendant, Wiggins Island Coal Export Terminal Pty Ltd and which I will call WICET. The plaintiffs' firm, which I will call MMM, contracted to perform some of that construction under several contracts with WICET including that which is the subject of this case. It is described as "GC12 Offshore Marine Works: Approach Jetty and Ship Berth" and was made in December 2011. I will call it the Contract. It has a total value of about $327 million.

[2] Pursuant to the terms of the Contract, MMM provided four bank guarantees as security for its performance in amounts totalling $32,929,687.72. That total was about 10 per cent of the contract price. By cl 5.5 of the General Conditions of Contract, WICET was entitled to have recourse to those securities in circumstances which included where WICET had a bona fide claim against MMM whether for damages or otherwise.

[3] On 17 December last, WICET called upon all four guarantees and received payment from the guarantors in full. It claims to be entitled to damages from MMM on account of MMM's delay in performance.

[4] MMM agrees that according to cl 5.5, WICET was entitled to call upon the guarantees. But it says that the terms of the Contract were necessarily qualified by the *Queensland Building and Construction Commission Act* 1991 (Qld) ("the Act") in two ways.

The legislation

[5] The first limitation is imposed by s 67K of the Act, which limits retention amounts and securities for a builder's performance to 5 per cent of the contract price. In this case, the total of the four guarantees was about 10 per cent of the contract price. Section 67K is as follows:

> "67K Limits for retention amounts and securities for building contracts other than subcontracts
>
> (1) This section applies to a building contract if the contracting party under the contract is a principal or a special purpose vehicle.
>
> (2) The building contract is subject to a condition that at any time before, under the contract, practical completion of building work is reached, the total value of the following is to be not more than 5% of the contract price for the contract—

(a) all retention amounts for the contract that are being withheld;

(b) all securities for the contract given and still held.

(3) Subsection (2) does not apply to retention amounts or securities to the extent that the retention amounts or securities are for the financial protection of the contracting party, having regard to amounts paid by the contracting party that relate to something that has not yet been installed in accordance with the requirements of the contract.

(4) The building contract is not subject to the condition mentioned in subsection (2) if—

(a) the contract—

(i) is in writing; and

(ii) explains the condition; and

(iii) expressly provides that the contract is not subject to the condition; and

(b) the provision of the contract that expressly provides in the way mentioned in paragraph (a)(iii) is initialled by the parties to the contract."

[6] The second limitation is the restriction imposed upon enforcement of performance guarantees under a building contract by s 67J of the Act, which provides:

"(1) The contracting party for a building contract may use a security or retention amount, in whole or in part, to obtain an amount owed under the contract, only if the contracting party has given notice in writing to the contracted party advising of the proposed use and of the amount owed.

(2) The notice must be given within 28 days after the contracting party becomes aware, or ought reasonably to have become aware, of the contracting party's right to obtain the amount owed."

If this is a "building contract", then WICET is "the contracting party" and MMM was the "contracted party". It is accepted that if s 67J applied, WICET did not give a notice to MMM according to s 67J(1).

[7] MMM seeks relief to the effect that the total which was paid under the four guarantees to WICET be paid by WICET to MMM, albeit on condition that new guarantees, but amounting to no more than five per cent of the Contract price, be provided to WICET.

[8] WICET disputes the application of s 67J and s 67K to the Contract, arguing that at no time has the Contract been "a building contract" within those provisions. The outcome of this case depends upon whether that contention is correct. It is for MMM, as the plaintiff, to prove that the Contract is a building contract in the relevant sense.

[9] When the Contract was made, the Act was differently named. It was then called the *Queensland Building Services Authority Act* 1991 (Qld). I will discuss the legislation as it was in December 2014 (and is).[1] With one exception the relevant provisions of the Act and the *Queensland Building and Construction Commission Regulation* 2003 (Qld) ("the Regulation") are identical to those of the *Queensland Building Services Authority Act* 1991 and the *Queensland Building Services Authority Regulation* 2003 which were in operation when the Contract was made.

[10] The term "building contract" is defined relevantly by s 67AAA as follows:

> "(1) For this part, a *building contract* means a contract or other arrangement for carrying out building work in Queensland but does not include—
>
> (a) a domestic building contract; or
>
> (b) a contract exclusively for construction work that is not building work.
>
> (2) In this section—
>
> *construction work* see the *Building and Construction Industry Payments Act 2004*, section 10."

[11] The term "building work" is defined in Sch 2 of the Act as follows:

> "*building work* means—
>
> (a) the erection or construction of a building; or
>
> (b) the renovation, alteration, extension, improvement or repair of a building; or
>
> (c) the provision of lighting, heating, ventilation, airconditioning, water supply, sewerage or drainage in connection with a building; or
>
> …
>
> but does not include work of a kind excluded by regulation from the ambit of this definition."

[12] The term "building" is defined in Sch 2 of the Act relevantly as follows:

> "*building* includes any fixed structure.
>
> *Examples of a fixed structure—*
>
> - a fence other than a temporary fence
> - a water tank connected to the stormwater system for a building
> - an inground swimming pool or an aboveground pool fixed to the ground"

[13] Section 5 of the Regulation provides as follows:

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[1] *Queensland Building and Construction Commission Act* 1991 (Qld).

> "5 Work that is not building work
>
> (1) For the Act, schedule 2, definition building work, work stated in schedule 1AA is not building work.
>
> (2) To remove any doubt, it is declared that subsection (1) does not cease to apply to any work stated in schedule 1AA merely because the work is carried out in combination with other work stated in schedule 1AA."

[14] Schedule 1AA of the Regulation sets out more than 50 exclusions. Those which are presently relevant, because they are relied upon by WICET, are the following items:

> "11 Work for a water reticulation system, sewerage system or stormwater drain
>
> (1) Construction, extension, repair or replacement of a water reticulation system, sewerage system or stormwater drain, other than works connecting a particular building to a main of the system or drain.
>
> (2) … *building* includes a proposed building.
>
> …
>
> 19 Work on harbours, wharfs and other maritime structures
>
> Construction, maintenance or repair of harbours, wharfs and other maritime structures, unless the structures are buildings for residential purposes, or are storage or service facilities.
>
> 20 Electrical Work
>
> Electrical work under the *Electrical Safety Act 2002*.
>
> …
>
> 32 Earthmoving and excavating
>
> Work consisting of earthmoving and excavating."

However, when the Contract was entered into and relevant work was performed, the exclusion in item 11 was as follows:

> "… construction, extension, repair or replacement of a water reticulation system, sewerage system or stormwater drain, *outside the boundaries of private property*." (emphasis added)

All of the relevant work was upon land which was private property.

[15] As its title suggests, the Contract provided for the construction of a jetty and a ship berth (or wharf) at the end of that jetty. MMM accepts that the construction of the jetty and the wharf would be within the exclusion in item 19 of Sch 1AA, because the structures are "wharfs and other maritime structures". But as is common ground, a "building contract" may be one in which only some of the work required is "building work". MMM's case

is that the Contract, either by its original terms or as it came to be by variations, required it to undertake other work which was not of a kind excluded by any of the items in Sch 1AA. Each of these items will be discussed below. But they are all of a kind which could be described as "temporary", in the sense that they were not things to be erected, installed or repaired for some purpose enduring beyond the performance of the Contract. For example, they include the temporary site offices of MMM, which it was to erect but also remove (as it has done).

Interpretation of the legislation

[16] The interpretation of the relevant provisions of the Act and the Regulation is already the subject of a judgment of the Court of Appeal in a related case between these parties.[2] In that case, MMM sought an interlocutory injunction to restrain WICET from calling upon the guarantees under the Contract as well as other guarantees under another contract between the parties which was called the PE95 Contract. MMM was refused any relief at first instance and its appeal was dismissed. The Court of Appeal held that MMM had no serious question to be tried in respect of the guarantees under the PE95 Contract, because all of the work which the Contract required of MMM was within the exclusion in item 19. As to the (presently relevant) Contract, the court held that an interlocutory injunction should be refused because that was favoured by the balance of convenience. In particular, MMM's complaint of likely reputational damage from the calling of bank guarantees could not ground an injunction in respect of the Contract when WICET, unrestrained by an injunction, could and would call the guarantees under the PE95 Contract.

[17] The judgment of the Court of Appeal thereby left open the question of whether the Contract is a "building contract" under the Act. But the analysis of the relevant statutory provisions by Fraser JA (with whom Muir and Morrison JJA agreed) is instructive and in some respects, where it was essential to the outcome, is binding.

[18] The PE95 Contract described itself as being for "all works associated with … onsite installation/hook-up and completion of commissioning for Shiploader SL1 and its towed tripper". This shiploader was to be located on the site of the subject wharf. Fraser JA said that the shiploader was something which was within item 19 because:

> "[20] The location of the shiploader on a rail on the side of the wharf adjacent to the water and its function compel the conclusions that it is or forms part of a 'maritime structure' within the meaning of item 19 …"

He further held that the shiploader was not a "service facility" for the purposes of item 19 because the shiploader "has the same function and may even be regarded as being a part of the wharf upon which it moves on fixed rails" and the meaning of "service facilities" in item 19 could not be such as to exclude a wharf itself.[3] Fraser JA also found that it was also "…equipment for hoisting, conveying or transporting materials …" within the meaning of the exclusion in item 27.[4]

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2 *Monadelphous Engineering Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2014] QCA 330.
3 [2014] QCA 330, 9-10 [21].
4 Ibid 9 [20].

[19] But MMM argued that certain terms of the PE95 Contract required other work to be performed which were outside those exclusions.

[20] Fraser JA referred to an argument, which is effectively repeated here by WICET, that all of the work under the two contracts was within item 19 simply because it was part of what is described as stage 1 of the WICET development which "might itself constitute a 'maritime structure', namely a coal export port".[5] Fraser JA did not accept that argument, at least as a basis for concluding that MMM lacked a serious case to be tried.[6]

[21] His Honour also rejected an approach under which item 19 would be treated "as comprehending all work which is directly or indirectly required to produce the shiploader", because "the statutory criterion is not whether the relevant work is directly or indirectly necessary for the production of a structure described in an item".[7] Rather, his Honour said, "it is whether the work is of a *kind* stated in the item" (my emphasis).[8] Earlier in his judgment, he observed that:[9]

> "[I]f the relevant work is 'of a kind' described in an item it is outside the definition of 'building work'. It is therefore not necessary that the work be precisely described by the item"

and that this required "the work to fall within a broad and practical interpretation of the item".[10]

[22] Fraser JA then discussed the particular works which were required by the PE95 Contract and which MMM argued were outside any relevant exclusion. The first was the requirement of cl 2.13 of the PE95 Contract by which MMM was to "be responsible for the engineering design, supply and installation of the necessary temporary services and structures to enable the specified commissioning works to be completed at [MMM's] preassembly yard", including "but not necessarily be limited to … [p]ower supply … [w]ater supply …". Fraser JA said that these commissioning works were "an integral aspect of the work of constructing the shiploader [and that] [m]ore generally, the 'temporary' character of any services and structures required by this clause points to the closeness of the relationship between the work upon those services and structures and the creation of the shiploader".[11] He therefore held that the work required by cl 2.13 of the PE95 Contract was "of a kind" described in item 19 as the construction of the maritime structure.

[23] Next Fraser JA considered the work required by cl 2.1(b) of the PE95 Contract, which referred to "Site establishment and disestablishment including provision of construction offices, facilities, plant and equipment (both onsite and at [MMM's] preassembly yard) including temporary fencing as required for [MMM's] security". That work was characterised by his Honour as follows:[12]

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5 Ibid 10 [22].
6 Ibid.
7 Ibid 10 [23].
8 Ibid.
9 Ibid 9 [18].
10 Ibid 10 [23].
11 Ibid 10-11 [24].
12 Ibid 11 [26].

> "This work seems a further step removed from the direct work of constructing the shiploader, but the temporary character of any structure produced by the work is again apparent. For the reasons given in relation to cl 2.13 and also bearing in mind the necessity to adopt a liberal and practical interpretation of item 19, this work is within, albeit nearer the outer bounds of, work of a kind described in that item as construction of a maritime structure."

[24] Clause 2.1(f) of that contract referred to "Design, supply, installation and subsequent removal of any temporary works required, including, for instance, hardstand or temporary access to the erection site and temporary structures and supports as necessary to complete the Works". Fraser JA said that the erection of "temporary structures and supports" seemed "an integral aspect of the construction of the shiploader".[13] He said that, "[i]n that and other respects the emphasis upon the temporary nature of the works again points to the closeness of the relationship between this work and the creation of the shiploader. This is also work of a kind described in item 19".[14]

[25] Then there was cl 2.1(p), which referred to "[a]ll other works necessary to complete the Works as described in the Contract documents whether or not detailed in this Scope of Work", of which Fraser JA said:[15]

> "Nothing appears to exclude this from the work of constructing the shiploader".

[26] He summarised his conclusions as to these items of work as follows:[16]

> "[T]he PE95 Contract is exclusively for 'all works associated with … onsite installation/hook-up and completion of commissioning for Shiploader SL1 and its towed tripper', a description of works of a kind which is excluded from the definition of 'building work' by item 19 of Sch 1AA in the Regulation."

[27] His Honour then considered another question, which was whether the work required by any of the provisions upon which MMM relied was "building work", even without the application of an exclusion within the Regulation. His Honour said:

> "[30] I would add that it is open to question whether any of the contractual provisions upon which MMM relied describe work which is 'building work' within the meaning of the relevant paragraphs of the definition of that term. 'Building work' described in paragraph (a) is necessary if the work described in paragraphs (c) and (e) is to be characterised as such work. The definition of 'building', upon which the relevant aspect of the scope of paragraph (a) appears to hinge in this case, gives as examples of a 'fixed structure' a fence 'other than a temporary fence', a 'water tank connected to the stormwater system for a building', and an 'inground swimming pool or an aboveground pool fixed to the ground'. The examples and the text of the definition 'are to be read in the context of each other and the other provisions of the Act, but, if the example and the provision so read are inconsistent, the

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[13] Ibid 11 [27].
[14] Ibid.
[15] Ibid 11 [28].
[16] Ibid 11 [29].

> provision prevails'.[17] There is no such inconsistency here. For that reason, the use of the example to select the intended meaning of 'fixed structure' from amongst the available meanings does not contravene the provision in s 14D(b) of the *Acts Interpretation Act* that an example 'does not limit, but may extend, the meaning of the provision'. Consistently with the ordinary meaning of 'fixed structure' and with what one would expect in an Act regulating the building industry, the examples suggest that the product of construction work is not within paragraph (a) of the definition of 'building work' if it is not fixed to the soil in such a way as to require it to be treated as part of the land rather than as a chattel. The requisite degree of fixation must depend upon the circumstances revealed by the evidence, but the expression 'fixed structure' in this context may not comprehend works to facilitate and to endure only during the construction of a building, which are designed and constructed in such a way as to be readily removed upon completion of the building, and which a building contract requires the contractor to remove upon completion of the building.[18] That seems to describe all of the work required by the clauses upon which MMM relied. However, as this point was not the subject of detailed argument, I refrain from expressing a final conclusion upon it."

[28] Fraser JA then discussed the arguments for MMM (which are largely repeated here) that certain works required by the (presently relevant) Contract were outside any exclusion in the Regulation. He noted that many of the works were very similar to those which he had rejected as "building work" in the PE95 Contract. But in the case of the Contract, MMM had adduced more extensive evidence in support of its arguments. Therefore, Fraser JA was unable to conclude that MMM had no serious question to be tried in respect of the Contract. He said:

> "[36] … Some of the buildings are described as being temporary ('temporary office and amenities buildings (including meeting room, training room, crib facilities, kitchen and toilets)'), but some may not necessarily be in that category (for example, 'workshop area', 'generators', 'drinking water tanks', 'sewerage tanks', and 'storage area'). The effect of Mr Meulman's evidence is that all of this work was specified as part of the scope of work under the GC12 Contract. At least some of the structures depicted on the photograph appear to be both substantial and a considerable distance from the waterline.
>
> [37] At a trial the evidence might suggest that the whole of this export coal terminal, or at least the whole of the work within the GC12 Contract, should be treated as a single 'maritime structure', just as a single 'harbour' may comprise a variety of different works, some in the sea and some on land above high water mark. At this interlocutory stage, however, the evidence drawn to the Court's attention reveals an arguable case that the GC12 Contract required

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[17] *Acts Interpretation Act* 1954 (Qld) s 14D(c).

[18] Compare Derrington J's statement in *Morton Engineering Co Pty Ltd v Stork Wescon Australia Pty Ltd* (1999) 15 BCL 192 at 195 that "any fixed structure" may include "any structure that is fixed, even if only temporarily". The definition construed in that case did not include the examples which appear in the current definition.

> MMM to construct fixed structures which are physically and functionally quite distinct from the wharf, jetty, shiploader, and other works which comprise the relevant maritime structure or structures within item 19 and the equipment described in item 27. That being so, it is arguable that some of the work required by this contract falls within one of the paragraphs in the definition of 'building work' and is not within either of the items in Sch 1AA upon which WICET relied as excluding the work from that definition."

[29] From this judgment, I should approach the task of the characterisation of the relevant works with what Fraser JA described as "a broad and practical interpretation of the item [within the Regulation]" and without it being necessary "that the work be precisely described by the item". I should consider the closeness or otherwise of the relationship between the works relied upon and the construction of the jetty and the wharf. And the "temporary" character of the services or structures required by the works will indicate the closeness of that relationship.

[30] In the alternative analysis considered by Fraser JA (set out at [27] above) he suggested that that the definition of "building", which is critical to the definition of "building work" and in turn that of "building contract", may require the construction of something which is so affixed to the land that it would be considered to be part of the land, rather than a chattel. The expression "fixed structure" in the definition of "building" is undefined. And there is no definition of "structure". There is, with respect, force in the view, which is fortified by the examples of a "fixed structure", that it is limited to something which is so affixed to the land that it becomes part of the land. However, counsel for the plaintiff relied upon the judgment of Derrington J, at first instance, in *Morton Engineering Company Pty Ltd v Stork Wescon Australia Pty Ltd* ,[19] where his Honour suggested that "any fixed structure" in this context might include "any structure that is fixed, even if only temporarily" and that "the ordinary meaning of that expression according to the dictionaries should not be trammelled by any special principles and connotation that have come to be associated with the expression, 'fixtures'". His Honour's remarks were not essential to his reasoning and the point did not arise upon an unsuccessful appeal from that judgment.[20] It may be noted that in that case, the finding was that the relevant structure was a "very substantial structure" and that there was "no evidence of any intention to move it".

[31] The submissions for WICET emphasised the "temporary" nature of the works upon which MMM's case relies. In my view, there is a way in which the temporary nature of the subject works is important, which is not dependent upon something being a fixture or upon the operation of Sch 1AA of the Regulation. A "building contract" is a contract *for* carrying out building work. Relevantly here, it is a contract *for* the construction of a fixed structure. The word "for" is used to identify the object or purpose of the contract as performed. A building contract is a contract which, as appears from its terms and with an understanding of the relevant facts and circumstances, is a contract intended to result in a fixed structure from a concluded performance of that contract. In the present case, the Contract was a contract for the construction of a fixed structure or structures, being the jetty and the wharf. They were structures which were the agreed result of the builder's performance of the Contract. But something which was built only to facilitate the

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[19] (1998) 15 BCL 192, 195.

[20] *Stork Wescon Australia Pty Ltd v Moreton Engineering Company Pty Ltd* (1999) 15 BCL 278.

construction of the jetty and wharf, rather than as something to have a use after the performance of the contract, is different. I cannot accept that such a "temporary" structure in this sense could be a "building" in the relevant respect. It would, in my view, be incorrect to describe a contract, which requires the construction of a temporary site office, as a contract "for" carrying out the construction of that office. WICET argues that all of the items of work upon which MMM relies are of this "temporary" kind. If that is correct in fact, then MMM's claim should fail.

The items of work

[32] I go then to the evidence about the items of work upon which MMM relies as constituting building work. For MMM that evidence was given by Mr Meulman and for WICET it was given by Mr Liddle and Mr Mulvaney. The relevant items of work are described in paragraphs 9(a) and 9(b) of the amended statement of claim.

[33] The relevant terms of the Contract, as it was originally made, were as follows. In part 2.1 of Section D - Scope of Work, it was agreed that MMM as the Contractor should make allowance for:

> "…
>
> b) Site establishment and disestablishment including provision of construction offices, facilities, plant and equipment including temporary fencing as required for the Contractor's security on site and in their offsite construction area.
>
> c) Provision of temporary electricity, water, data and telephonic communications during execution of Works onsite.
>
> …
>
> f) Supply, installation and subsequent removal of any temporary works required, including for instance hardstand or temporary access to the erection site and temporary structures and supports as necessary to complete the Works."

Clause 1.2 of the special conditions of contract F10 - Site Conditions & Requirements provided:

> "The Principal [WICET] will provide areas for the Contractor to establish its office, first aid room, amenities, workshop, store etc. and laydown facilities. … Improvements for all-weather traffic as necessary to suit the Contractor's use of the areas shall be the responsibility of the Contractor.
>
> All temporary buildings and facilities the Contractor provides for its own purposes shall be subject to the approval of the Principal's Representative and, where applicable, Statutory Authorities. Adequate provision should be made to secure all temporary buildings to prevent damage during periods of high winds and cyclonic conditions.

> Within two weeks of the issue of the Certificate of Practice Completion the Contractor shall remove all temporary buildings and facilities and restore the areas to their original condition.
>
> The Principal will not provide hardstand or compacted areas. The Contractor shall upgrade Principal supplied areas so as to be suitable for their intended purpose."

[34] The first group of these items are the subject of particulars (i), (ii) and (ix) of para 9(a) as follows:

> "(i) installed concrete footings temporary office and amenities building, along with slabs for walkways, outdoor meeting areas and workshop areas situated approximately 150 metres west of the ramp leading to the construction barge wharf ("the CBW");
>
> (ii) installed temporary offices, meeting room, crib facilities, kitchen, toilets, and other amenities at MMM's site office facility located in the laydown area situated approximately 150 metres west of the ramp leading to the CBW;
>
> …
>
> (ix) constructed roof structures between office, crib buildings and roof structures."

[35] MMM installed "office and amenities buildings" for the performance of the Contract in an area described as Area 14. Mr Liddle said that everything in Area 14 was a temporary facility of the kind referred to in part 2.1 of the Scope of Work. All of the "office and amenities buildings" referred to in subparagraph (i) have now been removed. They were demountable facilities in that they were designed in a way that would allow them to be removed from the site without destroying them. None of that evidence was challenged. He also said that these buildings were not used by anyone but MMM's personnel and their subcontractors. In cross-examination he agreed that they were also used by WICET personnel, including himself. That fact is inconsequential. In his oral evidence, he agreed that these buildings were supported by steel supports coming from bored concrete piers and that they were installed in a way which allowed them to withstand cyclonic winds as the contract required. As part of the removal of the buildings, the concrete footings have been removed. He agreed that there was "no particular technical maritime purpose to those buildings".[21] Nor was there any "particularly obvious maritime construction technique or method used in their construction".[22]

[36] Mr Liddle said that the "slabs for walkways, outdoor meeting areas and workshop areas were associated with the 'office and amenities buildings' and were also all temporary". Their function was to facilitate the use of Area 14 by MMM's personnel and MMM has now removed them.

[37] As for subparagraph (ii) of para 9(a), again these were all items which were installed within Area 14 and they were all temporary. Their function was to facilitate the use of

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[21] T 1-27.
[22] T 1-28.

Area 14 by MMM's personnel and to provide MMM with the office facilities which it required to perform the Contract. MMM has now removed them.

[38] The structures in subparagraph (ix), Mr Liddle said, were components of temporary facilities in Area 14. Again, they have been removed by MMM.

[39] It is far from clear whether these items in (i), (ii) and (ix) became fixtures. For the most part they were affixed to the land rather than simply resting on their own weight, which would raise a rebuttable presumption that they were fixtures.[23] That presumption may be rebutted by reference to the affixer's intention, which is to be ascertained by reference to all of the surrounding circumstances including the degree of annexation, what is to be done with the item and the function to be served by the annexation.[24] In *Australian Provincial Assurance Co Ltd v Coroneo*,[25] Jordan CJ, in a much cited passage,[26] said:

> "The test of whether a chattel which has been to some extent fixed to land is a fixture is whether it has been fixed with the intention that it shall remain in position permanently or for an indefinite or substantial period: *Holland v Hodgson*, or whether it has been fixed with the intent that it shall remain in position only for some temporary purpose: *Vaudeville Electric Cinema Ltd v Muriset*. In the former case, it is a fixture, whether it has been fixed for the better enjoyment of the land or building, or fixed merely to steady the thing itself, for the better use or enjoyment of the thing fixed … If it is proved to have been fixed merely for a temporary purpose it is not a fixture … The intention of the person fixing it must be gathered from the purpose for which and the time during which user in the fixed position is contemplated."
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> (footnotes omitted)

Should it matter, in my view I would hold that none of the items within (i), (ii) and (ix) became fixtures, essentially because the affixation of them was intended to be temporary. On the alternative argument suggested by Fraser JA that would put paid to MMM's case about these items. However, I would prefer to base the same conclusion upon my reasoning above at [31]. Alternatively, I would hold that the temporary character of these works confirms the close relationship between the work in the installation of these items and the construction of the jetty and wharf so that they would be work "of a kind" described in item 19 of Sch 1AA.

[40] The work the subject of subparagraph (vii), described as the supply and installation of "a standpipe to draw water supply from the stormwater treatment pond" was required for the supply of water for earthworks to an area called the Rec B Area. Earthworks were required there in order to make the area suitable for the storage of MMM's machines, equipment, materials and other items used in performing the Contract. Those items have now been removed and the area is vacant. The area serves no function and the standpipe is no longer being used. According to my reasoning at para [31], the agreement for this item could not make the Contract a building contract. Alternatively and having regard

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[23] Peter Butt, *Land Law* (Lawbook, 6th ed, 2010) 42-43 [3 04] and the cases there cited at n14.
[24] Ibid 42-43 [3 09].
[25] (1938) 38 SR (NSW) 700, 712-713.
[26] See in particular *TEC Desert Pty Ltd v Commissioner of State Revenue (WA)* (2010) 241 CLR 576, 590 [38]; *J & D Rigging Pty Ltd v Agripower Australia Ltd & Ors* [2013] QCA 406, 7 [15].

particularly to its temporary nature, it was so closely associated with the construction of the jetty and wharf as to be within item 19.

[41] The work the subject of subparagraph (viii) is described as the construction of "crew transfer pontoons at the CBW". The pleading uses the shorthand CBW to describe the construction barge wharf, which was a temporary wharf to be used by MMM and other contractors solely for the performance of works for the first stage of the Terminal, including in MMM's case, the performance of the works under the Contract. According to Mr Meulman, the CBW contained a "roll on roll off" facility, which facilitated the transfer of materials, plant and equipment from the land to barges transporting to and servicing the offshore wharf work area and from barges to the land for storage of those items. A further component was a crane runway, again to facilitate the transfer of materials, plant and equipment between the land and vessels. The third and remaining component of the CBW were the crew transfer pontoons, which Mr Meulman said were very similar to those found in the Brisbane River for passenger ferries which facilitated the movement of construction personnel to and from the shore. The construction of transfer pontoons at the CBW, the subject of subparagraph (viii), is plainly of a kind which is the construction of a maritime structure. But MMM argues that these pontoons were "service facilities" and are thereby excluded from item 19.

[42] The pontoons were part of the construction barge wharf. As Fraser JA held, the term "service facility" in item 19 could not be construed in a way which effectively excluded from item 19 a wharf itself.[27] I conclude that these pontoons were of a kind within item 19.

[43] The work described in subparagraph (x) was at Fisherman's Landing. This is located approximately six kilometres from the CBW.[28] It was not originally intended to form part of MMM's construction methodology. But in September 2012, WICET directed MMM to establish and install amenities buildings at Fisherman's Landing. The offices and amenities buildings were of a similar construction to those used in MMM's site facility and Mr Meulman described them as "temporary buildings".[29] The work included the installation of sewerage and water tanks and a power generator for those buildings. The amenities buildings have since been removed. Mr Liddle's uncontested evidence was that these facilities at Fisherman's Landing were established because of delays in the installation of the CBW. These buildings and other structures at Fisherman's Landing are indistinguishable from the work described in subparagraph (i). For the same reasons, they would not make the Contract a "building contract".

[44] The work described in subparagraph (xi) as "the roll, compaction and trim of the laydown area" was the result of a variation from a site instruction to MMM in March 2013. The laydown area was used for the storage of materials and plant. It was a flat compacted area of earth upon which MMM stored plant and equipment and other items.[30] This work did not involve building work within the definition in Sch 2 of the Act, even without reference to the exclusions in Sch 1AA of the Regulation: see [31] above. Alternatively, it was work which was sufficiently related to the creation of the jetty and the wharf to be

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27 [2014] QCA 330, 9-10 [21].
28 Affidavit of Meulman sworn 20 February 2015, para [85].
29 Affidavit of Meulman sworn 20 February 2015, para [90].
30 Meulman T 1-14.

of a kind within item 19. And in respect of this work, there is also item 32 of Sch 1AA, which excludes work consisting of earthmoving and which would also exclude this work.

[45] It is convenient to go then to subparagraph (xiii), which was work of the installation of drains and piping for drainage at this laydown yard. This work did not make the Contract a building contract in the relevant sense, essentially for the reasons given in the previous paragraph save that item 32 of Sch 1AA would not apply.

[46] The work in subparagraph (xii) was in the nature of earthworks in the area described as reclamation bund B. Mr Meulman agreed that reclamation bund B was "simply another laydown area" in the nature of that referred to in subparagraph (xi).[31] For the same reasons that I gave in relation to that subparagraph, the work in subparagraph (xii) did not make the Contract a building contract.

[47] It is convenient to then go to the particulars in subparagraphs (ii) and (iii) of para 9(b) of the amended statement of claim. This work was the installation of tanks and associated piping for the supply of drinking water and for what is pleaded as "the storage of sewerage" at a place which was about 150 metres from the ramp leading to the CBW. Mr Meulman explained that these tanks and plumbing were installed to connect drinking water and sewerage to each of the buildings at the office compound which is described in subparagraphs (i) and (ii) of para 9(a) of the pleading. My reasons for the work the subject of 9(a)(i) and (ii) apply here also.

[48] It should be noted that only the work particularised in (ii) and (iii) remains of para 9(b). There is therefore no need to consider other work which is mentioned within para 9(b), namely lighting, heating, ventilation, and air-conditioning. The plaintiff's argument about para 9(b) did not extend beyond the items within (ii) and (iii) of the particulars.

[49] That leaves for consideration subparagraphs (v), (xiv), (xv), (xvi) and (xvii) which are about roads.

[50] The first is the cross link site road which is pleaded in subparagraph (v) of para 9(a). It was constructed by MMM pursuant to a variation to the Contract. Its purpose was to provide access between what are described as the Narrows Road and the Terminal Access Road or "TAR".[32] According to Mr Meulman's evidence, the "main purpose" of this road was "to maintain access to the Site Facility whilst works were being undertaken on the Terminal Access Road".[33] In his affidavit evidence, Mr Meulman said that to the best of his knowledge the road was "intended to remain in place permanently".[34] But in his oral evidence, when asked whether the road was "constructed solely for the purposes of the construction phrase of the terminal", he answered: "I probably don't know the answer to that one".[35]

[51] Mr Liddle's evidence was that the road provided MMM with access to its laydown areas in Area 14 and Reclamation B Area, in which places MMM stored equipment, materials and other items which it required to perform the Contract. (In his oral evidence,

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[31] Meulman T 1-16.
[32] Meulman T 1-15.
[33] Affidavit of Meulman sworn 20 February 2015, para [96].
[34] Affidavit of Meulman sworn 20 February 2015, para [101(a)].
[35] T 1-15.

Mr Meulman agreed.)[36] All of that equipment has since been removed. It was suggested to Mr Meulman in cross-examination that the road had not been constructed as would be expected if it had intended to be a permanent road or, in other words, a road to be used in the operation of the terminal after completion of construction. He answered that he did not know.[37] And it was then suggested that in the next stage of the construction of the terminal, the cross link road was to be "removed as part of the creation of a stockyard area or stockpile area", to which he answered, in effect, that he did not know.[38]

[52] Mr Liddle gave evidence that a separate contractor has been engaged to make selected temporary roads and the terminal, including this cross link road, into permanent roads.[39] The cross link road is a dirt road. It has no sealing and no kerbs or road markings. Drains were installed to this road to maintain all-weather access to the site during construction.[40] Further work would be needed to be undertaken on these drains to make them appropriate for a permanent road.[41]

[53] The submissions for WICET accept, as Daubney J held in *Ooralea Developments Pty Ltd v Civil Contractors (Aust) Pty Ltd*,[42] that because a road can be "constructed", it is a "structure". WICET submits that this road had a sufficiently close relationship with the construction of the jetty and wharf as to fall within item 19. Alternatively, it says that the work was within item 32 of Sch 1AA.

[54] The onus is upon MMM to prove that the construction of this road did involve building work in the relevant sense. Mr Liddle's evidence is that the cross link road was only temporary. Ultimately, Mr Meulman's evidence was that the cross link road was built for the purpose of providing access to the laydown areas during construction and he was unable to say whether it was intended that the cross link road would remain after construction. According to my reasoning in para [31], this road did not make the Contract a building contract because it is not proved that it was constructed for the purpose of remaining on the land as a fixed structure after the performance of the Contract. Another contractor is now constructing a permanent road in the place of this temporary road. It is far from demonstrated that the contractual intention was to produce a structure, in the form of the dirt road, which was to remain intact after the performance of the Contract. Alternatively, I wold accept the arguments for WICET that it was within item 19. It is unnecessary to express a view as to item 32 in this respect, but it may be noted that the work involved went beyond earthmoving and excavating by including drainage works.

[55] Subparagraph (xiv) of para 9(a) involved the construction of "private site access and ring roads in the vicinity of reclamation bund B and the grading and rolling of existing surfaces" under a particular variation direction. This work involved grading existing gravel to a required finished surface level and proof rolling the existing gravel to ensure that it had been sufficiently compacted.[43] It involved filling, compacting and trimming fill and placing other materials such as road base and crusher dust.[44]

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36 T 1-16.
37 T 1-16.
38 T 1-16.
39 Affidavit sworn 5 March 2015, para [27].
40 Affidavit of Liddle sworn 5 March 2015, para [28].
41 Ibid.
42 [2013] QSC 254.
43 Affidavit of Meulman sworn 20 February 2015, para [109].
44 Affidavit of Meulman sworn 20 February 2015, para [111].

[56] In his affidavit evidence, Mr Meulman said that to the best of his knowledge the existing private side access and ring roads were intended to remain in place permanently.[45] But in cross-examination he conceded that he did not know whether they were intended to be permanent roads.[46]

[57] Again, these were roads which were constructed for the purpose of the performance of the Contract. It is not unproved that they were constructed for some purpose enduring beyond the performance of the Contract. Accordingly, the inclusion by variation of a term requiring their construction did not make the Contract a building contract, according to what I have said at [31]. Alternatively, I would hold that this work was within item 19 and item 32 of Sch 1AA.

[58] Subparagraph (xv) of para 9(a) was repair work undertaken on the "Narrows Road" and "Terminal Access Road" (or "TAR"), involving compaction, rolling and stabilisation work under a certain variation. Subparagraph (xvi) was repair work to the TAR, including grading, rolling and scarifying of the road surface under a further variation. Mr Liddle's evidence was that the TAR is not a permanent road.[47] The same route might be used permanently but with a road constructed which is different from the present because it would be sealed. As at the date of the hearing, the temporary road was being dug up and drains were being removed. Also according to his evidence, the Narrows Road was the subject of work to provide access during construction under the Contract in circumstances where the TAR had not yet been built. Narrows Road will not be replaced with a new road. The Narrows Road, the Terminal Access Road and the TAR private site roadway were, according to Mr Liddle, "temporary construction roads [which] … cannot be used permanently in their current form".[48]

[59] Mr Meulman agreed that the purpose of these roads was to facilitate construction of the terminal.[49] In his oral evidence, he also effectively withdrew a statement in his affidavit evidence[50] that to the best of his knowledge, these roads were intended to be permanent.[51]

[60] Again, work of the repair of these roads did not involve the construction of the road. Accepting that a road could be a fixed structure and thereby a building, so that the repair of a road could be the "repair of a building" for the purpose of the definition of "building work", it is not established that either of these roads was a fixed structure in the sense that the road as constructed (and as repaired) was intended to have an enduring existence beyond the performance of the Contract. It was not thereby a building contract on account of this repair work, because it was not a contract *for* the repair of a fixed structure which was to have such an enduring existence. My reasoning at para [31] applies. Alternatively, I would hold that the work was within items 19 and 32 of Sch 1AA.

[61] There remains subparagraph (xvii) which involved "further repair work for the TAR" and "grading and rolling work for the site car park" under another variation direction from WICET. My conclusions in the previous paragraph apply to this further repair work for

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45 Affidavit of Meulman sworn 20 February 201, para [115].
46 T 1-17.
47 Exhibit 3.
48 Affidavit sworn 5 March 2015, para [42].
49 T 1-18.
50 Affidavit sworn 20 February 2015, para [125(a)].
51 T 1-18.

the TAR. The site car park was obviously used by persons entering the site, including MMM personnel. This work is also excluded by item 32.

Conclusion

[62] From none of the items pleaded in para 9(a) and (b) has MMM established that the Contract, in its original or varied terms, was for building work as defined by the Act and the Regulation. It is unnecessary to consider WICET's alternative argument that it is only the original terms of the Contract which are to be considered for this question.

[63] Consequently, this was not a building contract as defined for the Act and s 67J and s 67K did not apply. The plaintiffs' claim will be dismissed.