SUPREME COURT OF QUEENSLAND

CITATION:	*IW & CA Price Constructions Pty Ltd v Australian Building Insurance Services Pty Ltd & Ors* [2017] QSC 39
PARTIES:	**IW & CA PRICE CONSTRUCTIONS PTY LTD ABN 50301203933 A TRUSTEE FOR THE COASTAL BUILDING INSURANCE CLAIMS & REPAIRS TRUST** (plaintiff) **v** **AUSTRALIAN BUILDING INSURANCE SERVICES PTY LTD ACN 162 498 599** (first defendant) **BRUCE WILLIAM CARRIGAN** (second defendant) **IAN WINSTON PRICE** (third party)
FILE NO/S:	No 9993 of 2013
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	4 – 7 October 2016 written submissions 17, 24 October, 1, 9 November 2016.
JUDGE:	A Lyons J
ORDER:	**1. I will hear the parties as to Costs and as to the form of the Orders.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – where the defendant business was sold by the plaintiff to the second defendant – where the

defendants claim that the duties to cooperate, to act in good faith and to account were implied into the contract of sale – whether the duties are implied into the contract

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – OTHER MATTERS – where the defendant business was sold by the plaintiff to the second defendant – where the defendants submit that the plaintiff and third party breached the implied duties to cooperate, to act in good faith and to account by *inter alia* disparaging the second defendant to a major client of the business – whether any breaches occurred

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR BREACH OF CONTRACT – REMOTENESS AND CAUSATION – LOSS OF PROFITS – where the defendant business was sold by the plaintiff to the second defendant – where the defendants claim the plaintiff breached the implied duties to cooperate, to act in good faith and to account by *inter alia* disparaging the second defendant to a major client of the business – where the defendants claim that the breaches of the implied duties caused the major client to temporarily cease allocating work to the business – where the defendants claim damages for loss of profits – whether the actions of the plaintiff caused the damages claimed

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR BREACH OF CONTRACT – REMOTENESS AND CAUSATION – OTHER CASES - where the defendant business was sold by the plaintiff to the second defendant – where the defendants claim the plaintiff breached the implied duties to cooperate, to act in good faith and to account by *inter alia* disparaging the second defendant to a major client of the business – where the defendants claim that the breaches of the implied duties caused the major client to temporarily cease allocating work to the business – where the defendants claim damages for diminution of the goodwill of the business – whether the actions of the plaintiff caused the damages claimed

Baldwin v Icon Energy Ltd [2016] 1 Qd R 397
Benward Pty Ltd & Ors v Metal Deck Roofing Pty Ltd & Ors 2001] NSWSC 1053
Bert v Red 5 Ltd [2016] QSC 302
BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 180 CLR 266
Butt v M'Donald (1896) 7 QLJR 68
Byrne v Australian National Airlines Ltd (1995) 185 CLR 410
Commissioner of Taxation (Cth) v Murry (1998) ALR 67
Elwood v Cotton [2009] FCA 633.
Etna v Arif [1999] 2VR 353
Esso Petroleum Pty Ltd v Southern Pacific Petroleum NL [2005] VSCA 228
Hart v MacDonald (1910) 10 CLR 417
James E McCabe Ltd v Scottish Courage Ltd[2006] EWHC 538
Kosho Pty Ltd v Trilogy Funds Management Ltd [2013] QSC 135
Laurelmont Pty Ltd v Stockdale & Leggo (Queensland) Pty Ltd [2001] QCA 212
March v E & M H Stramare Pty Ltd (1991) 99 ALR 432
Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd [2015] FCAFC 127
National Roads & Motorists' Association (NRMA) v Whitlam [2007] NSWCA 81
Peters (WA) Limited v Petersville Limited (2001) 205 CLR 126
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596
WL Marshall v The Colonial Bank of Australasia (1904) 1 CLR 632
Yam Seng Pte Limited v International Trade Corporation Limited [2013] EWHC 111 (QB)

COUNSEL: D de Jersey and B A Vass for the plaintiff and third party
P A Travis for the first and second defendant

SOLICITORS: North Coast Law for the plaintiff and third party
AXIA Litigation Lawyers for the first and second defendant

The dispute

[1] In June 2013 Ian Price and Bruce Carrigan entered into a written contract for the sale by the plaintiff company (Price Constructions) to the first defendant (ABIS) of a building repair business for $600,000 on a 'walk in walk out' basis as from 1 July 2013. The business specialised in insurance claims for damage to buildings with the majority of the business' work coming from insurance companies. Despite the sale of the business CGU Insurance continued to direct significant payments to Price at Price Constructions for about four months although the work was done by Carrigan. Price Constructions did not forward those payments to Carrigan.

[2] A dispute arose between Price and Carrigan about entitlement to those payments and due to the dispute CGU stopped directing work to Carrigan from around October 2013 until January 2014. In November 2013 there were some significant storm events in the area in which the business operated which generated many insurance claims. CGU did not direct any work to ABIS. ABIS did not pay the balance purchase price.

[3] Price Constructions claims the balance of the purchase price and costs of the telephone lease under the contract from ABIS, and from Carrigan as its guarantor. ABIS counterclaims for damages for breaching implied terms of the contract and seeks to set off against Price's claim a claim for damages for breaching the implied terms of the contract.

The Business in question

[4] Until 1 July 2013 the plaintiff company (Price Constructions) owned and operated the building claims repair business called Building and Insurance Repair Services (BIRS or the Business). Ian Price, the third party to these proceedings, was at all times the Controlling Director of the plaintiff company which was started by him in 2005 and is based on the Sunshine Coast, Queensland. The Business receives the majority of its work from insurance companies, particularly after a natural event or disaster has occurred requiring large scale building repairs to be completed. The evidence indicates that at 1 July 2013 the Business' two main clients were the insurance companies NRMA and CGU and that their claims provided a significant component of the Business' revenue.[1] As at 1 July 2013 the Business was on a "Builder's Panel"[2] for CGU and had a Preferred Supplier Agreement with CGU.[3]

[5] By early 2013 Bruce Carrigan, the second defendant and director of the first defendant Australian Building Insurance Services (ABIS), had entered into negotiations with Price to buy the Business. On 15 May 2013 Price and Carrigan met with a representative of CGU, Kris Kyris, to discuss the sale of the Business and the assignment of CGU's Preferred Supplier Agreement from the plaintiff company to

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1 Evidence of Carrigan, T-4, 28, ll 25-27.

2 See evidence of Carrigan, T-4, 14, ll 9-14.

3 Exhibit 5.

Carrigan, as the new owner. The Assignment of the Preferred Supplier Agreement was subsequently completed on 28 June 2013.[4]

[6] During negotiations prior to the date of settlement, the parties came to an agreement that any payment received by Carrigan for work completed by the Price prior to the sale of the Business would be forwarded on to Price. Price also agreed that he would similarly forward to Carrigan any payments incorrectly sent to him for work completed after the sale of the Business.

The Contract

[7] On 19 June 2013 the written contract for the sale of the Business was executed by the parties (the Contract). Relevantly, the Contract provided that:

- the Purchase Price of the Business was $600,000.00;

- the Business was sold on a '*walk in, walk out'* basis, defined in Clause 3.2 of the Standard Conditions of Sale as follows:

  > "If the Business is sold on a 'walk in, walk-out' basis, then the Business includes the goodwill, fixtures, fittings, furniture, chattels and the plant and equipment, industrial and intellectual property, work-in-progress (if any), permits, licenses, stock-in-trade and other assets set out in any schedule attached to this Contract (but excluding any Excluded Assets) and which assets are in this contract referred to as the 'Business Assets'.

- Special Condition 9 also stated that the Purchase Price of the Business included *"any stock in trade at the time of completion* [of the Contract] *and any work in progress"*;

- By Standard Condition 1.1, 'Work in Progress' was defined as being:

  > "a. the benefit of any contract or other arrangement under which the Seller has provided any services to third parties for which payments is to be made by or on behalf of a third party, whether in whole or in part, and which services have been provided in connection with the Business;
  >
  > b. any goods (excepting stock-in-trade) owned or agreed to be bought by the Seller which are used in or subject to any process of manufacture, combination, treatment, production, application or other procedure which alone or in combination with any other goods or inputs adds value to the goods for the purpose of applying or using them in the course of conducting the Business or any activity which is a step in conducting the Business; or

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4 Exhibit 7, see Exhibits 5-6.

c. any transaction listed as work-in-progress in any schedule, annexure or appendix to this Contract."

- by Standard Condition 16.3 the seller could, on the date of settlement, give notice to the buyer concerning the debts owed to the seller in respect of the business at settlement ("Notified Debts");

- by Standard Condition 16.4, each Notified Debt remained the property of the seller;

- by Special Condition 2.1, the Purchase Price was to be paid by a series of instalments on which interest would be paid. The balance of the Purchase Price was immediately payable on the default of an Instalment, bearing an interest at the rate of 7%;

- by Special Condition 2 of the Contract, the Instalments were due as follows:

  $50,000.00 at settlement;

  $90,000.00 on or before 31 January 2014, 31 July 2014, 31 January 2015, 31 July 2016, 31 January 2016; and

  $100,000.00 on or before 31 July 2016.

- By Standard Condition 14, on or before the date of Completion (1 July 2013, as per Item P) the plaintiff will deliver to the defendant or to any authorised telecommunications carrier and postal service cancellation forms in respect of the existing telecommunication and postal services to the premises to the intent that:

  "a. the cancellation of the plaintiff's subscription takes effect on the date of Completion; and

  b. the defendant may acquire the telecommunication and postal services and the telephone number and facsimile number (if any) set out in Items J(g) and J9H) from the date of Completion"; and

- Carrigan indemnified the plaintiff for any failure by the first defendant to perform its obligations under the Contract.

[8] Settlement of the Contract took place on 1 July 2013 and the first instalment of $50,000.00 was paid to the plaintiff by Carrigan. Following settlement the Business was renamed 'Australian Building Insurance Services' (ABIS).

Events after the Sale of the Business

Payment of 'Work in Progress' after Settlement and the dispute

[9] After settlement of the Contract on 1 July 2013, CGU continued to make payments to Price Constructions despite the fact they were payable to ABIS as "Works in Progress" (WIP) pursuant to Standard Conditions 1.1 and 3.2 of the Contract.

[10] Price acknowledges that an amount of $382,180.57 was received by Price Constructions for work completed after 1 July 2013, which it was not entitled to under the Contract. ABIS claims however that the figure is in fact greater and that amounts totalling $407,605.59 were paid to Price Constructions after 1 July 2013.

[11] The next instalment of the Purchase Price of $90,000, due 31 January 2014, was subsequently not paid and no further instalments of the Purchase Price were paid by Carrigan or ABIS to Price Constructions after 1 July 2013. The balance of the Purchase Price, being $550,000, remains outstanding.

[12] Irrespective of whether the amount paid incorrectly to Price Constructions is $382,180.57 or $407,605.59 there is no doubt that the evidence establishes that from 15 July 2013, CGU continued to pay amounts to Price which were payable to ABIS pursuant to the Contract. It is also clear that Price did not account to ABIS for those amounts and indeed the evidence establishes that when Carrigan raised the error with Price via email on 18 July 2013, Price did not respond.[5] The evidence further indicates that as early as 12 August 2013 an amount in excess of $138,000 had been incorrectly paid into the plaintiff's accounts but Price did not apprise CGU of the error.[6]

[13] The dispute escalated on 13 August 2013 when Price sent an email[7] to Carrigan requesting payment for invoices from 'Meecam Constructions' totalling $273,727.85. Price claimed the invoices were raised by the Business prior to settlement. Price is a director of Meecam Constructions.[8] The invoices from Meecam were immediately disputed by Carrigan as there had been no involvement with that company. It would seem clear that the invoices were only generated on 13 August 2013 and therefore could not yet have been incorrectly paid to ABIS as Price claimed.

[14] On 16 August 2013 Price sent a further email to Carrigan which stated:[9]

> "On another note I would like to have a response as what you intend to do about the invoices attached to the email I sent to you on Tuesday [13 August] this afternoon.
>
> Sorry Bruce but I need to know what you intend to do about the mounting debt that you owe us.
>
> I am sending an email to Matt Hill in relation to all the invoices that we raised prior to the end of June to ensure that they get payed [sic] into our account & not yours."

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5 Exhibits 37, 41.

6 Exhibit 15, pp 356-357, 418; Exhibits 11, 12.

7 Exhibit 9.

8 See Exhibit 9.

9 Exhibit 8.

[15] It was established during evidence that Matt Hill, referred to in that email, was a senior manager of IAG, the parent company of both NRMA and CGU.[10] The meaning and effect of this email was contested by the parties at trial. The defendants submit that the email was meant to inform Carrigan that if no response was received about the "mounting debt" that afternoon, Price would be contacting Hill from IAG about the payment of invoices. The defendants submit that this amounted to a threat by Price to use the prior relationships with clients of the Business to force the defendants to pay amounts in excess of what was agreed under the Contract.[11] Price maintained at trial that the email was not intended to be a threat, that Hill only worked for NRMA, that the "mounting debt" only referred to invoices raised by CGU and that the last sentence in the email was independent of the rest of the email.[12]

[16] Carrigan responded to Price's email later on 16 August 2013[13] and raised numerous discrepancies with the invoices claimed by Price to be owed by ABIS in the email dated 13 August 2013. As well as raising these discrepancies, Carrigan also noted that there were "fundamental issues" with the transfer of the Business including but not limited to the unconfirmed payments being sought from the plaintiff.

[17] On 26 August 2013 Price responded to Carrigan's email of 16 August 2013 setting out what he believed was still owed to the plaintiff by ABIS under the Contract. In particular Price wrote next to one invoice number, "*If you have been paid for this then the invoice was paid on our ABN not yours. I will be requesting that NRMA pay us & seek re-imbursement from you. This is steeling* [sic]".[14] It is understood that the basis for these requests was Price's claim that the plaintiff company was entitled to these payments under the alleged oral terms of the Contract. This claim was abandoned on the first day of this trial.

[18] On 30 August 2013 solicitors retained by the plaintiff sent correspondence to the defendants.[15] I infer that the letter related to the dispute about the WIP.

[19] By 12 September 2013 the evidence indicates that the plaintiff had received a total of $215,935.59 from CGU for WIP.

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10 Evidence of Price, T-2, 31, l 45.

11 Defendants' Closing Submissions, p 11.

12 Evidence of Price, T-2, 33, l 30.

13 Exhibit 41.

14 Exhibit 41.

15 Exhibit 35.

[20] On 30 September 2013 Carrigan made a diary note of a telephone call from Kris Kyris of CGU, who indicated that the Business had been "cut off due to litigation with Price."[16] CGU subsequently began to "disallocate" work from the Business.[17]

[21] On 9 October 2013 Carrigan sent an email to Kyris of CGU which confirmed that legal action had been taken against ABIS. Carrigan requested a meeting with Kyris to ascertain "how best to deal with this matter to prevent any further escalation by [the plaintiff] and to prevent disruptions to our relationship".[18]

[22] On 22 October 2013 the plaintiff filed a Claim and Statement of Claim for breach of what it alleged were the oral terms of the Contract. The plaintiff claimed that pursuant to these oral terms, it was entitled to a portion of the WIP. Also claimed was a breach of Standard Condition 14. As noted earlier the plaintiff's claim for breach of alleged oral terms of the Contract has now been abandoned.

[23] By 7 November 2013 CGU had paid a total of $351,153.59 to the plaintiff for WIP.[19] Neither Price nor the plaintiff forwarded these payments on to the defendants.

[24] On 7 November 2013 Carrigan requested via email that CGU make all future payments to ABIS. A copy of the relevant part of the Contract was attached to this email.[20] Kyris agreed that all future payments would be made to ABIS but advised that the defendants would have to follow up payments that had "already been cleared" with the plaintiff, and that further clarification was needed to ascertain the correct payee for invoices that had been raised prior to 1 July 2013.[21]

[25] On 8 November 2013 Price sent an email to Kyris attaching a copy of the plaintiff's Claim and Statement of Claim, advising that ABIS was "in breach of their agreement".[22] Price gave evidence that he sent this email on the advice of his then solicitors.[23] The same day Kyris of CGU telephoned Carrigan and Carrigan's contemporaneous file note records that Kyris informed him that "he had spoken to Ian [Price] and Ian advised that all invoices raised against purchase orders prior to 1 July 2013 belonged to him under the contract of sale". He also recorded that Kyris stated that "Ian further advised that ABIS has breached the contract of sale and that he is

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16 Exhibit 22.

17 Evidence of Klobucar, T-3, 57, ll 21-23; Evidence of Carrigan, T-4, 30, l 44.

18 Exhibit 21.

19 Exhibit 18, pp 356-357; Exhibits 11, 12.

20 Exhibit 23.

21 Ibid.

22 Exhibit 33.

23 T-2, 51, ll 32-35.

taking legal action". [24] During this phone call Kyris also advised Carrigan that ABIS was "shut off from work" and that ABIS had to resolve the matter with the plaintiff within a week and not further involve CGU.[25]

[26] On 8 November 2013 Carrigan sent an email to Kyris of CGU clarifying the meaning of WIP under the Contract and denying that any breach on behalf of the defendants had occurred.[26]

The Sunshine Coast Storm Events

[27] Significantly it was during this period of the dispute that a series of serious storm events occurred in the Sunshine Coast area. The Storm Events occurred between 8-14 November 2013 and 15-19 November 2013 and the Business did not receive any jobs from CGU in relation to these storm events, despite CGU issuing 658 claims.[27] The Business received 90 jobs from non-CGU clients. Carrigan gave evidence that he estimated that the Business would have received about 70 jobs from CGU for a storm event on the Sunshine Coast, given the Business' standing as a reputable company on CGU's panel and the similar allocations of claims to other like-sized companies at the time.[28]

[28] On 18 November 2013 Kyris confirmed with Carrigan that ABIS was "cut off until legal issues resolved".[29] On 20 November 2013 Carrigan telephoned Kyris to discuss the Storm Events and the possibility of ABIS securing work from CGU. Carrigan recorded that conversation with his mobile phone, and a transcript was tendered in evidence.[30]

[29] On 25 November 2013 the defendants filed a Defence and Counterclaim. The defence pleaded that no breach had occurred because no oral terms existed. By counterclaim the defendants submitted that by failing to forward payments incorrectly received for WIP and contacting clients of ABIS, Price had breached three implied terms of the Contract: the Duty to Account, the Duty to Cooperate and the Duty of Good Faith.

[30] On 28 November 2013 Carrigan met with Kyris from CGU to further discuss the working arrangements between CGU and ABIS. At the end of this meeting CGU confirmed that it would not pursue Price for a refund of monies paid to it by CGU and

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24 Exhibit 24.

25 Ibid, see also the evidence from Mr Kyris, T-4, 10, ll 33-36.

26 Exhibit 25.

27 Evidence of Carrigan, T-4, 24, l 37; T-4, 25, l 2.

28 Evidence of Carrigan, T-4, 28, ll 1-8.

29 Exhibit 26.

30 Exhibit 34.

that CGU would not be involved in the dispute as between Price and Carrigan.[31] On 29 November 2013 Carrigan sent a redacted copy of the Contract to Kyris.[32]

[31] On 11 December 2013 Carrigan requested a further meeting with Kyris in relation to the allocating of work to ABIS.[33] At that meeting on 19 December 2013 Kyris agreed to speak to his supervisor at CGU about reallocating work to ABIS, provided that CGU was not involved in any litigation.[34]

[32] On 16 December 2013 the defendants filed a Statement of Claim against Price, claiming that through Price's conduct as outlined above, Price acted contrary to s 18 of the *Australian Consumer Law.* This claim was ultimately abandoned by the defendants on the second day of the trial.

[33] On 10 January 2014 CGU sent an email to Carrigan confirming that CGU was prepared to commence allocating work to ABIS from 13 January 2014. This email noted however that if contact was made by Price seeking unpaid or incorrectly paid funds, CGU would deem that ABIS had not "taken control of the matter" and contract renewal may be affected as a result.[35]

[34] Due to the litigation on foot, the defendants did not pay the plaintiff the second instalment of the Purchase Price due 31 January 2014, pursuant to Special Condition 2 of the Contract. This and subsequent instalments remain outstanding.

The plaintiff's claim

[35] The plaintiff alleges the defendants have breached the Contract of Sale and claims the following amounts as against each defendant, pursuant to what it argues are breaches of Special Condition 2 of the Contract:

- $550,000.00 for the balance of the Purchase Price;
- $102,973.31 in interest on the Purchase Price from 1 February 2014 to 4 October 2016; and
- $15,250.56 for the Telephone Lease.

[36] As I have previously noted the plaintiff initially claimed a breach of what it alleged to be the oral and written terms of the Contract, but on the first day of the trial the claim

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31 Evidence of Mr Kyris, T-4, 10, ll 33-36.

32 Exhibit 28.

33 Evidence of Mr Klobucar, who also attended the meeting: T-3, 60, l 28; T-3, 60, l 4.

34 Ibid, T-3, 59, l 33; T-3, 60, l 26. See also Exhibit 30.

35 Exhibit 32, pp 1857-1858.

for breaches of alleged oral terms of the Contract was abandoned. The trial proceeded on the remainder of the plaintiff's claim for breach of the written terms of the Contract.

[37] The plaintiff accepts that since 1 July 2013, it has received a total of $382,180.57 for WIP which it was not entitled to under the Contract. Accordingly the plaintiff now sets off its claim for $668,223.87 ($550,000 + $102,973.31 + $15,250.56) against the first and second defendants by the $382,180.57 received.

[38] Applying this set off, the plaintiff claims $286,043.30 as against each of the defendants.

The counterclaim

[39] By counterclaim the defendants assert that, following the settlement of the Contract on 1 July 2013, the plaintiff through Price breached three implied terms of the Contract: the Duty to Cooperate, the Duty of Good Faith and the Duty to Account. Paragraph 14B of the counterclaim defined the Duty of Good Faith as being an implied term of the contract that "each party would not do anything to hinder or prevent the fulfilment or benefit of the Contract". The defendants submit that as a result, they were unable to receive the benefits for WIP or Goodwill, as promised under Clause 3.2 of the Contact.

[40] The defendants initially claimed against the third party for misleading and deceptive conduct whilst engaged in conduct in the course of trade or commerce pursuant to s 18, Chapter 2 of the *Australian Consumer Law*. This claim however was abandoned on day two of the trial and dismissed on 6 October 2016.

[41] The Counterclaim claims the following amounts:

(a) the amount of $25,425.02 (being the difference between the amount of $382,180.57 accepted by the plaintiff and the amount claimed of $407,605.59); plus

(b) the amount of $505,015 due to the loss of purchase orders from CGU ('lost profits'); plus

(c) the amount of $213,586 due to loss of goodwill ('diminution of the value of the Business' goodwill').

The Issues

[42] As can already be observed there are a number of issues for determination which can be listed as follows:

(i) What is the calculation of the plaintiff's claim?

(ii) Are there terms to be implied into the Contract?

(iii) Has there been a breach of the implied terms by Price?

(iv) Is there a causal link between the breach of the implied terms and the loss?

(v) What is the calculation of the loss?

The calculation of the plaintiff's claim

[43] There is no doubt that an amount of $600,000 is due and payable by ABIS pursuant to the Contract. Only $50,000 has been paid. An amount of $382,180.57 owing to ABIS is acknowledged to have been received by the plaintiff.

[44] The plaintiff also claims that the telephone lease "referred to in Special Condition 2 of the REIQ Contract"[36] was not assigned at the completion of the Contract and as such, the plaintiff has continued to pay $391.04 per month under this lease for the Business' telephone system. The plaintiff argues that it continued to make those payments in the amount of $4,301.44. Concerningly, it has not in fact been established that those amounts were paid. Price gave evidence that he believed[37] he had paid the telephone lease and relied on a signed Finance Lease Agreement Schedule from Telstra[38] to support this claim. The Finance Lease Agreement Schedule is for 48 months from 2 May 2013 and is signed by Price, however no invoices or payment receipts were tendered in support of that evidence. A total of $15,250.26 has been claimed together with interest, which the plaintiff submits it is entitled to by way of indemnity from the defendants pursuant to Standard Condition 15.1 of the Contract.[39]

[45] I am not satisfied however that that amount has been established as the amount owing for the telephone lease. Not only was it not established that the lease had been paid by Price or Price Constructions but I am not satisfied that Special Condition 2 of the REIQ Contract was breached. I can see no mention in Special Condition 2 of the telephone lease or indeed a requirement to assign or pay it. I note however that Standard Condition 14 of the Contract is in the following terms:

> "On or before the date of Completion the Seller will deliver to the Buyer or deliver to any authorised telecommunications carrier and postal service cancellation forms in respect of the existing telecommunication and postal services to the premises to the intent that:
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> The cancellation of the Seller's subscription takes effect on the date of Completion; and

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36 Plaintiff's Closing Submissions at [15].

37 T-4, 48, ll 37-41.

38 Exhibit 2.

39 Plaintiff's "Outline of Submissions in Reply on Behalf of the Plaintiff and Third Party" at [20].

The Buyer may acquire the telecommunication and postal services and the telephone number and facsimile number (if any) set out in Items J(g) and J(h) from the date of Completion".

[46] Standard Condition 15 relevantly reads:

> "15.1 With the consent of the owner or service provider, as the case may be (but not otherwise), the Seller assigns to the Buyer and the Buyer accepts as at the date of Completion the benefit and burden of:
>
> The agreements set out in Items N(b) and N(c);
>
> …
>
> 15.4 Where clause 15.1 applies, the Seller must indemnify the Buyer against all liability arising from any Service Agreement in respect of any act, matter or thing which arises before the date of Completion."

[47] Items N(b) and N(c) refer to "Leased – Refer to Schedule 'B'" and "Rental Agreements – Refer to Schedule 'C'" respectively. Relevantly, Schedule B refers to the Telephone System, which was leased under the Finance Lease Agreement Schedule.[40]

[48] Though counsel for the plaintiff submitted in their written submissions filed after the trial that the "benefit and burden" of "the agreements set out in items N(b) and N(c)"[41] were assigned, no evidence was given at the trial as to whether Price, as the Seller, had delivered to Carrigan or "any authorised communications carrier" the cancellation forms relating to the telephone lease.

[49] Accordingly whilst I am satisfied that the plaintiff has a basis for arguing that there is an amount of owing to it pursuant to the Contract, I consider that that does not include the amount claimed in relation to the telephone lease of $15,250.26. I would calculate that figure to be $550,000 plus interest on that amount. From this figure the plaintiffs claim the amount held to have been received by Price can be deducted. The plaintiff initially calculated the outstanding amount owing to it to be $286,043.30.

[50] The defendants however argue that the plaintiffs have breached the implied terms of the Contract and that the defendants are entitled to damages for that breach, which can be set off against the plaintiff's claim. What are the terms which the defendants argue are implied into the Contract?

Are there terms to be implied into the contract?

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40 Exhibit 2.

41 Plaintiff's "Outline of Submissions in Reply on Behalf of the Plaintiff and Third Party" at [20].

[51] The defendants argue that three implied terms have been breached by the plaintiff namely the Duty to Cooperate, the Duty of Good Faith and the Duty to Account and that they have suffered damage due to the breach. The plaintiff argues however that ABIS has not made out any basis for the terms to be implied into the Contract either in fact or in law.

[52] As the Full Court of the Federal Court recently noted in *Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd,*[42] the implication of a duty to cooperate and to do all things that are necessary to allow the other party to have the benefit of the contract are well established, but the question as to whether a duty of good faith is generally implied by law into contracts is as yet unresolved.[43]

[53] In relation to the implied duty to cooperate the law is conveniently summarised in the *Marmax Investments*[44] decision as follows:

> "[130] In *Secured Income*, Mason J (Gibbs, Stephen and Aickin JJ agreeing) referred to the implied obligation on each party to cooperate to secure performance of the contract, citing the following passage in *Mackay v Dick* (1881) 6 App Cas 251, at 263:
>
> > "as a general rule...where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."
>
> [131] Mason J continued (at 607 to 608):
>
> > "It is not to be thought that this rule of construction is confined to the imposition of an obligation on one contracting party to co-operate in doing all that is necessary to be done for the performance by the other party of his obligations under the contract. As Griffith CJ said in *Butt v. M'Donald* (1896) 7 QLJ 68, at pp 70-71:
> >
> > > "It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract."
> >
> > It is easy to imply a duty to co-operate in the doing of acts which are necessary to the performance by the parties or by one

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42 [2015] FCAFC 127.

43 [2015] FCAFC 127 at [121] and [122].

44 [2015] FCAFC 127.

> of the parties of fundamental obligations under the contract. It is not quite so easy to make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract but are not essential to the performance of that party's obligations and are not fundamental to the contract. Then the question arises whether the contract imposes a duty to co-operate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence of his decision is to disentitle the other party to a benefit. In such a case, the correct interpretation of the contract depends, as it seems to me, not so much on the application of the general rule of construction as on the intention of the parties as manifested by the contract itself."

[132] In *Wolfe v Permanent Custodians Ltd* [2013] VSCA 331; (2013) 9 BFRA 88 at [28], the Victorian Court of Appeal stated:

> "Although the duty to cooperate is broadly stated in *Butt v McDonald,* the scope of the duty is defined by what has been promised under the contract; it is not a general duty to ensure another party obtains an anticipated benefit."

[133] Similarly, in *James E McCabe Ltd v Scottish Courage Ltd* [2006] EWHC 538, Cooke J said:

> "A duty to cooperate in, or not to prevent, fulfilment of performance of a contract only has content by virtue of the express terms of the contract and the law can only enforce a duty of cooperation to the extent that it is necessary to make the contract workable. The court cannot, by implication of such a duty, exact a higher degree of cooperation than that which could be defined by reference to the necessities of the contract. The duty of cooperation or prevention/inhibition of performance is required to be determined, not by what might appear reasonable, but by the obligations imposed upon each party by the agreement itself.""

[54] The most recent endorsement by a Queensland Court of a duty to cooperate being implied into every contract was by Philip McMurdo J in *Baldwin v Icon Energy Ltd,*[45] who noted that a term requiring a party to do all things necessary to enable the other party to have the benefit of his contract was "implied in every contract". The authorities relied upon by Philip McMurdo J commence with the acknowledgment of

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45 [2016] 1 Qd R 397.

Butt v M'Donald,[46]which contains the articulation of the fundamental principle by Griffith CJ that:

> "It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract."

[55] Philip McMurdo J also made reference to *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* [47] and *Peters (WA) Ltd v Petersville Ltd*[48] and then noted that the next question would be what constituted the benefit of the contract. His Honour stated that "implied duty is different from a duty on one party to act so as to enhance the commercial value to the other party of the contract, as I said, with the agreement of Jerrard JA, in *Jackson Nominees Pty Ltd v Hanson Building Products Pty Ltd*" (footnotes omitted).[49]

[56] The cases outlined above accurately summarise the current state of the law and indeed establish that there is an implied duty to cooperate incorporated into every contract. It is the scope of that duty which is really the subject of controversy. Accordingly to the extent that the submissions of the plaintiff contend that there is no such implied duty, those submissions are incorrect. The submissions do however accurately indicate that there are limitations of the affirmative duty to cooperate and that it is the scope of the duty which is critical. Accordingly whilst the plaintiff has an implied duty to cooperate in this case, the real issues relate to the following questions: 'what is the benefit of the contract here?'; 'what is the scope of the duty here?' and then 'has been a breach of such a duty?'

[57] The defendants also claim that the Contract contained an implied term that each party will not do anything to hinder or prevent the fulfilment of the benefit of the Contract. It is argued by the defendants that not only do the Courts imply an affirmative duty to cooperate into every contract but similarly the law implies a negative covenant not to hinder or prevent the fulfilment of the promises made. Reliance is placed on the decision of Griffith CJ in *WL Marshall v The Colonial Bank of Australasia*[50] where Griffith CJ stated[51] "Now, all contractual relations impose upon the parties a mutual obligation that neither shall do anything which is calculated to hamper the other in the performance of the contract on his part." Counsel for the defendants argues that it is in this regard only that the counterclaim refers to an implied duty of good faith, and does not contend for the implication of a term that extends beyond the negative covenant that

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46 (1896) 7 QLJR 68.

47 (1979) 144 CLR 596.

48 (2001) 205 CLR 126.

49 At [69].

50 (1904) 1 CLR 632.

51 Ibid, at 647.

the High Court has held to be implied into all contracts, as discussed in *Peters (WA) Limited v Petersville Limited*.[52] Counsel also argues that such a duty was acknowledged by Applegarth J in *Kosho Pty Ltd v Trilogy Funds Management Ltd*.[53]

[58] Counsel for the plaintiff however argues that no implied terms have been breached and relies on the *Marmax* decision as it relates to the law on the implication of the terms of reasonableness and good faith in commercial agreements such as an REIQ contract. In this regard the *Marmax* decision referred to *Esso Petroleum Pty Ltd v Southern Pacific Petroleum NL*[54] where Warren CJ stated:

> "[3]… If a duty of good faith exists, it really means that there is a standard of contractual conduct that should be met. The difficulty is that the standard is nebulous. Therefore, the current reticence attending the application and recognition of a duty of good faith probably lies as much with the vagueness and imprecision inherent in defining commercial morality. The modern law of contract has developed on the premise of achieving certainty in commerce. If good faith is not readily capable of definition then that certainty is undermined. It might be that a duty of good faith is no more than a duty to act reasonably in performance and enforcement, a long established duty."

[59] In relation to the implied duty of good faith therefore, counsel for the plaintiff argues that there is no universally accepted account of the implied contractual duty of good faith and that there is significant controversy in the cases. In particular, it is argued that one of the first issues is on what basis is the term to be implied into a contract. Is it to be implied:

(a) by operation of law into all commercial contracts or a particular class of contract; or

(b) in a case specific or ad hoc fashion as a matter of fact in response to a presumed intention of the parties?

The second issue is, what is the content of the obligation of good faith? Counsel for the plaintiff argues that a contractual obligation of good faith may be implied in a particular case if it satisfies the test of the implication of terms established in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council.*[55]

[60] The real issue, it is contended, is whether such a term may be applied universally in commercial contracts by operation of law. Counsel for the plaintiff argues that this question is significant here because ABIS alleges that the duty to cooperate and the

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52 (2001) 205 CLR 126.

53 [2013] QSC 135 at [123].

54 [2005] VSCA 228.

55 (1977) 180 CLR 266.

duty of good faith are implied by law and it is argued that there has been little discussion of whether such duties can be implied at law in Queensland courts. In *Laurelmont Pty Ltd v Stockdale & Leggo (Queensland) Pty Ltd*[56] Dutney J (with whom McPherson and Williams JJA agreed) stated:[57]

> "While it seems to be recognised that a term requiring the parties to act in good faith may be implied by law as a legal incident of a particular class of contract it does not operate so as to prevent action by the party against whom it is sought to be enforced taken in that parties own legitimate commercial interests and not otherwise in breach of an express contractual term; see for example *South Sydney District Rugby League Football Club Ltd v. News Ltd* [2000] FCA 1541 per Finn J. at para 394.4."

[61] Counsel for the plaintiff argues that there was no indication of what class of contract attracted such a term. In *Laurelmont Pty Ltd v Stockdale & Leggo (Queensland) Pty Ltd* the appellant was a non-exclusive franchisee of the respondent's real estate business. In its decision, the Court did not clearly distinguish between terms implied in law and terms implied in fact, but Dutney J referred to the fact that the duty of good faith may be implied on either basis. In that case such a term was not implied as it was not required to give business efficacy to the contract.

[62] In this regard I note that in *Kosho*[58] Applegarth J stated that there is authority for the proposition that, at least in respect of certain types of contract, a term of good faith may be implied as a matter of law. That case concerned a contract between borrower and lender and his Honour did not consider that it had been firmly established as one such category of contract. Nevertheless, his Honour stated that given "the uncertain state of the law concerning the implication of a duty of good faith in a commercial contract of the present kind I shall make findings on the assumption that … [the lender] was obliged to act in good faith…".[59]

[63] In *Kosho* the lender's conduct was also alleged to amount to breach of an implied term to "act in good faith in their dealings with Kosho in relation to their consideration of, and in determining issues of satisfaction in relation too, the conditions precedents under the finance facility."[60] This term was alleged to arise by implication of fact, or by operation of law. In terms of the ascription of a duty of good faith, Applegarth J stated:[61]

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56 [2001] QCA 212.

57 Ibid, at [45].

58 [2013] QSC 135.

59 Ibid, at [125].

60 At [118].

61 At [124]-[125].

"[124] On one view, a duty of good faith does not arise by way of an implied term. Instead, good faith is reflected in other principles of contract law, including principles of construction. Still, there is authority for the proposition that, at least in respect of certain types of contract, a term of good faith is implied as a matter of law. A contract between a borrower and a lender has not been firmly established as a category of contract in which an obligation to act in good faith is implied as a matter of law. If, however, there is such a duty of good faith it may relate to the exercise of powers and discretions under the loan agreement. In such a context, a power such as the power of termination might not be exercised for an improper purpose or for a purpose which is extraneous to the contract. If, however, a party acts in the honest pursuit of a legitimate interest, and not for a purpose which is extraneous, dishonest, capricious or arbitrary, a breach of good faith will not be established.

[125] Given the uncertain state of the law concerning the implication of a duty of good faith in a commercial contract of the present kind I shall make findings on the assumption that, contrary to its submissions, Trilogy was obliged to act in good faith in its consideration of, and in determining satisfaction of the Special Conditions, including whether the terms of the deed of assignment and consent were satisfactory to it. However, any obligation to act in good faith cannot be equated with a free-standing duty to act reasonably. Instead, any duty to act reasonably having regard to the legitimate interests of the parties may be subsumed in the duty to act in good faith" (footnotes omitted).

[64] As to the content of the duty, I note that Applegarth J stated:[62]

"However, recent Australian authorities support the proposition that a contractual obligation of good faith embraces at least:

- an obligation on the parties to cooperate in achieving the contractual objects;

- compliance with honest standards of conduct; and

- compliance with standards of conduct that are reasonable having regard to the interests of the parties.

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62 At [123].

> Due regard must be had to the legitimate interests of both parties. However, a contractual obligation of good faith does not require a party to act in the interests of the other party or to subordinate its own legitimate interest in the interests of the other party" (footnotes omitted).

[65] In *Kosho* Applegarth J ultimately held that the lender was not in breach of the obligation despite the fact that the lender's delay was unreasonable. It was not sufficient to establish want of good faith. Here, counsel for the plaintiff argues that the High Court is yet to consider the issue and has declined to do so in a number of decisions, although in New South Wales a duty of good faith will be implied by operation of law into all commercial contracts unless it would be inconsistent with the express terms of the agreement.[63] In Victoria, however, the Court of Appeal has emphasised that a duty of good faith will not be implied indiscriminately into commercial contracts, but it remains possible to imply such a duty as a matter of fact in accordance with the test for the implication of terms established in *BP Refinery*.

[66] Counsel for the plaintiff concedes that in respect of the content of an implied contractual duty of good faith, there appears to be some consensus in the authorities that it embraces (at least) three related obligations:

(a) to act honestly and with a fidelity to the bargain;

(b) not to act dishonestly and not to act to undermine the bargain entered into or the substance of the contractual benefit bargained for; and

(c) to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.

[67] Counsel for the plaintiff argues however that in general, the cases have held that conduct in connection with the performance of a contract will amount to bad faith where it is: (a) dishonest, (b) arbitrary or capricious; (c) motivated by an extraneous or improper purpose; (d) in disregard of the counterparty's legitimate interests; or (e) seeks to prevent the performance of the contract or the withholding of its benefits. Furthermore the party subject to the obligation is not required to act in the interests of the other party or to subordinate its own legitimate interests.

[68] Accordingly counsel for the plaintiff argues that there should be no implication of any terms into this contract. Firstly because the Contract was a commercial business sale agreement entered into by the parties following commercial negotiations but also because the Contract is not within the recognised categories of agreement where the authorities accept that a duty of good faith should be implied at law.

[69] It is also argued that on the basis of the reasoning in *Laurelmont Pty Ltd v Stockdale & Leggo (Queensland) Pty Ltd* the implication of the terms should not be accepted

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63 *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184.

because they are not necessary to give business efficacy to the REIQ contract. In this regard it is argued that the REIQ contract already contains a suite of detailed provisions regarding how the parties would deal with and account for goodwill at and after completion and in particular, Clause 39 of the REIQ Contract contains an "entire agreement" clause. In this regard however I note that the High Court in *Hart v MacDonald*[64] held that the fact that an agreement stated that there were no terms other than those embodied in the document did not preclude the implication of a term into the agreement just as effectively as if it were included in writing. That decision was subsequently applied by the New South Wales Court of Appeal in *National Roads & Motorists' Association (NRMA) v Whitlam.*[65] There is no doubt however that the question in each case depends on the clause in question.

[70] Furthermore, counsel for the plaintiff submits that if a duty to cooperate or a duty of good faith were implied then this would be the first case in Queensland where such terms have been successfully implied. Indeed, counsel submits that there are no features of this case which distinguish it from those already considered in Queensland. Counsel further argued that the implied obligation of good faith would seem to extend to a prohibition on Price contacting his former customers. It is argued therefore that the conditions stated in *BP Refinery* could not be satisfied.

[71] I also note that counsel for the plaintiff does not progress an argument in relation to an alleged implied duty to account further than submitting that an implied duty of this kind would leave open when accounting is to be performed, who is to fund the accounting and which point the obligations under this duty start and end. To this counsel for the plaintiff also submit that it could never have been objectively intended by the parties that onerous and expensive obligations to account were assumed.

[72] In any event, counsel argues that even if such duties are implied, no breach has occurred.

[73] It is clear however that counsel for the defendants argues that reference to the implied duty of good faith in the counterclaim only refers to implied mutual obligations that neither shall do anything which is calculated to hamper the other in the performance of the Contract; or that neither will hinder or prevent the fulfilment of the purpose of the express promises made in the Contract; or that neither party may do anything to impede performance of the agreement, or to impede the right of the other to receive the proposed benefit of the contract; or, where a contract is made on the basis of the continuance of a state of things, neither may do anything to destroy or relevantly diminish the situation. As I have indicated, counsel for the defendants does not contend for the implication of a term that extends beyond the negative covenant or covenants that the High Court has held to be implied into all contracts.[66] The defendants have thus

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64 (1910) 10 CLR 417.

65 [2007] NSWCA 81.

66 *Peters (WA) Limited v Petersville Limited* (2001) 205 CLR 126.

defined the implied duty of good faith for which they contend in a way which is much narrower than that discussed in many of the cases; and the concerns sometimes expressed about such an implied duty do not arise.

[74] In *Byrne v Australian National Airlines Ltd*[67] McHugh and Gummow JJ pointed out that the necessity which will support the implication of terms at law is demonstrated where, absent the implication, "the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, could be seriously undermined"; or the contract would be "deprived of its substance, seriously undermined, or drastically devalued". In the case of a sale of goodwill based on the seller's relationship with customers or clients, the seller is particularly well placed to seriously damage or destroy the benefit being sold to the buyer by interfering with the relationship between the buyer and customers or clients after the sale. In my view there is an obligation on a seller of goodwill not to engage in such conduct.[68] It arises from the class of contract under consideration, and not the particular relationship between the parties.[69] It does not arise in relation to the ability of the purchaser to perform the contract; but it seems to me to be an aspect of some of the formulations of a negative implied covenant, such as the covenant not to hinder or prevent the fulfilment of the purpose of the contract; or the covenant not to impede the right of the other to receive the benefit of the contact.

[75] Accordingly it would seem to me that the real issue is whether there has been a breach of the duty to cooperate and whether the plaintiff has breached the negative covenant just discussed. In this regard I have considered the analysis by Leggatt J in *Yam Seng Pte Limited v International Trade Corporation Limited*[70] as to whether an implied duty of good faith exists in English Law. His Lordship considered that a general norm which underlies almost all contractual relationships is an expectation of honesty and that commerce takes place against such a background expectation. He continued:[71]

> "As a matter of construction, it is hard to envisage any contract which would not reasonably be understood as requiring honesty in its performance. The same conclusion is reached if the traditional tests for the implication of a term are used. In particular the requirement that parties will behave honestly is so obvious that it goes without saying. Such a

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67 (1995) 185 CLR 410 at 450; cited with approval in *Commonwealth Bank of Australia v Barker* (2014) 252

CLR 169 at [29].

68 There may be an exception for conduct by the seller which is authorised by the contract itself; but there is no suggestion of that in the present case.

69 See *Barker* per Kiefel J at [86].

70 [2013] EWHC 111 (QB).

71 At [137] – [138].

> requirement is also necessary to give business efficacy to commercial transactions.
>
> In addition to honesty, there are other standards of commercial dealing which are so generally accepted that the contracting parties would reasonably be understood to take them as read without explicitly stating them in their contractual document. A key aspect of good faith, as I see it, is the observance of such standards. Put the other way round, not all bad faith conduct would necessarily be described as dishonest. Other epithets which might be used to describe such conduct include "improper", "commercially unacceptable" or "unconscionable"."

[76] Leggatt J went on to discuss the importance of fidelity to the bargain and that whilst contracts can never be complete by expressly providing for every event that may happen, to apply a contract to circumstances not specifically provided for, the language must be given a "reasonable construction which promotes the values and puporses expressed or implicit in the contract."[72] Reference was also made to "relational" contracts which require a "high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements."[73]

[77] Taking into account the authorities outlined above, I consider that a duty to cooperate is implied into the Contract. I consider that the actions of Price (acting for Price Constructions) may be judged by reference to that duty and the negative covenants discussed earlier. In those circumstances I do not consider it necessary to determine whether a duty of good faith is implied into the Contract. For the same reason, I do not consider it necessary to determine whether a duty to account is implied into the Contract.

[78] In order to determine whether there has been a breach of the implied terms as argued by counsel for the defendant, it is necessary to consider in some detail the allegations made against Price and to analyse the evidence he gave at trial.

The witnesses

[79] Price gave evidence over two days at the trial. I consider that he was not totally frank in many of his answers but rather was argumentative, evasive and overly defensive in his answers. The following exchange under cross examination is illustrative of his attitude:

> "Now, do you recall that you fell into dispute with Mr Carrigan about – this is after the sale - - -?---About - - -

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72 At [139].

73 At [142].

> After the sale of the business, do you remember that you fell into dispute with Mr Carrigan about who was entitled to what money and who should be transferring money to whom? You understand – you recall that dispute?---Not in that context, no.
>
> You recall, though, that there was a dispute between you and Mr Carrigan about whether you were entitled to more money; you understood that?---I'm not sure whether I'm entitled to answer that question because of what happened yesterday.
>
> You don't have to say anything about it, other than that you understood that there was a dispute. As a matter of fact, there was a dispute between you about how much you were entitled to receive?---I just answered that question."

[80] I also consider that he was at times belligerent, including during the following exchange with counsel, although it is difficult to ascertain that attitude from just reading the extract of the transcript:[74]

> "And so what you would say today, then, is that if you did receive money that you knew at the time you weren't entitled to, you would have immediately given that to Mr Carrigan's company? That's hypothetical. I can't answer that, because I don't know what I would have done at – on that particular occasion.
>
> So you might have kept it even though you weren't – knew you weren't entitled to it; is that what you're saying? It's a possibility? It's hypothetical. I can't answer that question.
>
> It's a possibility? I don't know."

[81] I also consider that Price was generally unwilling to concede some basic propositions. This is evidenced by his response to questions by counsel for the defendants in relation to the amounts which the plaintiff now accepts were mistakenly paid to Price Constructions by CGU as follows:[75]

> "At least with respect to the $382,180.57 that you admit is not money that your company was not entitled to keep, you - - -?---I don't admit that. I didn't admit that at the time.
>
> But you now acknowledge that this money, this three hundred and - - -?---Yes, but you're talking retrospective back when – when these payments were received, not today.
>
> Right. Your evidence just a short time ago – that's not – your evidence just a short time ago was that these moneys were put into your bank account by

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74 T-2, 31, ll 4-13.

75 T-2, 30, ll 9-31.

> the insurer. It wasn't your fault; do you remember that?---I do remember that.
>
> But because the money went into your account and it wasn't your fault, that doesn't mean that you get to keep it if it's properly Mr Carrigan's company's money; that's correct, isn't it?---When I received all those payments, I was able to allocate those to invoices that I had drawn and sent to CGU or assumed had been sent to CGU.
>
> All right?---Every – every one of those claim numbers corresponded with a claim number that I had drawn an invoice out of my accounting system that was drawn against that debtor of CGU.
>
> Okay. So will you at least admit now that at the time you were mistaken as to your entitlement to keep that money?---No, I didn't mistake my entitlement."

[82] Price also claimed to not be able to remember certain other events which I consider would have been foremost in his memory given their significance. An example of this is his evidence that he could not recall any occasion when ABIS transferred money it incorrectly received into his account.[76] Neither could he recall claiming an entitlement to money in an email he sent to Matt Hill at IAG (the parent company of CGU), although he could recall he received a reply and that he referred it on as follows:[77]

> "But you claimed that you were entitled to certain money?---The – the – the – if I did – I don't remember what I sent in that email, however he replied to me and – and referred it to somebody else."

[83] Indeed in relation to some pivotal evidence about his email and amounts he claimed I consider that Price was deliberately obtuse in his replies to questions from counsel for the defendants, particularly when asked about his email to Matt Hill of IAG. In that period of cross-examination he often asked for questions to be repeated or claimed not to understand the question.[78] I do not consider he was sincere in those claims as the questions were clear.

[84] A significant issue in this case is whether Price contacted Kyris on or around 30 September 2013 and told him there was litigation between Price Constructions and ABIS. Price stated in his evidence that the first time he spoke to anyone at CGU about the dispute with Carrigan was during a phone call from Kyris on 7 November 2013. His evidence about the phone call and an email the following day was as follows:[79]

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76 T-2, 31, ll 15-16.

77 T-2, 32, ll 1-3.

78 See T-2, 31-34.

79 T-2, 44, ll 22-44.

"And what was said during that discussion?---Chris Kiris rang me just before lunch on 7 November and asked me what the arrangement was between Bruce and myself for projects that were allocated under – to us under my watch, and then immediately he said that. He said I understand it's probably a privacy issue, and I said you're right, and I will get back to you before the close of business this afternoon and let you know. I immediately rang my former solicitor, sought his advice, and he told me just to tell them that Bruce was in breach of our agreement and that I would send them the copy of the – our statement of claim because it was a public document anyway. So I rang him back that afternoon, said, basically, those words, and then the next morning I sent that email that you see there, and that was the extent of the conversation.

Now, is that the first time that you had sent the statement of claim to CGU?---It is.

And was this the first time that you'd spoken to anyone at CGU about the dispute that you were having with my client?---It is.

Now, did you have any further conversations with Mr Kiris (sic) following this – you sending this email regarding the subject matter of this email?---Not to my recollection at least."

[85] Price continued as follows:[80]

"Now, it's the case, isn't it, that when you actually spoke to Mr Chris Kiris of CGU about these discussions that you refer to here in this November 8 email you said either during those discussions or very shortly after this email was sent you said the new owners of BIRS are in breach of our agreement. We know you gave him a copy of the statement of claim and claim that was filed in the court, and during a discussion either before this email was sent or shortly after you told him about ABIS' complaint – you discussed ABIS' complaint to CGU that CGU was incorrectly paying ABIS' invoices to your company?---I'm not – I don't recall any of that.

You don't - - -?---I've got no knowledge of any of that.

You don't recall him calling up and saying, "Hey. I'm" – words to the effect of, "I'm getting complaints. I'm hearing from Mr Carrigan or I'm hearing from ABIS that a claim that CGU is paying to your company amounts that properly should be

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[80] T-2, 45-46, ll 44-36.

getting paid to ABIS." You don't recall Mr Kiris having a discussion with you where those matters came up?---No, I don't. No, I don't.

And I'm going to put to you that, in fact, that's what the subject matter of the discussion was?---On what occasion?

On either – it's one of those discussions referred to in the November 8 email, or it's very shortly afterwards, but it's in this vicinity you told - - -?---I have no knowledge of any other discussions with Chris Kiris apart from the 7th of November.

And you denied to Mr Kiris that CGU had made any error whatsoever?---I just told you I have no other knowledge of any discussion with Chris Kiris except for the 7th of November, and it was not discussed at that phone call.

And I'm just going to put to you for that same discussion or a discussion around about this email, so that there's no surprise later, you told Mr Kiris that all invoices raised against purchase orders prior to 1 July 2013 belonged to your company under the contract that you had with ABIS?---The only discussion I had with Chris Kiris was on the 7th of November, and that discussion is in the disclosure documents, and that is all I know.

Now, I've put to you that – and you've denied – that you told Mr Kiris that all the invoices raised against purchase orders prior to 1 July belonged to your company under the contract of sale that your company had with ABIS. Now, I'm putting to you again that you did say that and that that statement was false when you made it?---You can put it to me if you like, but I have no knowledge of it."

[86] I simply do not accept that evidence and I consider that his responses during cross examination were not truthful. I reject that evidence because I do not consider it to be credible in light of the other evidence that I do accept which I shall outline in more detail shortly.

[87] Kris Kyris (Kyriazapoulos) from IAG (the parent company of CGU) also gave evidence which was in short compass, as he stated that he did not really involve himself in the matter as he considered it did not concern him or his company. He clearly did not want to be in Court giving evidence. I consider he was an honest enough witness but his

answers were not overly fulsome as the following exchange reveals in relation to an email to him from Price on 8 November 2013:[81]

> "MR TRAVIS: Mr Kyriaz, do you have any recollection of this email?---I do.
>
> Yes. And - - -?---And I can tell you that on that day I mentioned that I'm not qualified or able to discuss the matter and it was immediately forwarded – I believe it was to a Thomas Leung, our internal solicitor at the time.
>
> Yes. Very good?---Correct.
>
> Now, what's your recollection like of the events that surrounded the sending of this email?---So, to be honest, I took no interest because it didn't serve a purpose for my role. At the end of the day we were dealing with one building company and I – we – I did mention at the time this is something you needed to resolve yourselves.
>
> So I think in answer to the question – I'll put the question again. I apologise - - -?---Yeah.
>
> - - - for putting it again, because I think I know where you're going. What was your – what's your recollection of the events surrounding the sending of this email?---So, again, as I mentioned, I didn't take too much interest. I knew that there was a change of hands of, I guess, ownership, and that's where I left it, mate. Like I said, I'm not qualified to comment about those items."

[88] Bruce Carrigan also gave evidence during the trial. In contrast to Price and Kyris I considered that Carrigan was a thoughtful and careful witness with a good memory for the events in question. Furthermore he had made contemporaneous notes which supported his recollection of the events in question. In particular there is a diary note of 30 September 2013[82] which records the message from Kyris about being "cut off due to litigation". When cross examined by counsel for the plaintiff about the file note the following exchange occurred:[83]

> "When was that telephone – when was that discussion with Mr Kyriaz and you – when did it occur?---I believe on the 30th of September I believe.
>
> And what exactly did Mr Kyriaz tell you on the 30th of September?---Well, from what I could recollect it was that basically Mr Price had advised him that they

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81 T-4, 10, ll 25-45.

82 Exhibit 22.

83 T-4, 46, ll 4-13.

were taking legal action against me for breach of contract and – or agreement and he was – Mr Kyriaz said he's basically going to turn us off.

That he had taken legal action. Did you say that he had taken legal action?---I couldn't say had or was, but - - -".

[89] I accept Carrigan's evidence of this conversation. It is significant in my view that the word litigation is used in the file note of 30 September 2013. At that point in time the evidence indicates that rather than contemplating litigation, Carrigan was trying to negotiate with Price to get him to repay the amounts incorrectly paid to Price Constructions. In contrast however Price was indeed contemplating litigation as he had engaged solicitors by 30 August 2013 as there is correspondence from his solicitors on that date.[84]

[90] Carrigan also has a file note dated 8 November 2013[85] which records the content of a discussion he had just had with Kyris[86]. The significant aspect of the 8 November file note is that it records a number of facts and includes the time of the conversation with Kyris ("1.45- 2pm on 8/11/13") as follows:[87]

> "- Kris advised that he had spoken to Darren Walker.
>
> - He advised that there (sic) system is automated.
>
> - He advised that any invoice raised and submitted and auto approved in ariba will automatically be paid to the account listed under original purchase order to which it is attached
>
> - He advised that they cannot stop this process and current invoices in the system
>
> - He advised that he spoke to Ian [Price] and Ian advised that all invoices raised against purchase orders prior to 1 July 2013 belong to him under the contract of sale.
>
> - He advised that Ian further advised that ABIS had breached the contract of sale and that he is taking legal proceedings against Ian
>
> - He advised that CGU has now shut ABIS off from work and that ABIS needed to resolve this matter with IAN in a week and not to further involve CGU".

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84 Exhibit 35

85 Exhibit 24.

86 Exhibit 24.

87 Email Bruce Carrigan to Admin dated Friday, 8 November 2013 2:57PM; Exhibit. 24.

[91] Carrigan's evidence is also supported by other contemporaneous material including emails between the parties. On 20 November 2013 he recorded his side of a conversation with Kyris and that note also confirms a number of aspects of his evidence.[88] He also made notes of a meeting he had with Kyris on 28 November 2013. [89] Accordingly I consider that Carrigan had a more accurate memory of conversations and interactions with both Price and Kyris. Where there is a conflict between the evidence of Carrigan and Price I prefer the evidence of Carrigan. In this regard I make it clear that in relation to the events surrounding the provision of information to CGU and Kyris about the dispute over the WIP, I prefer Carrigan's evidence to that of Price.

[92] Anton Klobucar also gave evidence. I consider that he was also a careful and thoughtful witness who gave considered answers to questions that were asked of him. Whilst he is admitted as a solicitor and has degrees in Law and Commerce, majoring in Accounting and Finance, he works as a corporate consultant. He was engaged by Carrigan in mid-2013 to assist in the restructuring of the Business and to develop new claims systems and computer systems. It is also clear that Klobucar understood the significance and complexity of some of the factual issues from the outset as the earlier email of 7 November to Kyris made clear.[90]

[93] I consider that Klobucar's evidence was of significance as he was involved in the dispute from an early stage and he gave evidence that he had helped draft the email to Kyris of 9 November 2013.[91] He was well aware at that stage of the dispute and was involved in trying to resolve the issue as between ABIS and CGU. His evidence about that issue was as follows:[92]

> "Are you able to tell the court what that issue was that was developing?---Yes. I became aware through the business and through the owner that essentially there was a – that CGU had started to disallocate ABIS from works. Secondly, there were invoices that were raised for works that ABIS had acquired and that they had completed, that they'd invoiced to GSU, and those invoices were being paid to a third party, to the former owners of the business – prior business. And I was assisting them to have – to use the opportunity of the business development program to enter into discussions about seeking a refund on those invoices, to have all the jobs that were actually – that ABIS had acquired, to have that transferred over to ABIS officially so that this wouldn't occur again, and the other – and the primary motive for me was to actually introduce myself, start to commence and develop a business relationship so that we would potentially

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88 Exhibit 34.

89 Exhibit 27.

90 Trial Bundle Vol 7 Tab 146.

91 See Exhibit 25.

92 T-3, 57, ll 21-40.

> be invited to participate in the next CGU tender and then for them to become a subsequent client for [indistinct]
>
> What did you understand Mr Chris Kiris' role in – with respect to developing this commercial relationship with clients that you spoke of?---Chris Kiris was the person who allocated all the work. He was the primary liaison for the business owner at CGU. So he oversaw the relevant claims handlers that the claims coordinators at ABIS were engaging with, and he also – Chris Kiris was the person who provided instructions to CGU's account staff in relation to their claims processes and payouts."

[94] There are some critical events which are contested by the parties and it is necessary to make findings as to what evidence I accept and what inferences I consider can be drawn. There is a contest as outlined in paragraph [14] about an email Price sent to Carrigan on 16 August 2013, following up on his demands for payment for invoices generated by his company 'Meecam Constructions' on 13 August 2013. The defendants argue that the email amounted to a threat by Price to force the defendants to pay amounts in excess of what was agreed under the Contract.[93] Price maintained at trial that the email was not intended to be a threat, that Hill only worked for NRMA, that the "mounting debt" referred to invoices raised by CGU and that the last sentence in the email was independent of the rest of the email.[94] I do not accept Price's evidence in this regard. First he tried to diminish Hill's role when it is clear Hill was in a senior position with IAG, the parent company of both CGU and NRMA. Price also tried to maintain that most of the invoices related to NRMA work when it is clear that is incorrect.

[95] Furthermore I consider that given the overall content of the email and the positioning of the paragraphs, the clear inference is that Price would inform Hill about Carrigan allegedly owing money, unless the amounts claimed were paid. In my view the demands for payment on 13 and 16 August 2013 were indicative of an aggressive and bullying attitude. I also consider that there were manifestations of this attitude in Price's manner at times during his oral evidence before this Court. I consider that the available inference is that the email of 16 August 2013 was indeed a threat. I also consider that that email indicates contact occurred between Hill and Price in relation to debts Price was claiming were owed to him by Carrigan on or around 16 August 2013.

[96] The email from Price to Carrigan of 26 August 2013[95] is also illuminating as it manifests not just a bullying attitude but a demand for payment:

> "If you have been paid for this then the invoice was paid on our ABN not yours. I will be requesting that NRMA pay us & seek reimbursement from you. This is steeling [sic]."

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93 Defendants' Closing Submissions, p 11.

94 Evidence of Price, T-2, 33, l 30.

95 Exhibit 41.

[97] Another issue, not without significance, is whether on or about 30 September 2013, Price contacted Kyris and told him that Price Constructions had taken, or was taking action against him (and, at least by inference, ABIS). I have accepted the reliability of the evidence of Carrigan about this conversation. On one view, the evidence is inadmissible hearsay. It was not the subject of objection and indeed it was the subject of some cross examination.[96] On that basis, this evidence may be used as proof of the communication between Price and Kyris to the extent of its persuasive power.[97] In the context of Price's preceding and subsequent conduct, it seems to me that power is considerable.

[98] The submissions for the plaintiff and Price do not really address the admissibility of Carrigan's evidence of this conversation. It may be arguable that it was admissible as evidence of facts, namely CGU's decision not to allocate work to ABIS, and the communication of that decision to Carrigan on behalf of ABIS. On that basis, the evidence is admissible as showing the reason for CGU's decision, but it is not direct evidence that the reason is correct in fact.[98] Nevertheless, it seems to me that the reason itself is circumstantial evidence of a communication to CGU that litigation had been instituted or proposed.[99] In light of this evidence, and Price's conduct both before and after 30 September, I find such a communication occurred. The case pleaded by ABIS is that the communication was to Kyris: when the circumstantial evidence might be consistent with a communication to some other person associated with CGU. However Kyris seemed to be the point of contact for Price when dealing with CGU; and was the person responsible for assigning work. I am therefore prepared to draw the inference that the communication was to Kyris. It would be apparent from my earlier discussion of Price's evidence that I reject his denial of such a communication.

[99] I also note the email from Carrigan to Kyris of 9 October 2013[100] in which he refers to litigation having been commenced also refers to "previous discussions" with Kyris about claims by Price Constructions against ABIS. I do not consider that it was Carrigan who first informed CGU of the dispute or the prospect of litigation given the litigation was initiated by Price in October 2013 and Price had already engaged solicitors by August 2013. Having had regard to the evidence outlined above I consider the inference to be drawn is that prior to 30 September 2013 Price informed Kyris that

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96 T-4, 46, ll 1-13.

97 See *Cross on Evidence,* [31110].

98 See the discussion of *Skinner & Co v Shew & Co* [1894] 2 Ch 581 and *Re Workman's Compensation Act;*

Cullen v Clarke (1968) IR 368(SC) as discussed in *Cross on Evidence,* [37025].

99 See the judgment of Wilson, Dawson and Toohey JJ in *Walton v R (*1989) 166CLR 284, 302-304 as discussed in *Cross on Evidence,* [31065] and [31095].

100 Exhibit 21.

there was a dispute between Carrigan and Price in relation to the WIP and that Carrigan or ABIS owed money to Price Constructions.

Findings in relation to Price's actions with CGU

[100] I am satisfied and accept the essential submission[101] by Counsel for the defendants that Price Constructions kept for itself and failed to transfer to ABIS the WIP Benefit that CGU incorrectly paid into Price Constructions' account instead of paying to ABIS.

[101] In terms of the correct calculation of the amount overpaid and whether it is the amount of $407,605.59 claimed by ABIS or the amount of $382,180.57 which is conceded by the plaintiff, I have considered the Forensic Accounting Reports of Steven Ponsonby[102] and the Schedules attached, which outline the amounts received by Price Constructions since 1 July 2013. Whilst I am satisfied that it has been established that the amount of $382,180.57 was incorrectly received by the plaintiff I am not satisfied ABIS has established an entitlement to the additional amount.

[102] The disputed amount relates to two invoices, namely Invoice 1635 in an amount of $2265 and Invoice 1685 in an amount of $19,513. Invoice 1635 was paid to Price Constructions by CGU on 15 July 2013 and Invoice 1685 was paid on 6 August 2013. The date those invoices were actually raised has not been able to be ascertained by Mr Ponsonby, who has also had reference to the report prepared by a second forensic accountant, Mr Kurvink. Given that inability to locate the date the invoice was raised and given that both amounts were paid by CGU within 5 weeks of the sale of the Business, I am not satisfied that the defendants have established that those amounts were amounts for WIP which should have been paid to ABIS pursuant to the Contract.

[103] I also consider, given my analysis of the evidence outlined above, that Price actively informed CGU that it should pay the WIP amount to Price Constructions and not to ABIS. I consider this was done by Price before 30 September 2013.

[104] I also consider that, on the same grounds, Price failed to inform CGU that it should not pay to Price Constructions the WIP Amount, or any part of it, and that CGU should pay the WIP Amount to ABIS.

[105] Furthermore I consider that Price's actions after 1 July 2013 were such that not only were CGU aware of dispute about the WIP, but were also being informed that Price Constructions was entitled to those amounts. Indeed Price commenced proceedings on 22 October 2013 claiming as much and in this regard I note that CGU continued to incorrectly pay amounts for WIP under the Contract to Price Constructions. Furthermore after commencing these proceedings on 22 October 2013 Price not only

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101 Submissions dated 24 October 2016, at [103].

102 Exhibits 15, 18.

sent a copy of the Statement of Claim to Kyris at CGU on 8 November 2013 but, in the email which attached the document, he stated that ABIS "are in breach of our agreement."[103]

[106] Given my findings outlined above, I conclude that Price by that very conduct disparaged ABIS to CGU.

[107] I am also satisfied that CGU began dis-allocating work to ABIS from early October 2013 until mid-January 2014.

Has there been a breach of an implied term?

[108] As has already been noted, counsel for the plaintiff argues that there has been no breach of the alleged implied terms and advances the following arguments in this regard.

[109] Counsel argues that the established cases indicate that the content of a duty of good faith and cooperation is to require the contracting parties to act honestly and with fidelity to the bargain; not to act dishonestly; not to act to undermine the bargain entered into or the substance of the contractual benefit bargained for; and to act reasonably and with fair dealing having regard to the interests of the parties. In this regard it is argued that there is no suggestion that Price Constructions or Mr Price acted dishonestly or unreasonably because Exhibits 37 to 42 show that after completion, Price and Carrigan engaged in "civil and open discussions"[104] for a period of some months regarding Price's contention that he was entitled to amounts in respect of work which had been completed prior to the completion date.

[110] Counsel for the plaintiff argues that the conduct of Carrigan and ABIS during this period was not that of a party confronted by another contracting party acting dishonestly and without fidelity to the bargain. Rather it is argued that Carrigan and ABIS instead engaged with Price regarding the issues raised and that Price was open and forthcoming about his position. It is argued that there was an exchange of emails, that Price and Carrigan met to discuss the reconciliation and Carrigan prepared a spread sheet for Price to complete which set out the amounts owing to him. Counsel argues that there was no suggestion that Price was in breach of the REIQ Contract, let alone that he was acting dishonestly or in breach of some implied duty of good faith or cooperation. Counsel for the plaintiff submits that the evidence is to the contrary of any breach occurring and that Carrigan accepted Price's approaches and offered a compromise.

[111] In relation to the conduct alleged in the further amended counterclaim,[105] counsel for the plaintiff argues that the evidence led by ABIS failed to establish that the alleged conduct occurred. It is alleged at paragraph 28 that "after the first defendant issued

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103 Exhibit 33.

104 Plaintiff's Closing Submissions at [74].

105 Amended counterclaim at [28], Court Document 69.

invoices to CGU with respect to incomplete repair jobs that had been finished by the first defendant", Price contacted Kyris of CGU telling him that ABIS: "is in breach of the Contract"; that ABIS was in breach of a collateral or other agreement; that ABIS was "not entitled to the payment of the invoices" and that "CGU should pay the amount of those invoices to the plaintiff". Counsel for the plaintiff note that the conduct alleged in paragraph 28 of the amended counterclaim was not substantiated by Kyris at the trial.

[112] I have formed a contrary view with respect to those arguments. In terms of the first argument advanced I consider that the plaintiff's submission that, because Carrigan accepted Price's approaches and tried to come to some arrangement with him about his disputed WIP claims, this showed that Price could not have been acting "without fidelity to the bargain", to be extraordinary. Price kept for himself and failed to transfer to ABIS the WIP amount he was not entitled to. He failed to inform CGU of the correct state of affairs and they continued to pay him. Price's acts are not simply acts of omission but rather there is evidence that he took positive steps to give CGU incorrect information.

[113] I consider that Price's actions from 1 July 2013 led CGU to believe, and were intended to lead CGU to believe, that Carrigan and ABIS were in breach of the agreement, that Price Constructions was entitled to funds which ABIS and Carrigan were withholding and that Price was suing to recover monies owing to him. The plaintiff's Statement of Claim alleged a breach of an oral WIP Agreement by the defendants and liability for more than three quarters of a million dollars. This claim was ultimately abandoned and it would seem to me that the claims about the existence of such an agreement were baseless. There is no doubt however that the very provision of the Statement of Claim in that form would indeed have raised concerns at CGU about ABIS and indeed concerns that it could be drawn into the litigation.

[114] I also reject the plaintiff's third argument that the defendant has not established that Price told Kyris that ABIS was in breach of the Contract, not entitled to the payment of the invoices and that CGU should pay the amount of those invoices to the plaintiff because of Price's evidence. I did not find Price at all credible in this respect. He had been demanding payment from Carrigan, he was accusing him of stealing, he was threatening to contact Matt Hill, he had engaged solicitors and he had filed a Claim and Statement of Claim. As I have previously indicated I do not accept Price's evidence that he did not speak to anyone at CGU before 7 November 2013. It is simply implausible.

[115] I have already addressed the issues in relation to whether there was a duty to account and I do not consider it necessary to refer to that issue any further.

[116] However in order to determine whether there has been a breach of the Contract it is necessary to consider what the "benefits" of the Contract were. I agree with the submission of counsel for the defendants as to those benefits. That is, that for the Purchase Price of $600,000, Price Constructions promised ABIS:

(i) the "WIP Benefit" which was the work in progress as at 1 July 2013 and the amounts payable for work done by ABIS after 1 July 2013; as well as

(ii) the "Goodwill Benefit" which was the business relationship Price Constructions had established with CGU and its other clients.

[117] In my view the actions of Price amount in the very least to a breach of the implied duty to cooperate given ABIS did not get the benefits of the Contract. I consider that the plaintiff did not fulfil its duty to cooperate and also breached its obligation not to hinder or prevent the fulfilment of the purpose of the Contract; and not to impede the right of the other to receive the benefit of the Contract. Price's actions meant that ABIS did not have access to the payments it was entitled to under the Contract. ABIS was entitled to the WIP payments and when Price Constructions was incorrectly sent those payments, Price kept them and did not inform CGU of the error. Significantly he asserted rights to payments he was not entitled to in his email correspondence to both ABIS and CGU. Furthermore I consider Price Constructions through Price fundamentally undermined ABIS's ability to establish a good working relationship with CGU, its major client, in the first vital months after the takeover of the Business.

[118] Given the defendants' limited reliance on the breach of an implied duty of good faith as being essentially a breach of the mutual obligation to cooperate and my finding that there has been such a breach, I do not consider it necessary to consider the implied duty of good faith in any further detail.

Did the plaintiff's actions cause a loss to the defendants?

[119] Did Price's actions in breaching the implied covenants result in a loss to ABIS? The defendants argue that because of the actions of Price and Price Constructions, CGU did not give ABIS any work between October 2013 and January 2014 and it thereby suffered loss.

[120] The question therefore is whether Price or Price Constructions, by breaching those covenants, caused a loss to ABIS and if so, what the quantification of that loss is. The onus is clearly on ABIS to prove a sufficient connection between the breaches of the duty to cooperate and the loss and damage which has been pleaded: (a) loss of profits, and (b) loss of goodwill.

[121] In determining whether the plaintiff's breach of the implied duty to cooperate caused one or both of these heads of damages, I am required to consider the question of causation in terms of fact and in law.[106] The question of causation in law only arises if I

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106 *March v E & M H Stramare Pty Ltd* (1991) 99 ALR 432.

find that factual causation has occurred.[107] The distinction between these two sets of enquiries was set out by Applegarth J in the recent decision of *Bert v Red 5 Ltd*:[108]

> "[91] Issues of factual causation and the scope of liability for losses which are proven to have in fact been caused by a defendant's conduct involve two different kinds of enquiry:
>
> "[99] When lawyers use the term "causation" one of two different types of enquiry may be involved. The first and factual enquiry is the role played by something in the history of an outcome. It is about "how things came about".[6] It may be an enquiry into whether a defendant's breach of contract, negligence or contravention of statute played a role, along with other conditions or "causes", in the plaintiff's entry into a loss-making transaction. This is a "factual causation" enquiry.
>
> [100] The second enquiry is not about how things came about. It proceeds on the basis of an understanding of factual causes. It enquires into whether legal responsibility should be attributed to the defendant for a given occurrence, for example, the economic loss suffered by the plaintiff arising from a transaction.
>
> [101] Causation in law is not concerned simply with a factual or historic enquiry into the relationship between conditions. As Mason CJ stated:
>
> > 'In law, … problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence. … Thus, at law, a person may be responsible for damage when his or her wrongful conduct is one of a number of conditions sufficient to produce that damage.'[7]
>
> [102] In undertaking the second type of enquiry in deciding whether or not to attribute legal responsibility for a given occurrence, value judgments are made about the appropriate scope of liability.
>
> [103] A court may refuse recovery of all or part of claimed losses, despite, as a matter of incontrovertible fact, the defendant's conduct being a cause of the loss, in the sense that the loss would not have occurred but for the defendant's conduct. Sometimes this occurs because the losses were incurred beyond a certain date. In other cases it is because the losses are characterised as too remote or not foreseeable. In some cases the loss, although having been caused as a matter of historical

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107 Ibid at 431.

108 [2016] QSC 302 at [91].

> fact by the defendant's conduct, will not be recoverable because extreme or unreasonable conduct by the plaintiff occurs, such that the court concludes that the defendant's conduct should be found not to have "caused" the plaintiff's loss. In other cases, recovery of all or part of claimed losses may be denied because of a supervening factor. In each of these cases the court limits the recovery of losses on the basis of a judgment about the appropriate scope of legal responsibility, not on the basis of an enquiry into historical fact.
>
> [104] At law, a person may be responsible for a loss when his or her conduct was one of a number of conditions sufficient to produce that loss. Whether or not the person is made legally responsible for all or part of a loss for which his or her conduct was *a* cause is an enquiry into whether it is appropriate to attribute legal responsibility for a given occurrence in the context of [a] particular legal norm" (footnotes emitted).

Factual causation

[122] The first issue to be considered is whether the defendants would have suffered the lost profits and/or the diminution of the value of the Business's goodwill if Price had not breached the implied duty to cooperate. Integral to this inquiry is the conduct of Price, which is considered to be in breach of that implied duty.

[123] Due to my findings as previously outlined in relation to the provisions of information to CGU I reject the plaintiff's allegation that it was Carrigan himself who first informed CGU of the dispute.

[124] I do not accept the argument that any dis-allocation of work was not due to Price's actions. I consider that Price's actions had everything to do with the flow of work stopping. In this regard I consider the email from Kyris at CGU to Carrigan dated 10 January 2014[109] to be critical to this finding. That email was in the following terms:

> "Hi Bruce, Just confirming what we discussed today.
>
> - CGU is prepared to commence re-allocating claims as of Monday 13 January.
> - All tax invoices will be paid into current ABN
> - All monies paid to BIRS, but owed to Ian Price, is the responsibility of BIRS (ABIS) to redirect funds.

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[109] Exhibit 32.

- **If contact is made by Ian Price, seeking unpaid or incorrectly paid funds, CGU will deem that BIRS have not taken control of the matter and may potentially affect contract renewal in 2014.**

- Aside from the above its BAU" (my emphasis).

[125] In my view the unmistakeable conclusion from that email, particularly the section emphasised, is not only that the CGU work was cut off but it was cut off because of Price's complaints to CGU about the defendants.

Causation at law

[126] I do not consider there to be any reason not to hold Price legally responsible for the losses to the defendants that, on the facts, were caused by his actions. There were no supervening acts between Price's conduct and the losses sustained and there have been no submissions by counsel for either party that would suggest that the losses sustained by the defendants in this case were too remote to be considered outside the scope of causation.

[127] In my view, the actions of Price and Price Constructions caused loss to the defendants.

What is the quantification of the loss to ABIS?

[128] The defendants claim that, because of the dis-allocation of work from CGU in the period October 2013 to January 2014, they were not allocated a significant volume of work in that period. The defendants claim two major heads of damage, namely (i) loss of profits as a result of being cut off during the storm events and (ii) diminution in the value of the asset of goodwill sold by Price Constructions to ABIS under the Contract.

[129] It is clear that between 8 and 14 November and then between 15 and 19 November 2013 a series of storms hit the Sunshine Coast and Wide Bay Region. In terms of the quantification of the loss to ABIS in this period, the critical evidence comes from the oral evidence of Forensic Accountant Steven Ponsonby together with his First Report dated 7 April 2016[110] with amendments dated 27 May 2016, as well as his Second Report dated 28 September 2016.[111] Exhibit 19 tendered by the plaintiff is also significant as it is a document prepared by CGU and sets out a Table of all of the CGU Insurance Claims in the Sunshine Coast area as a result of the two storm events in November 2013. The evidence indicates that in the periods between 8 and 14 November and 15 and 19 November 2013, CGU issued 658 claims. There were 167 claims in the first event and 491 in the second. In the entire period a single repair claim was issued to ABIS with respect to a CGU insurance policy, however that was assigned to ABIS by a loss adjuster rather than by CGU.

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110 Exhibit 15.

111 Exhibit 18.

[130] In the period during which the Business was shut off, there is therefore evidence before the Court as to the allocations that were given to its competitors. The evidence is based on Exhibit 19 and the oral evidence of Carrigan, who gave relevant information in relation to the comparisons between ABIS and its competitors for work at the time of the storm events. A summary of Carrigan's information is outlined in Tabular form below:

Competitor	**Mr Carrigan's Evidence**	**No. of Jobs Allocated**
Rowlo Constructions	Based in Maroochydore. They were on the CGU panel at the time. ABIS was bigger and better organised. They do general construction insurance work. A good competitor to the Business. They had a good reputation and CGU used them but capacity was limited.	73
Townsend Building Services	Based in Brisbane. Used to be a larger insurance repairer. Similar to the Business.	70
Ensure Building Pty Ltd	Based in Brisbane. Similar size to the Business.	39
Ben Campbell	Based on the Sunshine Coast. Small operator.	33
Bay Building Group	Based in Brisbane. One of the larger insurance repair businesses operating.	27

[131] Mr Carrigan's evidence was that ABIS got about 90 jobs from non CGU clients and his estimate would be that ABIS would have received at least 70 jobs from CGU during the relevant periods. That evidence is based on the fact that Rowlo Constructions was a similar competitor and they received about 73 claims. Carrigan considered that ABIS would have received at least as many, given that they were better able to handle the work than Rowlo and also had a better reputation.[112] I note in the first of the storm events Rowlo was only allocated 6 claims but received 67 in the second event, which means that although the number of claims in the second event was three times that in the first event, Rowlo's allocation in the second event increased ten times as did Bay

[112] T-4, 23, ll 15-42; T-4, 26, ll 5-19.

Building by six times. The Brisbane based groups also received a greater increase in their allocations.

[132] It is clear that the calculation of the loss to ABIS due to the dis-allocation of work is not a calculation which is capable of exact precision but rather a matter of inference based on certain factual matters. Having considered the evidence of Carrigan and Ponsonby, together with the Ponsonby Reports[113] and Exhibit 19, I am satisfied that the defendants have established that they would have received at the very least in the order of 70 jobs from CGU during the November 2013 storm events.

[133] Carrigan also gave evidence, which I accept as it was based on his experience of other storm events, particularly in Chinchilla and Brisbane, that the value of each job would have averaged about $25,000. Having considered Exhibit 19 I am also satisfied that the figure of $25,000 is substantiated. I accept the analysis, as indicated by Exhibit 19, that 83% of the claims were under $20,000 but the average value of the remaining claims was $48,561.54. This is consistent with an average of $25,000. The calculation of the Gross Receipts Figure is ($25,000 x 70) which is $1,750,000.

[134] Ponsonby's First Report[114] shows that the cost of each CGU claim was in the order of 65.79% which produces a net profit of $598,675 based on Exhibit 19, which I note that Ponsonby did not have access to until he was shown it during cross examination. In his First Report Ponsonby calculates the loss to be $505,015. Given the contents of Exhibit 19 I consider that it is correct to calculate the loss at $598,675. Ponsonby gave evidence that he had done that calculation himself and that was his conclusion if the source of the information in Exhibit 19 could be verified as coming from CGU, which was ultimately satisfied.

[135] Accordingly I am satisfied that $598,675 is the figure which represents the loss of profit during the storm event due to the dis-allocation of work.

Has there been a diminution of the Goodwill?

[136] I have accepted that Price's breaches of the implied duty to cooperate caused CGU to cut off work to ABIS for over three months. The question now is whether that also resulted in damage to, and diminution of, the goodwill of the Business.[115] The defendants rely on Ponsonby's Second Report[116] to argue that there has been a diminution in the value of the goodwill resulting from Price's damage to that intangible asset. Counsel for the defendants submits that the quantification of that amount is $213,586 on the basis of Ponsonby's amended Second Report. That is a significant figure given the period of dis-allocation of work by CGU is a short period of three

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113 Exhibits 15, 18.

114 At p 360.

115 Defendant's Closing Submissions at [134].

116 Exhibit 18.

months, the loss of work has been established on the evidence to have been with one client only and ultimately the flow of work was at least partially restored by 13 January 2014.

[137] The calculation of the loss of goodwill is notoriously difficult to explain and even more difficult to calculate. In *Commissioner of Taxation (Cth) v Murry*[117] the goodwill of a business was defined as follows:[118]

> "From the viewpoint of the proprietors of a business and subsequent purchasers, goodwill is an asset of the business because it is the valuable right or privilege to use the other assets of the business as a business to produce income. It is the right or privilege to make use of all that constitutes "the attractive force which brings in custom". Goodwill is correctly identified as property, therefore, because it is the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means that have attracted custom to it. It is a right or privilege that is inseparable from the conduct of the business" (footnotes omitted).

[138] In this case, Item L of the Contract provided that the Business would be sold on a "walk in, walk out" basis which by virtue of Clause 3.2 of the Contract, included the goodwill of the Business.[119] The defendants argue that is "the fundamental benefit of the commercial relationship (and associated goodwill) that the Business had with its insurance clients, including CGU".[120]

[139] In determining whether there has been a diminution of the goodwill, I have had particular regard to the fact that CGU became inextricably caught up in the dispute and that Price was clearly making incorrect assertions about ABIS and Carrigan, which would inevitably have affected the standing that Carrigan and ABIS had with CGU. I also accept the force of the argument, drawn from what was outlined in *Commissioner of Taxation (Cth) v Murry* above, that during the period it was cut off, ABIS was unable to conduct the Business "in substantially the same manner and by substantially the same means that [had] attracted custom to it" before the breaches occurred. At trial Carrigan described the steps that would usually be taken by ABIS to secure work from CGU and I am satisfied Carrigan and ABIS were prevented from taking those steps to secure work and produce income, because ABIS was barred from being allocated any work from CGU.[121] This was despite being a reputable member of CGU's Building Panel.

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117 [1998] HCA 42; 193 CLR 605; 72 ALJR 1065; 155 ALR 67; 98 ATC 4585; 39 ATR 129.

118 Ibid at [23].

119 See Exhibit 4, pp 1169, 1172.

120 Further Amended Counterclaim, Court Document 69, at [14A].

121 T-4, 21-23, ll 11-11.

[140] Taking into account that CGU was one of ABIS' biggest clients and indeed prior to October 2013 work allocated to ABIS by CGU made up over 27% of ABIS' profits,[122] I am satisfied that the goodwill of the Business was inevitably damaged. The real issue is to what extent.

Quantification of Damages

[141] In coming to his calculation that the damage to the goodwill of the Business totalled $213,586,[123] forensic accountant Steven Ponsonby relies on his Report and Supplementary Additions, tendered as Exhibits during the trial. In determining the value of the Goodwill of the Business, Mr Ponsonby adopted the following approach:[124]

> "10.1. In order to establish the value of the goodwill of the Business under both the Plaintiff and the Defendant, it is first necessary to value the Business.
>
> 10.2. Therefore, in the sections following, I first establish the value of the Business and there from, the value of the Goodwill.
>
> 10.3. As I have not been provided with, nor do I have available to me, an appropriate prediction of the future net cash flows that the Business would have been expected to generate, I have had to value the Business by the Capitalisation of Future Maintainable Earnings method, using its past results as a basis for establishing those profits. The Future Maintainable Profits figure used will be on a Before Interest and Tax basis.
>
> 10.4. I have determined a going concern basis as being an appropriate basis for determination of the applicable value.
>
> 10.5. I have undertaken a Limited Scope Valuation Engagement APES 225 Valuation Services.
>
> 10.6 As the value of the Business is to be established irrespective of long term debt, for a Capitalisation Rate, I will use an appropriate Cost of Equity.
>
> 10.7. This can then be used to calculate the value of the Goodwill over and above the market value of the assets of the business.
>
> 10.8 As set out above, in assessing the value of the goodwill I have adopted the economic in-use value of the assets."

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122 See Exhibit 18, p 927.

123 Defendant's Closing Submissions at [155].

124 Exhibit 18, pp 914-916.

[142] Ponsonby also outlined in his Report[125] that he included a Goodwill calculation based on an average of the Business' Future Maintainable Earnings (FME) for the financial years ended June 2012 and June 2013 on the basis of the growth of turnover. He also explained that in valuing the Business at the relevant time periods, he does not include revenue generated by CGU given "CGU ceased providing work to the First Defendant on or around November 2013, in the absence of more appropriate information being made available to me, I consider it appropriate to remove the financial impact of CGU to ascertain the loss of Goodwill (if any) in this matter."[126] The removal of the revenue received from CGU in the calculation of the goodwill was criticised by Counsel for the plaintiff on the basis that the removal was based on an assumption that the CGU work was permanently discontinued.

[143] Ponsonby indicated in his evidence that as a result of the interference in the relationship with CGU, he understood that CGU refused to allocate any further work to the Defendant until such time as the dispute was resolved. He stated that from his review of the financial information he identified that the revenue from CGU represented approximately 27% of the total revenue for the plaintiff for the financial year ended 30 June 2013. He then noted that the revenue of ABIS decreased by approximately 28% in financial year ended 30 June 2014 compared to the revenue for the financial year ended 30 June 2013. Accordingly, in undertaking the assessment of the FME he considered it was appropriate to eliminate the revenue generated from CGU and to quantify the FME on the basis of the CGU revenue being excluded. He also indicated that "potentially I could be double counting, and I think that's inappropriate."[127]

[144] Ponsonby identified that the total revenue for the plaintiff for the financial year ended 30 June 2013 was $1,695,715 (excluding GST) and that the identified total revenue for the Defendant for the financial year ended 30 June 2014 was $1,259,865 (excluding GST). He concluded that in the absence of more appropriate information being made available it was appropriate to eliminate the CGU revenue from the FME analysis. The approach then taken[128] to determine the value of the goodwill of the Business was, in summary, the following:

i. Determine the value of the Business as at 30 June 2013 (i.e. as at the sale of the Business) and 30 June 2014 (i.e. the subsequent financial year after the Business had been operating under the control of Carrigan);

ii. Determine the value of the Net Tangible Assets required to conduct the Business on a day to day basis as at 30 June 2013 and 30 June 2014; and

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125 At 7.2.1.4.

126 Exhibit 18, at 7.2.1.5.

127 T-3, 45, l 45.

128 Exhibit 18.

iii. If the value of the Business exceeds the value of the Net Tangible Assets required to conduct the Business on a day to day basis, that excess is attributable to Goodwill.

[145] I consider that, given Ponsonby's explanation, his approach of removing the CGU revenue form the calculation was appropriate in the circumstances and the calculation was not simply done on the basis that the work from CGU was permanently discontinued as alleged.

[146] In relation to attributing excess value to Goodwill, Mr Ponsonby stated that in respect of Intangible Assets generally, it appeared that the Business did not own any exclusive patents, licenses or other similar proprietary rights. Accordingly he considered that it was appropriate to attribute any excess of the Value of the Business, over and above the Net Tangible Assets, to Business Goodwill.[129]

[147] Using that approach Ponsonby concluded that the value of the goodwill of the Business as at 30 June 2013 (as under the control and management of the Plaintiff) was $872,428 and that the value of the goodwill of the Business as at 30 June 2014 (as under the control and management of the Second Defendant) was $658,842. The loss of goodwill was then determined by him as being the difference between those two figures, which was $213,586.

[148] Counsel for the plaintiff submits that there are a number of other difficulties with the calculations in the Report. In particular it was argued that in performing the assessment of FME Ponsonby had arbitrarily singled out the 2011 year from the calculation. It is argued that had the figure for 2011 been taken into account the future maintainable profits would have been reduced from $548,291 to $365,527.66. Ponsonby gave that figure during his evidence and whilst he stated in his evidence that he had removed 2011 form the calculation as he considered it to be an 'outlier' and not a typical year, I consider the better approach would have been to make the calculation on the previous three years rather than the two years he adopted. That recalculation therefore inevitably lowers the calculation of the ABIS' loss and damage.

[149] Counsel for the plaintiff also challenged the increase in the capitalisation rate from 30% to 35% between the first and second report, which also had the consequence of increasing the calculation of the loss and damage figure. The increase in the capitalisation rate of ABIS' business to 50% in the second report was also criticised on the basis that it was arbitrary, as Ponsonby was unable to identify material to substantiate the increase. Having considered the Reports and Ponsonby's evidence at trial I am not satisfied that he has in fact justified his conclusions at paragraph 13.8 of his Second Report, particularly with reference to the factors that are outlined in his Report at paragraph 13.4. Indeed I consider that the cross examination by counsel for the plaintiff established that Ponsonby did not have a sufficient factual basis for such an

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129 Exhibit 18, p 932.

increase and accordingly I do not consider he has outlined a satisfactory basis for the allocations of the capitalisation rates of 35% and 50%.

[150] Counsel for the plaintiff also criticised Ponsonby's identification of a "clear pattern" of work being derived by the Business prior to settlement and a significant decrease post settlement, arguing that the graph relied upon did not support that conclusion.

[151] I also accept that in preparing his report Ponsonby indicated that some of the material was incomplete. I am not satisfied therefore that the amount claimed of $213,586 has been established. However, as Gordon J noted in *Elwood v Cotton*[130] the task of calculating damages must be done even if the material is incomplete and the task involves speculation, because "the court has the right, and even the duty, to speculate in calculating compensatory damages" and the difficulty in estimating damages or the requirement of speculation does not relieve the Court of the responsibility of undertaking the exercise. In that case a significant discount was applied given the imprecision in the data provided to the Court. Ultimately the approach her Honour adopted was "doing the best I can".

[152] In *Benward Pty Ltd & Ors v Metal Deck Roofing Pty Ltd & Ors*[131] when Palmer J was undertaking the quantification of Goodwill he stated that "No exactness can be achieved in the task" and that it depends very much on "impression and a sense of balance".[132] Accordingly, I consider that a significant reduction should be applied in the case given the factors I have referred to above, and, doing the best I can, I consider a figure in the order of $95,000 is a more appropriate figure for the loss of Goodwill.

[153] I consider therefore that the conclusions which follow from the reasons are as follows.

Conclusions

[154] The amount owing to the plaintiff under the Contract is $550,000 plus interest on the unpaid balance Purchase Price at 7% (Special Condition 2) from 1 February 2014.

[155] The amount owing to ABIS for WIP pursuant to the Contract is $382,180.27 plus interest under s 58 of the *Civil Proceedings Act* 2011.

[156] The amount owing for damages for loss of profits relating to the November 2013 Storm Events is $598,675 plus interest under s 58 of the *Civil Proceedings Act* 2011 from 1 January 2014.

[157] The amount of the diminution of Goodwill is $95,000 plus interest under s 58 of the *Civil Proceedings Act* 2011 from 8 November 2013.

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130 [2009] FCA 633.

131 [2001] NSWSC 1053.

132 At [69].

[158] I will hear the parties as to Costs and as to the form of the Orders.