SUPREME COURT OF QUEENSLAND

CITATION:	*Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Limited; Wiggins Island Coal Export Terminal Pty Limited v Civil Mining & Construction Pty Ltd* [2019] QCA 12
PARTIES:	**In Appeal No 4068 of 2018:** **CIVIL MINING & CONSTRUCTION PTY LTD** ACN 102 557 175 (appellant) **v** **WIGGINS ISLAND COAL EXPORT TERMINAL PTY LIMITED** ACN 131 210 038 (respondent) **In Appeal No 4286 of 2018:** **WIGGINS ISLAND COAL EXPORT TERMINAL PTY LIMITED** ACN 131 210 038 (appellant) **v** **CIVIL MINING & CONSTRUCTION PTY LTD** ACN 102 557 175 (appellant)
FILE NO/S:	Appeal No 4068 of 2018 Appeal No 4286 of 2018 SC No 6050 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 85 (Flanagan J)
DELIVERED ON:	6 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	13 September 2018; 14 September 2018
JUDGES:	Sofronoff P and Fraser and Morrison JJA
ORDERS:	**1. In CA 4068 of 2018, the appeal is dismissed with costs.** **2. In CA 4268 of 2018, the appeal is dismissed with costs.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – VARIATIONS – where Wiggins

Island Coal Export Terminal Pty Ltd (WICET) is the corporate vehicle for a joint venture to develop and operate a coal export terminal – where Civil Mining & Construction Pty Ltd (CMC) was contracted by WICET to complete some of the earthworks and civil works required for the construction of the terminal – where WICET caused CMC to be delayed by 208 days in completing the work under the contract, for which CMC was entitled to an extension of time to the date for practical completion – where in a section of the contract dealing with variations the contract contained a table headed "Schedule of Daywork Indirect Personnel and Facilities Rates" (DIPFR) – where the central question on CMC's appeal is whether the DIPFR schedule contains rates such that it can be said to be one where the Contract "prescribes specific rates … to be applied in determining the value" of the CMC's on-Site overhead costs for the 208 days of delay caused by WICET – whether on a proper construction of the contract the DIPFR schedule is not one that is prescribed under the relevant clause of the contract

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PROCEDURAL ASPECTS OF EVIDENCE – EXPERT REPORTS AND EXPERT EVIDENCE – where WICET's appeal concerned the admission into evidence of Exhibit 31, also referred to as the Vance Measurement – where in general terms WICET complained that Exhibit 31 was admitted into evidence over its objection, and that the document represented a radical departure from CMC's pleaded case – where the issue between the parties was whether CMC had been delayed overall in completing the earthworks – where WICET, who engaged their expert, Mr Abbott, to produce a productivity analysis to show that CMC was not so delayed – where Exhibit 31, the Vance Measurement, responded to the pleaded case and to Mr Abbott's report – where Mr Vance simply sought to demonstrate that there were antecedent delays in the period 23 November 2011 to 19 February 2012, by reference to the extra time the works took to complete – where Mr Vance's calculations were consistent with the pleaded case and relevant to the issues alive on the pleadings – whether the learned trial judge was correct to admit Exhibit 31, the Vance Measurement

Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd [2017] QSC 85, referred to
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37, cited
Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd (1972) 127 CLR 253; [1972] HCA 4, distinguished

COUNSEL: S L Doyle QC, with S J Webster, for the appellant/respondent (CMC)
D A Kelly QC, with J Green, for the respondent/appellant (WICET)

SOLICITORS: Thomson Geer for the appellant/respondent (CMC)
Corrs Chambers Westgarth for the respondent/appellant (WICET)

[1] **SOFRONOFF P:** I agree with the reasons of Fraser and Morrison JJA and the orders proposed.

[2] **FRASER JA:** I have had the advantage of reading in draft the reasons for judgment of Morrison JA. I agree with the orders proposed by his Honour and I agree generally with his Honour's reasons subject only to my following additional reasons. Morrison JA's detailed analysis, which includes the text of the contractual provisions to which I will refer, enables me to express these reasons succinctly.

[3] Under the major construction contract made between Wiggins Island Coal Export Terminal Pty Ltd ("WICET"), as principal, and Civil Mining & Construction Pty Ltd ("CMC"), as contractor, clause 36 required the principal's representative to make a valuation under clause 40.5 of on-site overheads attributable to certain delay in CMC's work for which WICET was responsible. In CMC's appeal the main issue is whether, in terms of clause 40.5(a), the contract "prescribes specific rates or prices to be applied in determining the value". CMC argues that the trial judge erred in concluding that the contract did not so prescribe the application of the rates in a contract schedule headed "Schedule of Daywork Indirect Personnel and Facilities Rates". I agree with the trial judge's conclusion, principally for two related reasons given by his Honour. First, none of the contractual provisions upon which CMC relies (including the schedule itself) purports to require the principal's representative to apply the rates in the schedule in the valuation of on-site overheads required by clause 36. Secondly, the combination of the schedule heading and its location within the contract (amongst other schedules in section C4-2 concerning rates for variations carried out as daywork) suggests that the rates in it are applicable only in the valuation of variations directed by the principal's representative to be carried out as daywork pursuant to clauses 40.1, 40.5(h) and 41.

[4] In relation to the second point, it may be that clause 41, if construed in isolation, would require the valuation of a variation directed to be carried out as daywork to reflect the principal's representative's assessment of the actual cost of the work. But in the context of the specific provisions in section C-4 (under the heading "Rates for Pricing Variations") and related schedules – including the Schedule of Daywork Indirect Personnel and Facilities Rates – the proper construction of the contract as a whole is that relevant rates specified in those schedules are potentially applicable in the valuation of variations directed to be carried out as daywork.

[5] CMC initially argued that the rates in the Schedule of Daywork Indirect Personnel and Facilities Rates were incapable of any application in the valuation of variations directed to be carried out as daywork, but in the course of argument CMC ultimately accepted that at least some of those rates were capable of such an application in particular kinds of cases identified by WICET.[1] It was then submitted for CMC that the schedule should be regarded as applicable in the valuation of on-site overheads attributable to delay in CMC's work, upon the footing that the only potential use of any rate in the schedule in the valuation of variations directed to be

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[1] Transcript 13 September 2018 at T1-10 ll 10-12; compare T1-28 ll 15-25 and Transcript 14 September 2018 at T1-15 to T1-15, T1-23 ll 12-18 and T1-26 to T1-28.

carried out as daywork was merely theoretical or remote. The fact that at least some of the rates in the schedule are potentially applicable in a claim for a variation directed to be carried out as daywork undermines the various arguments advanced for CMC which would seek to deny significance to the word "daywork" in the heading of the schedule, the absence of anything in the schedule to indicate that it is confined to on-site overheads, and the fact that the schedule appears in a part of the contract otherwise concerned with the valuation of variations carried out as daywork.

[6] CMC also argues that the use of the schedule for valuing variations directed to be performed as daywork is inconsistent with the statement in the contract annexure of a charge for overheads, profit, etc for daywork, as contemplated by clause 41(f), of 12.5 per cent. Upon this point I would accept WICET's response that clause 41 requires only that in determining the value of daywork "regard shall be had to" that charge. The meaning of that expression in this particular context must take into account not only the reference in schedule C-4.2 to the entitlement of the contractor to the mark up of 12.5 per cent "which shall be deemed to cover all costs including … all off-Site and on-Site administration … overheads …", but also the influence of the schedule itself in contemplating the use of the rates in it in the valuation of daywork. It would be for the principal's representative to determine if and how the 12.5 per cent charge in the annexure should be factored into any particular valuation.[2] But even if, as CMC argued, the 12.5 per cent charge in the annexure is not reconcilable with the rates in the schedule, that would reveal only that the detailed and complex contractual provisions upon which the parties agreed included two inconsistent provisions. It would not justify a conclusion that a schedule which expresses itself as being applicable to "daywork" rates, which is found amongst other provisions concerning rates for variations carried out as daywork, and which includes no indication that it is confined to on-site overheads, prescribes specific rates to be applied in determining the value of on-site overheads attributable to delay.

[7] Subject only to those matters I respectfully agree with Morrison JA's reasons for concluding that CMC's appeal should be dismissed. I agree with his Honour's reasons for concluding that the appeal by WICET should be dismissed.

[8] **MORRISON JA:** Wiggins Island Coal Export Terminal Pty Ltd (**WICET**) is the corporate vehicle for a joint venture to develop and operate a coal export terminal at Wiggins Island near Gladstone.

[9] Civil Mining & Construction Pty Ltd (**CMC**) was contracted by WICET to complete some of the earthworks and civil works required for the construction of the terminal.

[10] WICET caused CMC to be delayed by 208 days in completing the work under the contract, for which CMC was entitled to an extension of time to the date for practical completion.

[11] Clauses 35.5 and 36 of the contract provided that if CMC was granted an extension of time for delay, then WICET would have to pay for "on-Site overheads" attributable to the delay, valued under Clause 40.5. In turn, Clause 40.5(a) provided

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2 Compare the meaning that was given to the expression "have regard to" in a very different context: *R v Hunt*; *Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329 (Mason J).

that "if the Contract prescribes specific rates or prices to be applied in determining the value, those rates or prices shall be used".

[12] In a section dealing with variations the contract contained a table headed "Schedule of Daywork Indirect Personnel and Facilities Rates".[3] It had a list of 20 items and rates, and concluded with an "Overall Composite Daily Rate".

[13] CMC contended that the Overall Composite Daily Rate (and the other rates in the table) were "*specific rates or prices*" prescribed by the contract under clause 40.5(a), to be applied in determining the value of the CMC's on-Site overhead costs for the 208 days of delay caused by WICET.

[14] The learned trial judge rejected that contention.

[15] The central question on CMC's appeal is whether the DIPFR schedule contains rates such that it can be said to be one where the Contract "prescribes specific rates … to be applied in determining the value".

[16] The central question on WICET's appeal is whether the learned trial judge erred by admitting into evidence a schedule prepared by Mr Vance,[4] and then applying it to determine the length of delay caused by certain directions issued by WICET.[5]

The relevant terms of the contract

[17] There was no dispute on the appeals that the contract, being a commercial contract, should be construed in accordance with the principles identified in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*.[6]

[18] Clause 36 provides:

> "Where the Contractor has been granted an extension of time under Clause 35.5 for any delay caused by an event listed in Clause 35.5(b)(i), the Principal shall pay to the Contractor … for on-Site overheads attributable to the delay valued by the Principal's Representative under Clause 40.5. The Principal's Representative's valuation shall exclude any off-Site overheads or profit.
>
> …
>
> The Contractor shall not be entitled to make any Claim for delay costs which could have been reasonably avoided by the Contractor. Further, such costs shall not be included in any valuations of delay costs pursuant to Clause 40.5.
>
> …
>
> Except to the extent expressly set out in Clause 36, the Contractor shall not be entitled to make a Claim for any costs, expenses, damages or other amounts resulting from any delay or disruption arising from any cause (including without limitation breach by the Principal)."

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3 I will refer to this schedule as the DIPFR schedule.

4 One of CMC's supervisors on site.

5 The schedule became Exhibit 31, and was called "the Vance Measurement".

6 (2015) 256 CLR 104, per French CJ, Nettle and Gordon JJ at [47]-[51] and [116]-[117].

[19] Clause 40.1 makes provision for variations:

> "The Principal's Representative may direct the Contractor to-
>
> (a) increase, decrease or omit any part of the work under the Contract;
>
> (b) change the character or quality of any material or work;
>
> (c) change the levels, lines, positions or dimensions of any part of the work under the Contract;
>
> (d) execute additional work; and/or
>
> (e) demolish or remove material or work no longer required by the Principal.
>
> The Contractor shall not vary the work under the Contract except as directed by the Principal's Representative or approved in writing by the Principal's Representative under Clause 40."

[20] Clause 40.3 provides that "Unless the Principal's Representative and the Contractor agree upon the price for a variation, the variation directed or approved by the Principal's Representative under Clause 40.1 shall be valued under Clause 40.5."

[21] Clause 40.5(a) of the contract provides that:

> "Where the Contract provides that a valuation shall be made under Clause 40.5, the Principal shall pay or allow the Contractor or the Contractor shall pay or allow the Principal as the case may require, an amount ascertained by the Principal's Representative as follows-
>
> (a) if the Contract prescribes specific rates or prices to be applied in determining the value, those rates or prices shall be used;
>
> (b) if Clause 40.5(a) does not apply, the rates or prices in a Priced Bill of Quantities or Schedule of Rates shall be used to the extent that it is reasonable to use them;
>
> (c) to the extent that neither Clause 40.5(a) or 40.5(b) apply, reasonable rates or prices shall be used in any valuation made by the Principal's Representative;
>
> (d) in determining the deduction to be made for work which is taken out of the Contract, the deduction shall include a reasonable amount for profit and overheads;
>
> (e) if the valuation is of an increase or decrease in a fee or charge or is a new fee or charge under Clause 14.3, the value shall be the actual increase or decrease or the actual amount of the new fee or charge without regard to overheads or profit;
>
> (f) if the valuation relates to extra costs incurred by the Contractor for delay or disruption, the valuation shall include a reasonable amount for overheads but shall not include profit or loss of profit;

(g) if Clause 11(b) applies, the percentage referred to in Clause 11(b) shall be used for valuing the Contractor's profit and attendance; and

(h) daywork shall be valued in accordance with Clause 41."

[22] The tables at the heart of the competing contentions are found in section C-4 of the contract, entitled "Rates for Pricing Variations".[7] That section relevantly provides:

"**C-4 Rates for Pricing Variations**

Where the relevant Specification provides for more than one class or type of the product listed, the Unit Rates table below; Schedule 4.1: Unit Rates shall include rates and descriptions for each class or type.

Variations shall be performed on a Unit Rates or a Daywork Rates basis at the sole discretion of the Principal's Representative.

The Contractor shall only be remunerated for work actually performed and approved by the Principal's Representative. The Contractor shall not be entitled to remuneration for plant stand-by time.

The Contractor shall provide time sheets, payroll records and such other information as the Principal's Representative may require for verifying the work actually performed by the Contractor.

C-4.1 Unit Rates

The cost of approved variations under the Contract shall be calculated in accordance with Schedule 4.1 – Unit Rates for Variations herein, with particular reference to:

4.1.1 The unit rates in this Schedule are the full inclusive cost of the work described including all Contractor's obligations set forth in the Contract.

4.1.2 The unit rates herein are fixed and are not subject to adjustment for rise and fall in costs unless otherwise stated in the Contract.

4.1.3 Unless specifically stated otherwise in this Schedule the unit rates shall apply to work that is additional or with increased quantities (outside the upper limits of accuracy stated in the Annexure Part A) and to work that is deleted or with reduced quantities (outside the lower limits of accuracy stated in the Annexure Part A) under the Contract."

[23] Then followed "Schedule 4.1 Unit Rates for Variations", containing a series of rates for specific items of work.

[24] Section C-4 continued with a number of provisions dealing with "C4.2 Daywork Rates":

"**C-4.2 Daywork Rates**

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7 Appeal Book (**AB**) 653.

Daywork sheets for Variations shall be verified and signed on a daily basis by the Principal's Representative and the responsibility for obtaining the signature rests with the Contractor.

Daywork sheets shall reflect both labour and plant resources, together with any materials and hired resources used by the Contractor.

No additional entries or additional claims will be made on the Daywork sheets after signature thereof.

4.2.1 Labour

- The labour rates specified in Schedule C-4.2 shall be deemed to include (but are not limited to) the cost of wages, Contractor's profit, overheads, all supervision and management (including foreman and above), use of small tools under AUD 5,000 in value, insurance, consumables, accommodation, construction facilities, timekeeping, charges, transportation to and from the Site, transportation around the Site, all clerical and office work and all incidental costs incurred in performing the work.
- Normal time and overtime shall be as defined in the relevant Site industrial agreement.

4.2.2 Constructional Plant

- The rates for Constructional Plant specified in Schedule C-4.3 are inclusive of driver and operators' wages, water, oil, fuel, consumable stores, maintenance, spare parts, services, repairs, insurance, overheads, profit and all other things of whatever nature required for the efficient and safe operation of the plant.
- The plant rates set out in Schedule C-4.3 are fixed and are not subject to change for any reason whatsoever including difficulty of the work or any difference between estimated and actual quantities.
- Service books for all equipment may be requested by the Principal's Representative to verify the state of the equipment.

4.2.3 Materials and Subcontracts

- In calculating the payment due to the Contractor for materials used for Daywork (except for materials for which the cost is included in the Daywork labour rates), only the net quantity actually used for the Daywork shall be measured.
- The Contractor shall be entitled to payment in respect of materials and subcontracts used in Daywork at the actual invoiced cost to the Contractor, including freight to the

Site, but excluding any cash or trade discounts, plus a percentage mark-up as shown in Annexure Part A which shall be deemed to cover all costs including, but not limited to the following:

- all off-Site and on-Site administration;
- delivery, handling and storage;
- insurances;
- overheads, profit and margins;
- mark-up of whatsoever nature.

- Unless otherwise agreed, materials required in the performance of the Daywork and which are not otherwise covered by a rate in the Schedule C-4.2 and C-4.3 (whether plant or labour) shall be paid for only in the quantities authorised by the Principal's Representative."

[25] Then, within section C-4 there followed a series of four schedules entitled: "Schedule C-4.2 – Schedule of Daywork Labour Rates", "Schedule of Daywork Indirect Personnel and Facilities Rates",[8] "Schedule C-4.3 – Schedule of Daywork Constructional Plant Rates", and "Schedule of Plant and Equipment Stand Down Rates".

[26] The appeal is concerned with the DIPFR schedule, which appears in this form:

Schedule of Daywork Indirect Personnel and Facilities Rates

Item	Award Classification	Working Rate (A$)		
				Day
1	Construction Manager			2,900.00
2	Project Manager			2,800.00
3	QA/QC Manager			2,250.00
4	Safety/Environmental Manager			1,950.00
5	Senior Project Engineer			2,400.00
6	General [Superintendent]			2,500.00
7	Site Engineer			1,950.00
8	Foreman			2,250.00
9	Contract Administrator			1,500.00

8 The DIPFR schedule; AB 658.

10	12m x 9m Office Complex			180.00
11	12m x 3m Office			60.00
12	12m x 3m Crib			70.00
13	6m x 3m Ablution Block			110.00
14	Portable Chemical Toilet			28.00
15	Pump Outs			100.00
16	6m x 3m Office Furniture			25.00
17	6m x 3m Crib Furniture			35.00
18	Server			200.00
19	Communications			55.00
20	Office Running Costs			50.00
21	Overall Composite Daily Rate (Includes Staff and facilities)			38,000.00

Pre-contractual conduct

[27] Before the contract was entered into WICET requested CMC to clarify some aspects of their tender.[9] A schedule of questions was prepared, headed "Bid Clarifications". Under the sub-heading "Pricing" 10 specific questions were asked, 4 to 10 being:

> "4 CMC to submit completed Schedule C-4.1 Unit Rates for Variations
>
> 5 CMC to submit completed Schedule C-4.2 Schedule of Daywork Labour Rates
>
> 6 CMC to submit completed Schedule C-4.3 Schedule of Daywork Constructional Plant Rates
>
> 7 CMC to submit Labour Rate Build-Ups as required by C-4.3
>
> 8 CMC to submit detailed list of indirect personnel and facilities including daily rates to be applied for extensions of time
>
> 9 CMC to submit standby rates for all plant and equipment listed in Schedule C-4
>
> 10 CMC to submit an overall composite daily rate for indirect personnel and facilities to be applied for extensions of time to the date for practical completion."

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9 AB 453-454.

[28] CMC responded with their "tender clarifications". The original schedule was adopted, with the responses to the right of the questions. Answers 4 to 10 were as follows:[10]

> "4 Refer to Attachment 13
>
> Revised Schedule C-4.1 additional prices for variations. Further to CMC's discussion with David Enright, CMC advise the rates submitted for variations are rates applicable to the GC09 Bulk Earthworks and Civil Works Contract.
>
> Remaining unpriced Items 2.1.5, 2.1.6, Item 3 and 4 inclusive would apply to scopes of works that CMC would not be utilised on this project.
>
> 5 Refer to Attachment 14
>
> Revised Schedule C-4.2 with rates now including all requirements specified in Schedule C-4.2.
>
> 6 Refer to Attachment 15
>
> Revised Schedule C-4.3 with rates now including all requirements specified in Schedule C-4.2.
>
> 7 Refer to Attachment 16
>
> New Labour Rate Build-Up in [attachment] Schedule C-4.2.1.
>
> 8 Refer to Attachment 17
>
> New Schedule C-4.2.2 list of CMC indirect personnel and facilities including daily rates.
>
> 9 Refer to Attachment 18
>
> New Schedule C-4.3.1 with plant and equipment standby rates.
>
> 10 Refer attached New Schedule C-4.2.2 list of CMC indirect personnel and facilities including overall composite daily rates."

[29] Question 8 and its response are the important ones for the purposes of resolving the issue in CMC's appeal. WICET asked for a list of indirect personnel and facilities including daily rates to be applied for extensions of time. What was given was a list of indirect personnel and facilities including daily rates, but: (i) contained in a new schedule C-4.2.2 which was part of the schedules dealing with variations; and (ii) headed "Schedule of **Daywork** Indirect Personnel and Facilities Rates".[11]

Submissions on CMC's appeal – CA 4068 of 2018

[30] Mr Doyle QC and Mr Webster, appearing for CMC, submitted that the DIPFR schedule was the schedule to be applied when undertaking the valuation called in by Clause 36, and carried out under Clause 40.5. It was submitted that the schedule was the only part of the contract where one could find an expression of on-Site overheads attributable to delay. It was said there was no other provision of the

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10 AB 458.

11 Emphasis added.

contract which dealt with that issue, and no purpose served by the schedule other than to provide such rates.

[31] It was submitted that the word "prescribes" in clause 40.5(a) was to be construed as "identifies". In context the word did not mean "mandated" because the obligation to value was already created by a combination of clauses 35, 36 and 40.5(a). It was submitted that, reading the contract as a whole, the word "prescribes" meant that the DIPFR schedule identified itself as the thing which valued on-Site overheads for delay.

[32] The submission was put this way: a reading of the contract as a whole showed that the parties agreed upon a regime and included in their contract something which appears to meet the description. The only answer to the question as to why that would be done, was that they intended it to be applied. That was sufficient identification for the purpose of the word "prescribes".

[33] It was submitted that an aspect of the proper construction was that Clause 36 was amended from its standard form, to specifically provide an entitlement to recover on-Site overheads attributable to delay. Further, the amendments introduced the valuation under Clause 40.5.

[34] It was submitted that the schedule should not be seen as part of Schedule 4.2, because C-4.2 was only concerned with Daywork labour rates, whereas the DIPFR schedule dealt with overheads. Schedules C-4.2 and C-4.3 both included elements of profit, whereas the schedule in question did not. Thereby it was not one of the schedules referred to in the opening clauses of s 4.2, and was merely there for the purpose of calculating overheads. Because the other tables described rates which included overheads, supervision and the like, it was submitted there was no work left for the DIPFR schedule, except to provide rates for the purpose of valuing overheads where there was an extension of time. By that means the rates were prescribed by their appearance and evident purpose. Even if they were not, they nonetheless constituted a schedule of rates which it was reasonable to use.

[35] In order to demonstrate that the schedule was not included for the purpose of valuing Daywork variations, reference was made to Clause 41 of the contract. It was submitted that if the Principal's Representative made either of the choices in Clause 41, the requirement to keep records of the resources for the execution of the Daywork was inapt if one was referring to on-Site overheads. Further, the assessment of Daywork involved the valuation process to achieve actual costs, whereas the schedule in question simply reflects figures fixed at the time of the contract.

[36] It was submitted that when one compared the various schedules in C-4, one could see that the DIPFR schedule must relate to the calculation of on-Site overheads for delay claims. This was because the Labour Rates Schedule and the Constructional Plant Schedule both referred to items which included overheads and profits, and thereby lent themselves more readily to the concept of the work being increased, or the quantities increased. On the other hand, the schedule in question related to items, none of which would ever be used in a greater quantity unless the contract was delayed and therefore the assets had to remain on-site for longer than had been anticipated.

[37] Mr D Kelly QC and Mr Green of Counsel, appearing for WICET, made submissions which were, in large part, the direct opposite of those advanced by CMC. On the

construction issue central to this appeal there is no need to rehearse those submissions.

Discussion

Does the Contract prescribe specific rates?

[38] The particular delay in this case is the 208 day delay in respect of which CMC claims for "on-Site overheads attributable to the delay". It is that component which is valued under clauses 36 and 40.5.

[39] Clause 36 specifies that the valuation is of the actual on-Site overheads attributable to the delay, and not overheads deemed to be incurred or estimated to be incurred. In the event of an extension of time under clause 35.5 for delay caused by the principal, the principal's obligation under clause 36 is to pay the extra direct costs, but only those "as are necessarily incurred … by reason of the delay", and as well only those "on-Site overheads attributable to the delay". There has to be a valuation of those actual costs, and that is directed to be carried out under clause 40.5.

[40] Clause 40.5(a) provides that what the principal is to pay is an amount "ascertained by the Principal's Representative", and then sub-paragraphs (a)-(h) provides various alternative methods of valuation,[12] and some components that have to be applied in reaching the valuation. Sub-clause (a) provides that the principal's representative shall use particular rates, but only "if the Contract **prescribes** specific rates … to be applied in determining the value".[13] In my view, use of the phrase "if the Contract prescribes" means there must be something to which one can point, on the face of the contract or schedules, that links the rate to be used to the valuation to be carried out. I am unable to conclude that there is such a link in relation to the use of anything in section C-4, and in particular the DIPFR schedule, that would suggest that the contract was prescribing any of those rates to be used in determining the value of the on-Site overheads under clause 36. There are a number of reasons for that conclusion.

[41] First, the term "prescribed" means "to lay down authoritatively as a guide, direction or rule; to impose … to dictate; to point, to direct; to give as a guide, direction, or rule of action … to direct; define; mark out".[14] A similar definition is given in the Macquarie Dictionary: "to lay down … as a rule for a course to be followed; appoint".[15] To the same effect is the definition in the Compact Oxford English Dictionary: "to write or to lay down as a rule of direction to be followed … to direct".

[42] Thus it can be said that what the phrase "if the contract prescribes" refers to is whether the contract provides an authoritative direction to a particular set of specific rates, and in a way which shows those rates are to be applied in determining the value under clauses 36 and 40.5. In my view, the sense in which that phrase is used is that it requires the contract to clearly point to the fact that the specific rates are to be used in the particular activity, namely the valuation. To my mind that requires something more definite than to simply say that whilst the contract does not do so, one can tell that the rates are the ones to be used because they have no other definite

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12 For example, sub-clause (a), (b), (c) and (h) are alternatives to one another. Sub-clauses (d), (e), (f) and (g) deal with different components depending on the circumstances.

13 Emphasis added.

14 Black's Law Dictionary 6th Ed 1183.

15 Macquarie Online Dictionary.

purpose. To adopt that method of analysis is to construe the contract as prescribing rates for that purpose, when it did not.

[43] Secondly, in my view, where the contract contains a provision such as clause 40.5(a), requiring that the rates to be applied are those which are prescribed as specific rates, that requires a more identifiable link between the particular rates and the valuation to be performed, than has been shown here. It is not sufficient to simply point to a schedule and say that it is the logical contender for the prescription under clause 40.5(a) because a rate in it has no other discernible work to do. Commercial parties negotiating a contract of this type should not be presumed to have taken such an elliptical course to documenting their intention. That the particular rate or even the schedule might end up having no discernible work to do does not mean that it always bore that complexion from the day the contract was entered into. The parties may well have thought that they were making provision for some event which, in the result, has turned out inutile. However, that fact does not open a line of construction such as that advanced by CMC. Clause 40.5(a) provides that certain rates shall be used in the valuation, but only if "the Contract prescribes specific rates". This contract does not prescribe the rates in the DIPFR schedule, much less the overall composite daily rate in that schedule.

[44] Thirdly, the fact that the parties designated the schedule as being one of "Daywork Indirect Personnel and Facilities Rates", and positioned it as part of Section C-4 which deals with variations, leads to the conclusion that that schedule is not one prescribed by the contract as one to be applied in determining the value of the on-Site overheads attributable to the delay, under clause 36. It is only by accepting CMC's contention that the word "Daywork" in that schedule should be treated as an error, and by accepting the contention that if there is no other discernible work to be done by that schedule, and in particular in respect of Dayworks, that one would conclude that the parties must have intended that it was a set of rates prescribed under clause 40.5(a).

[45] CMC contended that the learned trial judge was wrong to place any significance on the particular location of the DIPFR schedule. Adopting his Honour's observation that the relevant table "sits between" Schedule C-4.2 (the Schedule of Hourly Rates for Labour) and Schedule C-4.3 (the Schedule of Hourly Rates for Constructional Plant), and that the table is "not headed as a Schedule C-4 Schedule", it was thus contended that the table was oddly placed on any view and an interruption to the sequential numbering of other schedules. Further, that its presence between C-4.2 and C-4.3 was "incongruent with the introductory page to Schedule C-4.2, which addresses labour rates and constructional plant rates consecutively, but makes no reference at all to overhead or indirect personnel and facilities rates".[16]

[46] I do not accept that contention. Section C-4 deals with the rates of pricing variations. It is entitled "Rates for Pricing Variations". Even if one could not use the heading, a view to which I do not subscribe, the text of the opening paragraphs of section C-4[17] make it clear that it is dealing with variations.

[47] There are two bases which can be utilised for the performance of variations, each at the sole discretion of the Principal's Representative. The first is on a "Unit Rates"

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16 Appellant's Amended Outline, para 38.

17 AB 653.

basis, and the second is on a "Daywork Rates" basis. Section C-4.1 deals with unit rates and includes Schedule 4.1 which specifies the rates applicable. Thereafter the schedules deal with Daywork rates. Section C-4.2 is entitled "Daywork Rates", and that is what the following provisions deal with. Thus, Schedule C-4.2 is a "Schedule of Daywork Labour Rates",[18] Schedule C-4.3 is a "Schedule of Daywork Constructional Plant Rates"[19] and section C-4.3 deals with the labour rate build-ups applicable to Schedule C-4.2.

[48] Schedule C-4.2 which itself contains two parts. The first part is the schedule of Daywork Labour Rates. The second is the schedule of Daywork Indirect Personnel and Facilities Rates. Whilst it is correct to say that the DIPFR schedule "sits between" Schedule C-4.2 and Schedule C-4.3 that is only in a technical sense. In my view, the DIPFR schedule is part of Schedule C-4.2.

[49] As will become apparent, that conclusion receives support from what was evidently intended by CMC when it responded to the request for clarification about its pricing. It included the response as part of Attachment 17, and Schedule C-4.2.2, (as labelled in the response) or Schedule C-4.2.1 (as the actual attachment was labelled). Either way, CMC plainly intended that the schedule would be part of Schedule C-4.2.

[50] It is true to say that as it appears in the contract the DIPFR schedule is "not headed as a Schedule C-4 schedule". However, I do not think much significance can be placed on that fact. It is positioned precisely where CMC proposed when it responded. That is, it is part of Schedule C-4.2.

[51] Fourthly, I see nothing incongruent about the positioning of the DIPFR schedule and the introductory page to Section C-4.2. CMC pointed to the fact that paragraph 4.2.1 refers to the labour rates and paragraph 4.2.2 refers to the constructional plant rates. It submitted that there is no paragraph dealing with the indirect personnel and facilities rates. But that may well have been simply the product of a different subject matter in the schedules. The schedule of Daywork Labour Rates deals exactly with that topic, namely the price of labour. Paragraph 4.2.1 specifies the agreement between the parties that those particular rates are to include a number of items, referring to profit, overheads, accommodation and construction facilities and the like. Similarly, Schedule C-4.3 deals with the Daywork Constructional Plant Rates, in every case a rate applicable to a piece of machinery or a tool. Paragraph 4.2.2 provides that those rates are to be inclusive of certain things which include wages, consumable stores, overheads, profit and the like. The schedule of Daywork Indirect Personnel and Facilities Rates deals with something different. It is not the price of labour, nor is it the price of machinery or tools. It deals with the cost of those personnel who are indirectly concerned in the work, and the facilities necessary to support the performance of the work. There was thus no need to have a provision such as paragraphs 4.2.1 or 4.2.2 in respect of the indirect personnel and facilities rates.

[52] CMC referred to the decision of Leeming JA in *MetLife Insurance Ltd v RGA Reinsurance Company of Australia Ltd*[20] where his Honour referred to an approach dealing with the significance of location of a particular clause in a contract:

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18 AB 657.
19 AB 659.
20 [2017] NSWCA 56 at [86].

> "Another way of putting this is to observe that whichever party's submission be accepted, the Initial Event Sentence should not be placed where it is. In those circumstances, little weight should be given to its location. The issue is to identify the objectively manifested common intention to be imputed to the parties to the contract. Either the parties are to be taken as caring about placement, or not caring. If they did not, then scant regard can be given to where the Initial Event Sentence has been placed when determining its legal meaning. If they did, then something has gone awry, and either the Initial Event Sentence should be two sentences earlier or one sentence later in the Addendum, as Metlife submits, or else it should be three sentences earlier, as RGA submits. In those circumstances, it would be wrong to give material weight, when determining the legal meaning of the Initial Event Sentence, to its location in the Addendum".

[53] This case is not the same. CMC indicated at the outset where it considered this schedule should be placed, namely as part of Schedule C-4.2. Further, it was CMC who introduced the word "Daywork" as the heading of the schedule, a term entirely consistent with its position in relation to variations. There is nothing in the material to indicate a contrary view from WICET's point of view. Therefore this is a case where, objectively speaking, the parties were concerned about location, but the schedule has ended up in exactly the location intended.

[54] Fifthly, I do not accept CMC's contention that unless the DIPFR schedule was construed as being that prescribed under clause 40.5(a) there was no other work for that schedule to do.

[55] The schedule was directed by CMC to be part of the rates for pricing variations. There was good reason for that. Under the contract the Principal's Representative could direct CMC to carry out variations: clause 40.1. The procedure to be followed was that where the Principal's Representative proposed a variation, notice had to be given to CMC which would advise whether the variation could be effected: clause 40.2. If the variation could be effected then CMC had to advise of the effect that it might have on the construction programme and timing, and provide an estimate of cost: clause 40.2(a) and (b).

[56] Clause 40.3 provides that unless agreement is reached on the price for a variation "the variation directed or approved by the principal's representative under Clause 40.1 shall be valued under Clause 40.5". Clause 40.5 then provides for what is, in effect, a cascading series of provisions to assist in determining the value. Thus, under clause 40.5(a), if the contract prescribes specific rates or prices to be applied in determining the value, those rates or prices are to be used. If sub-clause (a) does not apply, then one turns to the rates or prices in a price bill of quantities or schedule of rates, but only to the extent that it is reasonable to use them: clause 40.5(b). Finally, clause 40.5(h) provides that "Daywork shall be valued in accordance with Clause 41".

[57] Clause 41 provides:

> "The Principal's Representative may direct that … variations directed by the Principal's Representative under Clause 40.1 shall be carried out as Daywork. The Contractor shall thereafter each day

record particulars of all resources used by the Contractor for the execution of the Daywork and each day furnish to the Principal's Representative the particulars and copies of time sheets, wages sheets, invoices, receipts and other documents evidencing the cost of the Daywork.

…

In determining the value of Daywork regard shall be had to-

(a) the amount of wages and allowance paid or payable by the Contractor at the rates obtaining on the Site at the time …;

(b) the amount paid or payable by the Contractor in accordance with any statute or award applicable to day labour additional to the wages paid or payable under Clause 41(a);

(c) the amount of hire charges in respect of Constructional Plant …;

(d) the amounts paid for services, subcontracts and professional fees;

(e) the actual cost to the Contractor at the Site of all materials supplied and required for the work; and

(f) the charge stated in the Annexure …"

[58] I do not consider that clause 40.5(h) should be construed as excluding the application of clause 40.5(a). They are not alternatives. The better construction is that the valuation is to be established by reference to specific rates that are prescribed by the contract (clause 40.5(a)) but subject to the approach in clause 41. In that respect clause 41 obliges the Principal's Representative to have regard to a number of factors when establishing the valuation. Unlike clause 40.5(a) which uses the mandatory phrase "shall be used", clause 41 simply obliges the Principal's Representative to have regard to those factors. One can see the way in which those clauses work together. There may be specific rates or prices prescribed by the contract to be applied in determining the value, and if so those prices are to be used, but always subject to moderation when the Principal's Representative has regard to the wages applying on the site at the time that the Daywork is done, or the statute or award applicable at the time, and so forth.

[59] That complementary operation applies, of course, only where variations are directed to be carried out as Daywork. To accede to the contention advanced by CMC would give the Principal's Representative an extraordinarily wide discretion as to how to value, particularly given that Schedule C-4 specifically proceeds upon the basis that the rates are applicable to Daywork. For example, Schedule C-4.2 contains a schedule of Daywork Labour Rates, and Schedule C-4.3 contains a schedule of Daywork Constructional Plant Rates. Those are specific rates prescribed by the contract to be applied in determining the value of a variation which has been directed to be carried out as Daywork. On the face of the contract clause 40.5(a) would apply to them. However, clause 40.5(h) and clause 41 combine to give the Principal's Representative the task of having regard to other factors set out in clause 41.

[60] Sixthly, CMC also contended that the presence of the word "Daywork" in the heading to the Overhead Rates Table cannot be treated as confining the application of the rates which follow.[21] It was submitted that reference to the pre-contract correspondence showed that the primary description comprised the words "Indirect Personnel and Facilities Rates", and that the word "Daywork" was subordinate.[22] It was said that the correspondence showed that the rates were provided in response to a request for rates for extensions of time, not rates for Daywork under Clause 41.

[61] Before dealing with that contention I pause to note that the relevance of the pre-contract correspondence was a matter of debate on the appeal. I refer to it below at paragraphs [67] to [74].

[62] I am not persuaded by that contention. Reference to the pre-contract correspondence shows that WICET asked for one thing, a composite daily rate to be used in respect of extensions of time, but that CMC provided something else, which was identified by it by reference to its content (Schedule of Daywork Indirect Personnel and Facilities Rates) and by its placement (CMC's identification of where it should be placed, namely as part of the variations schedules involving rates for Daywork). Given that it was CMC that introduced the term "Daywork", and it was CMC who decided where that schedule should be placed in the contract, I do not consider it possible to conclude that the word "Daywork" was subordinate or in error.

[63] Seventhly, CMC contended for two alternative grounds in relation to the DIPFR schedule. The first was that even if the overall composite daily rate was not prescribed by the statute, the other rates in that schedule were, and should be applied under clause 40.5(a). The learned trial judge had applied "reasonable rates" under clause 40.5(c) and CMC contended that the specified rates in the schedule should be applied rather than the reasonable rates. The result, it was said, was that WICET ought to have been found liable to pay CMC $1,203,317.77 (plus GST and interest).[23]

[64] I cannot accept that contention. Clause 40.5(a) provides that the value is to be determined by applying specific rates "if the contract prescribes specific rates". For the reasons outlined above the DIPFR schedule was not a set of rates prescribed by the contract for the purposes of clause 40.5(a). It is therefore not possible to split one part of the rates in that schedule from another. If the contract did not prescribe the use of the rates in that schedule that means it did not prescribe all the rates in that schedule.

[65] Eighthly, the next alternative submission was that even if the various rates in the DIPFR schedule did not fall squarely within clause 40.5(a), nonetheless they should have been applied because they comprised rates in a Schedule of Rates[24] and it was reasonable to use them under clause 40.5(b). It was said to be reasonable to use them because they are "plainly rates for overhead items, and the thing to be valued is CMC's on-Site overheads".[25]

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21 Appellant's Amended Outline, para 40.

22 In this respect reliance was placed on *Hardwick v Hardwick* (1873) LR 16 Eq 168 of 175.

23 Appellant's Amended Outline, paras 49-50.

24 That being the term defined in Clause 2 to include "any schedule" which shows a rate of payment for "any section or item of work to be carried out".

25 Appellant's Amended Outline, para 51.

[66] I do not accept this contention. Clause 40.5(b) comes into operation if clause 40.5(a) does not apply. However, that does not mean that any rates wherever they appear in a schedule of rates could be adopted for the purpose of forming a proper valuation under clauses 36 and 40.5. Alternative rates can only be used under clause 40.5(b) "to the extent that it is reasonable to use them". The rates in the DIPFR schedule are stipulated as rates for Daywork. That is not a concept applicable to the valuation of "on-Site overheads attributable to the delay" under clause 36. That clause is directed to providing reimbursement for the actual on-Site overheads which were incurred and which are attributable to the delay. The provision of rates which are applicable to Daywork do not necessarily reflect the actual on-Site overheads attributable to the delay. In my respectful view the approach of the learned trial judge was correct.

Significance of the pre-contract correspondence

[67] When one examines the enquiry made by WICET for clarifications about pricing, several factors stand out. First, questions 4-6 asked CMC to submit specific schedules identified as: C-4.1 Unit Rates for Variations; C-4.2 Schedule of Daywork Labour Rates; and C-4.3, Schedule of Daywork Constructional Plant Rates. All of those schedules form part of the section of the contract which deals with variations. An additional question (number 7) asked for figures "as required by C-4.3".

[68] Secondly, question 8 seems to have been directed towards extensions of time which did not necessarily affect the date for practical completion. It sought a "detailed list of indirect personnel and facilities including day rates" which would be applied to extensions of time generally. By contrast, question 10 asked for information to be provided in respect of "extensions of time to the date for practical completion". What was sought in that case was limited to "an overall composite daily rate for indirect personnel and facilities".

[69] Thirdly, what was provided in response to question 10 was a response which replicated that given to question 8. As can be seen in paragraph [28] above, each answer referred to "Attachment 17", described as "New Schedule C-4.2.2".[26] It was CMC who selected the attachment number and the designation of the schedule. Designating it as C-4.2.2 logically meant it was a part of the requested schedule of Daywork labour rates linked to what had been requested in question 5, namely a "completed Schedule C-4.2 Schedule of Daywork Labour Rates. When Attachment 17 was designated as "New Schedule C-4.2.2", the logical conclusion is that it is a related division of costs, linked to Daywork.

[70] Fourthly, even though Attachment 17 was described as "New Schedule C-4.2.2" in the responses, the actual attachment[27] designated it as "Schedule C-4.2.1", specifying that it was a "Schedule of Daywork Indirect Personnel and Facilities Rates". That term was not part of questions 8 or 10, though it was a term used in question 5, which asked for a completed Schedule C-4.2. The use of the term "Daywork" in Attachment 17 strengthens the argument that CMC were deliberately linking it to Dayworks, as that was what was specifically requested by question 5.

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26 Attachment 17 is at AB 483-484.

27 AB 484.

[71] Fifthly, CMC chose to respond to the request for an overall composite daily rate in respect of extensions of time, by designating that the overall composite daily rate was in respect of Daywork. It did that by the opening words in Attachment 17 and the fact that the schedule was designated as C-4.2.1 and thereby as part of the rates applicable to variations.

[72] Sixthly, when the parties came to include the schedule as part of the contract, it was no longer designated as C-4.2.1 or C-4.2.2. It was simply entitled "Schedule of Daywork Indirect Personnel and Facilities Rates" and was physically placed between Schedule C-4.2 (Schedule of Daywork Labour Rates) and Schedule C-4.3 (Schedule of Daywork Constructional Plant Rates).[28] That it was no longer separately designated by a particular number suggests that the parties included it as part of Schedule C-4.2, one dealing with Daywork Labour Rates and the other with Daywork Indirect Personnel and Facilities Rates. That conclusion receives some support from the fact that all three schedules are part of Section C-4.2 which is headed "Daywork Rates".[29]

[73] Therefore, in my view, the pre-contract correspondence lends support to the conclusion that the parties' objectively determined intention was that the DIPFR schedule was for Daywork, and not a schedule prescribed for valuing extensions of time under clause 35.5.

[74] If it was necessary to have regard to the pre-contract correspondence that would favour the conclusion that the DIPFR schedule was not included in a way that would attract clause 40.5(a). However, it is not necessary to go to that correspondence. The contract simply does not prescribe the DIPFR schedule for the purpose of clause 40.5(a).

Conclusion on CMC's appeal

[75] It will be apparent from the foregoing that the proper construction of the contract is that the DIPFR schedule is not one that is prescribed under clause 40.5(a) of the contract. Therefore CMC's appeal fails.

WICET's appeal – CA 4286 of 2018

[76] WICET's appeal concerned the admission into evidence of Exhibit 31, also referred to as the Vance Measurement. In general terms WICET complained that Exhibit 31 was admitted into evidence over its objection, and that the document represented a radical departure from CMC's pleaded case. In order to understand the nature of the contention, some background needs to be given.

Background

[77] Under the contract CMC was required to complete bulk earthworks which included the construction of "Reclamation C Bunds". The bunds were earthen walls constructed to create ponds where dredged spoil would be placed. Three sets of bunds were to be constructed, each comprised of a number of connected earthen retaining walls.

[78] The basic method of construction involved:

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28 See AB 657-659.

29 AB 656.

(a) the placement of geofabric by way of light machinery and labour;

(b) then the placement of a layer of drainage rock, which had to be excavated and hauled by truck from a particular place;

(c) then the wrapping of a second layer of geofabric;

(d) then the placement of approximately 50 centimetres of general fill, also excavated and hauled by truck from a particular site, and distributed by a bulldozer; and

(e) the placement of subsequent layers of general fill.

[79] The bunds were large, up to 30 metres wide and covering some 6.6 lineal kilometres.

[80] CMC's planned method of construction involved building the entire footprint of the bunds (being the bottom layers of drainage rock and fill), which would then be used by vehicles to extend the construction of the bunds. The method of construction meant that activities on top of the footprint could be cycled so as to avoid delays, and keep all labour and plant occupied and productive.

[81] By adopting that method of construction CMC planned to haul and lay fill material at the rate of 4,000m^3 per day, using two "teams". The teams were entitled Team 1 and Team 2, but each "team" was, in fact, a geographic work front being operated by a bulldozer, water carts, compactors and geofabric teams, with haul trucks placing material where it was needed at any given time. There was evidence that CMC had enough machinery and men to form two teams.

[82] The evidence revealed that when CMC was able to work in an unimpeded fashion the target production of 4,000m^3 per day was feasible. From March 2012 CMC was able to achieve production in excess of 5,000m^3 per working day, and from May 2012 that increased to more than 6,000m^3 per working day. However, CMC did not achieve 4,000m^3 per working day prior to February 2012.

[83] Given the size, nature, design and methodology of construction of the Reclamation C Bunds, CMC's ability to progress its construction depended upon, amongst other things, the availability of two access points into the Reclamation C Bunds, and the operation of multiple work fronts within those bunds.

[84] CMC explained its access methodology and the requirement for multiple work fronts, and two access points, to relevant representatives of WICET.

[85] CMC did not commence construction of the Reclamation C Bunds until 23 November 2011, and they were not completed until 4 July 2012. This contrasts with the assigned commencement and end dates, which had each team commencing on 14 October 2011 and finishing on either of 17 or 19 March 2012.

[86] CMC's case at trial was that its work in constructing the Reclamation C Bunds was seriously impeded by WICET's issuing a series of directions under the contract. The allegation was that those directions resulted in significant delay to the overall time taken to complete the bunds. The relevant aspect of that delay, at least for the purposes of this appeal, was a direction given in respect of cultural heritage impacts. CMC's case was that just after it had constructed its second access point from the main haul road, that area became unavailable because cultural heritage artefacts were

discovered.[30] CMC did not regain access for some time. The claim was for non-critical delay, for which CMC sought a valuation of payment under clause 40.5 of the contract.

[87] On 23 November 2011 CMC completed the haul road to the furthest access point to the Reclamation C Bunds, namely Access A, and began construction of the Team 2 Bunds. At that point CMC was able to commence construction of the Team 2 bunds from Access A. However, the cultural heritage direction meant that CMC did not gain access until 19 January 2012, constituting a delay of Team 1 works by 57 days. The limited access was enforced because WICET issued plans showing "no go zones" which restricted access in those areas. CMC's case was that from a practical point of view they were limited to only one access point until 9 January 2012.

The learned trial judge's findings

[88] The learned trial judge rejected the evidence of the expert called by WICET,[31] who had expressed the view that CMC had embarked upon a plan for the construction of the Reclamation Bunds which was fundamentally different from that revealed in its original program[32] and had established what was in fact a new methodology entirely. As a consequence, according to that expert, there was no compensable delay. In rejecting that evidence the learned trial judge said:[33]

> "[250] The difficulty I have with Mr Abbott expressing his opinion in these terms is that there was an obvious reason CMC had to adopt the different methodology than that contemplated in the Baseline Program. CMC was initially delayed in gaining access to the Reclamation C Bunds which, instead of being through two access points, was restricted to one. When a second access point opened up, namely Access B, the Cultural Heritage Directions and Further Flora Directions deprived CMC of its ability to use this access for the purposes of opening up multiple fronts as contemplated by the Baseline Program. To ignore this obvious explanation for an initial change in methodology and to in effect suggest that CMC never intended to follow this methodology and to achieve the production rates in the Baseline Program demonstrates a lack of objectivity."

[89] The learned trial judge explained the nature of the approach in the Vance Measurement, the objections by WICET and his findings in that respect in fairly succinct fashion:[34]

> "[251] As to (c), it is first necessary to explain the Vance Measurement. Mr Vance's approach by reference to exhibits 22 and 31 was to:
>
> (a) identify CMC's actual daily work and the duration to construct the bunds;

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30 This became known at trial as Event 3 or DE3.

31 Mr Abbott.

32 Called the Baseline Program.

33 *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2017] QSC 85 "Reasons below" at [250].

34 Reasons below, [251]-[254]; footnotes omitted.

(b) identify the period during which CMC was minimally affected in carrying out the work – April, May and June 2012;

(c) calculate a theoretical daily production on the basis of the average production during April, May and June 2012 at 4,600m^3;

(d) exclude days in which CMC did not work (on the basis of actual production records), excepting the truck bogging incident;

(e) make deductions to account for periods in which Mr Vance would have expected lower production;

(f) identify that CMC, if unimpeded, would have placed the volume of material sufficient to complete the Reclamation C Bunds by 28 May 2012; and

(g) make a deduction of three days for normal truck breakdowns in January 2012.

[252] Mr Vance has calculated that CMC completed the Reclamation C Bunds 73.5 days later than it could have if not impacted by the events pleaded by CMC. WICET objected to CMC providing this evidence from Mr Vance and continues to do so in its closing submissions. First, WICET submits that the Vance Measurement is not part of CMC's pleaded claim. WICET submits that Mr Vance's analysis does not fit within the pleaded periods of delay. This is not correct. Mr Vance's estimate is within rather than greater than the pleaded periods of relevant delay that are pressed. I accept CMC's submission that the final calculation of the correct period of delay is a matter which is dependent on all of the evidence and ultimately to be determined by the Court. From the evidence of Mr Vance, Mr Grey and Mr Barry I accept that the relevant directions did prolong the construction of the Reclamation C Bunds. The initial delay was to the commencement of work. Mr Vance and Mr King both measured this delay being from 14 October 2011 to 23 November 2011. The only difference is that Mr Vance has not deducted any days for presumed haul road construction as his evidence is that these roads were intended to be constructed under the Baseline Program prior to this date. As for the delays caused by the Cultural Heritage Directions and Further Flora Directions, the Vance Measurement fits within the delay events as identified by Mr King. WICET submits, however, that Mr Vance's measurement does not fit within the pleaded periods of delay because Mr Vance has determined that, if CMC was unimpeded, it would have moved the necessary volume of material by 28 May 2012 (from 23 November 2011). Because CMC completed the works on 4 July 2012, Mr Vance considered that the works had been delayed by a total of 37 days. That is, Mr Vance identified a period of prolongation

being from 28 May to 4 July 2012. That period of prolongation does not sit with any of the pleaded delay periods. Further, CMC's attempt to insert the Vance prolongation period into Team 1 for the Cultural Heritage and Further Flora Directions is, according to WICET, "opportunistic and plainly untenable":

> 'It is untenable because the delays identified by the Vance prolongation period were not limited to the matters the subject of DE3. This is acknowledged in CMC's submissions, and by Mr Vance in his evidence. For example:
>
> (i) at [290], CMC submits that the impact of the soft spot directions (which are ultimately abandoned), is "taken into account in the Vance Measurement". If that is the case, then inserting the Vance prolongation period into DE3 overstates the true impact of DE3;
>
> (ii) Mr Vance's evidence is to the effect that the key impacts on productivity lasted until the end of February 2012. DE3, as pleaded, is a delay between 23 November and 19 January. If Mr Vance's evidence is that delays occurred at least up until the end of February 2012, it is improper to put his prolongation period into DE3 only.'

[253] I do not accept this submission. The case that is advanced by CMC does fit within the case pleaded. The delay caused by the Cultural Heritage Directions and Further Flora Directions were ones which in effect deprived CMC of a second access point. Until those cultural heritage issues were dealt with, CMC was unable to operate on multiple fronts using two teams. It was this inability to do so which had a direct impact on CMC's production rates. As noted in [162] above, on 17 December 2011 Mr Vance sent a letter to Mr Walls which stated the Cultural Heritage Directions had caused delay by limiting the number of work fronts CMC could work on and attached a map identifying the location of the affected area at Access B. It was only on 9 January 2012 that the suspension relating to the Cultural Heritage Directions ended and CMC was able to access the Reclamation C Bunds by way of the haul road through Access B. The practical effect of the directions, therefore, was to keep CMC to one access into the bunds (Access A) until about 9 January 2012. The period of delay in relation to these directions is now much less than the period pleaded. The 30 days now sought in relation to this period of delay fits within the pleaded period.

[254] I have considered the further submissions outlined in [92] – [100] of WICET's reply submissions which deal with CMC's contention that the Vance Measurement has not been properly

challenged. In spite of WICET's objections to the Vance Measurement, I am content to rely on it. The Vance Measurement is simply an assessment by him as to how much earlier the Reclamation C Bunds would have been finished but for the relevant directions given by WICET. The main source material used by Mr Vance in compiling Exhibit 31 is contained in a document to which no objection was taken. The Vance Measurement ultimately confirmed Mr Vance's and Mr Barry's evidence as to the effect of the directions on the completion of the Reclamation C Bunds. This is evident from the following exchange:

> 'Mr O'Donnell: Mr Vance, just ignoring the graph that's on the screen for the moment, could I ask you this: apart from your work on the graph, if I asked you to estimate had you had the access that you asked for from the start for the Reclamation C Bunds and had you not had the various impediments in your work on the bunds about which you've given evidence, would the work in completing the bunds have finished earlier and if so, by how much?--- Yes, it would have finished earlier. I don't believe there was any possible doubt about that, really. By how much? I have carried out a calculation as requested and I can take you through it, if you like.
>
> All right. But I was asking you before you did the graph, if I'd asked you that question, what would have your best estimate have been?--- I would have said about three months.'

The graph to which Senior Counsel was referring was Exhibit 31."

WICET's submissions on appeal

[90] On appeal, Senior Counsel for WICET contended that up to the point at which Mr Vance produced Exhibit 31 CMC's pleaded case, and its case supported by its experts, was that there had been a delay of 57 days between 24 November 2011 and 19 January 2012, for which compensation was sought in the sum of approximately $2.8 million.[35] It was said that there was an obvious problem with such a claim because it assumed that the plant and equipment were not capable of doing productive work on other areas of the bund, and implicitly proceeded on the basis that the entire workforce was delayed for that period. It was contended that CMC adduced the Vance Measurement in Exhibit 31 without any forewarning, and it was a significant departure from the pleaded case to date.[36]

[91] The submission continued, that when WICET objected to the admission of Exhibit 31, CMC limited the use it intended to make of it, CMC submitting that:

(a) Exhibit 31 was not a document which was intended to be, or could be, used for quantum;

(b) Exhibit 31 was not sought to be used for the purpose of a disruption claim;

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35 WICET's outline, paras 58-62.

36 WICET's outline, paras 72-74.

(c) CMC was not departing from its pleadings or abandoning Mr King's evidence;[37] and

(d) the relevance of Exhibit 31 was simply as evidence to support the pleaded case that there were delays "at least of the order" as those set out in Exhibit 31.

[92] It was contended that during closing submissions CMC departed from those assurances by relying upon Exhibit 31 as the basis for a claim for damages. The contention was that Exhibit 31 was used contrary to its admitted purposes, with the consequence that the claim WICET then faced was one which had not been pleaded.

The pleaded case

[93] In the statement of claim as it stood when Exhibit 31 was tendered, CMC pleaded a number of matters concerning the construction of the Reclamation C Bunds, some of which were admitted and some of which were denied. The central matters in issue are those dealt with below.

[94] In paragraph 132E CMC pleaded that the most efficient way to construct the bunds walls was to construct them simultaneously and by using multiple work fronts. WICET put that in issue in its defence, denying that the most efficient way to construct the bunds walls was to construct them simultaneously, and explaining that it was not possible to do so: s 109E(b) of the defence.

[95] CMC then pleaded that its ability to construct the bunds walls efficiently using multiple work fronts was dependent upon it having multiple access points: s 132F. That also was put in issue: s 109EE of the defence.

[96] In paragraph 133AA of the statement of claim, CMC pleaded that its Baseline Program provided that the construction of the Reclamation C Bunds was to be performed by two teams performing works on different bunds. Paragraph 133AB then pleaded when each team was scheduled to complete the relevant bund, namely on 9 March 2012 in the case of Team 1 and 12 March 2012 in the case of Team 2: paragraph 133AB.

[97] WICET essentially admitted those allegations but defended on the basis that CMC did not use two teams to perform the construction, and the Baseline Program was defective in that it understated the overall duration for construction: paragraph 110A1 of the defence.

[98] CMC then pleaded the facts it relied on in relation to Event 3, namely the Cultural Heritage Directions and Further Flora Directions which affected Team 1 works. It was pleaded, and admitted, that on 23 November 2011 CMC had finished construction of the haul road to the Reclamation C Bunds by way of Access A.[38] CMC then pleaded the Cultural Heritage Direction and Further Flora Direction, as well as the issuing of plans with no-go zones. It also pleaded that CMC complied with those directions. Then, in paragraph 160AB CMC pleaded that on 9 January 2012 the suspension relating to those directions ended, and CMC was able to access

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37 Mr King was one of CMC's experts.

38 Para 159A of the statement of claim and para 113T of the defence.

the Reclamation Bunds through Access B. In essence that allegation was admitted in paragraph 113U of the defence.

[99] CMC then pleaded in paragraph 160AD that the effect of the directions "was to cause additional cost to the plaintiff, by … disrupting and delaying the Team 1 works by 57 calendar days from 24 November 2011 to 19 January 2012". In paragraph 113W of the defence WICET put that in issue, denying that the effect of the directions was to cause additional cost by disrupting or delaying the Team 1 works by 57 calendar days, and specifying that the denial was on the ground that CMC undertook productive work in the period of 24 November 2011 to 19 January 2012.[39] Further, WICET denied that the no-go zone plans caused any delay or disruption on the haul route from 23 November 2011 and pleaded that the directions would have only prevented work in a limited area around Access B, with productive work still occurring on other parts of the bunds, and in any event the directions were only in effect for a short period.[40]

[100] CMC pleaded an alternative valuation case, in paragraph 160AAC of the statement of claim. It was that the bulk earthworks had been delayed by 103 days, and specifically in respect of event 3, the delay had been caused by the Cultural Heritage Directions and Further Clearance Directions, accounting for 57 days.

[101] Then by paragraph 160AAH of the statement of claim CMC pleaded that the valuation under Clause 40.5 of the General Conditions resulted in a figure of approximately $2.8 million for the 57 day delay due to event 3. In response WICET denied that any compensable delay had occurred, and specifically that if there had been any delay none was referrable to event 3: paragraph 114A of the defence.

[102] CMC relied upon all of those matters to plead that the delay to the Team 1 works had been 103 calendar days: paragraph 134B of the statement of claim. That allegation was denied by WICET, which contended that no directions issued by it had the effect of delaying the Team 1 works, in part because no work was undertaken by CMC in teams, and the Baseline Program was defective by understating the overall duration: paragraph 113A of the defence.

[103] That review of the pleadings is sufficient to demonstrate that the live issues, at the time Exhibit 31 was produced, included the following:

(a) whether the efficiency of construction of the Reclamation C Bunds would be affected if CMC was denied access to multiple work fronts and access points;

(b) whether WICET issued a series of directions to CMC which delayed the Team 1 works, or the Team 2 works;

(c) whether CMC had underestimated the length of time it would take to complete the Reclamation C Bund works, particularly in its Baseline Program;

(d) whether the effect of Event 3 (the Further Flora Directions and the Cultural Heritage Directions) was to disrupt and delay the Team 1 works between 24 November 2011 and 19 January 2012, and if they did, for how long;

(e) whether CMC could or did undertake productive work on any part of the bunds during the period 24 November 2011 to 19 January 2012;

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39 Para 113W(c) of the defence.

40 Para 113W(d) of the defence.

(f) whether any of those matters had the effect of delaying the completion of the earthworks completely, when considered as a whole; and

(g) whether $2,804,425.69 was the correct valuation for the 57 day delay caused by Event 3.

Was Exhibit 31 inadmissible?

[104] WICET contends that the learned trial judge erred in admitting Exhibit 31 on the basis that it was irrelevant because it was fundamentally different to CMC's pleaded case. It is said that the pleaded case was for delays "during" the relevant events (and in particular Event 3) whereas Exhibit 31 was a "claim for a prolongation of those resources at the end of their works".[41] Thus it was said that while the pleaded claim was a claim in respect of the period 24 November 2011 to 19 January 2012, Exhibit 31 was concerned with the effect of directions which were made during that time upon resources between 4 June 2012 and 4 July 2012.

[105] In my view, that contention should be rejected. The issue between the parties was whether CMC had been delayed overall in completing the earthworks. Its pleaded case was that the various events, including Event 3 which occurred during the earthworks, delayed the completion of that work so that they ended later than they should have. Thus, CMC pleaded that the Team 1 works were due for completion on 9 March 2012 under the Baseline Program,[42] but that those works were delayed by 103 calendar days because of, inter alia, Event 3 (the Further Flora Directions and the Cultural Heritage Directions).[43] Specifically, paragraph 160AD(b) pleaded that those directions caused additional cost to CMC by delaying the Team 1 works by 57 calendar days from 24 November 2011 to 19 January 2012.

[106] That case was denied by WICET, who engaged their expert, Mr Abbott, to produce a productivity analysis to show that CMC was not so delayed.

[107] Exhibit 31, the Vance Measurement, responded to the pleaded case and to Mr Abbott's report. In essence, the Vance Measurement compared two positions. The first was what could have been achieved had there been no impediment to access. For that purpose the duration was calculated by reference to the actual equipment on site and the tonnages they could deliver. That was contrasted with what actually happened where only limited access was available between 23 November 2012 and 19 February 2012. The impact of that impediment to access was fairly simply demonstrated by comparing the date at which the works would have finished with unrestricted access namely, 28 May 2012, with the date of actual completion of those works, namely 4 July 2012. The difference was 37 calendar days.

[108] However, in my respectful view it is in error to contend that the claim was thereby for prolongation of resources at the end of the works. On the contrary, Mr Vance simply sought to demonstrate that there were antecedent delays in the period 23 November 2011 to 19 February 2012, by reference to the extra time the works took to complete. Thus, Mr Vance's calculations were consistent with the pleaded case and relevant to the issues alive on the pleadings.

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41 WICET's outline on appeal, paras 85-88.

42 Para 133AB of the statement of claim.

43 Paras 134B and 160AD of the statement of claim.

[109] In my respectful view the learned trial judge was correct to admit Exhibit 31, the Vance Measurement.

CMC's expert reports

[110] CMC produced a report by Mr King, a programming expert.[44] In the executive summary Mr King set out figures for the "delay incurred to the Reclamation C Team 1 Bund Earthworks Team". That schedule identified 12 calendar days delay to the haul road construction because of the Flora Removal and Cultural Heritage issues, and 57 calendar days delayed access. That delayed access was identified as the period between 24 November 2011 and 19 January 2012. Mr King listed his instructions as being to provide a report containing his analysis and expert opinion as to the impact of the pleaded directions on "CMC's rate of progress".[45] Mr King set out his methodology which was to consider the planned rate of progress, the actual rate of progress and the impact of delay events upon the completion, the fact that the completion of layer 1 to the bunds was delayed by over six months, the fact that the execution of the remaining work was performed in a shorter duration than planned and to identify what delay in events impacted upon the completion of layer 1, and thereby reach an opinion "as to the duration of the delaying events which impacted Layer 1 of the Reclamation C earthworks".[46]

[111] By reference to the Baseline Program and as-constructed data, Mr King identified the following matters relevant to his opinion:

(a) Team 1 was scheduled to complete layer 1 on 29 October 2011 compared with an actual completion date of 11 May 2012, representing "an overrun of 195 calendar days";[47]

(b) because subsequent layers could not progress until layer 1 had been completed, a delay to layer 1 would have a "knock on" effect to the completion of subsequent layers and "will mean that CMC's resources … are on site for a longer period of time";[48]

(c) from the actual completion date of layer 1 to the completion of the remaining earthworks, Team 1 completed its work in 101 calendar days, being 11 May 2012 to 20 August 2012;[49]

(d) the completion in 101 days was shorter than that which had been planned (132 days), that achievement taking place "once CMC had overcome the delays to progress associated with the first layer";

(e) the delays incurred by Team 1 in respect of Event 3 consisted of 57 calendar days between 24 November 2011 and 19 January 2012;[50]

(f) having reviewed the various directions and no-go zone plans, Mr King gave his opinion that there was a delay to the progress of the earthworks between 24 November 2011 and 19 January 2012, due to Event 3;[51] and

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44 AB 1000.
45 AB 1009.
46 AB 1011.
47 AB 1027.
48 AB 1029.
49 AB 1033.
50 AB 1035.
51 AB 1044.

(g) considering the as-built program, no work commenced on the first layer until 1 February 2012, and the 11 day period before that was "largely devoted to clearing of trees and rain".[52]

[112] WICET produced a report by Mr Abbott, which was critical of Mr King's report. Amongst other things Mr Abbott said that Mr King's report did not have regard to the extent of work actually performed or the effect of the various directions. I will return to the effect of Mr Abbott's evidence shortly, but for present purposes it is sufficient to note that the learned trial judge rejected significant parts of his report and evidence for two reasons. The first was that Mr Abbott had adopted the role of being an advocate for WICET.[53] The second was that Mr Abbott had based his report and opinions upon factual assumptions which were inconsistent with what actually occurred on site.[54] Before this Court WICET maintained the attack on Mr Vance's evidence and the Vance Measurement (Exhibit 31) by reference to Mr Abbott's opinions. That aspect of WICET's case suffers for the two reasons just mentioned.

[113] However, Mr King and Mr Abbott produced a joint report in respect of the earthworks.[55] There are some matters upon which they were agreed, and which have relevance to this issue.

[114] The experts were agreed that in constructing the Reclamation Bunds, CMC planned to move forward from its access points, working over completed works. In other words, CMC did not plan to work backwards to its access points over bad ground. Further, the experts agreed that CMC planned to construct the bunds using two teams of resources "because the Baseline Program required both Team 1 and Team 2 to commence the same type of work at precisely the same time at different locations on the Project".[56]

[115] The experts agreed that CMC did not execute the works in accordance with the Baseline Program, particularly as it did not wait for the completion of layer 1 to commence layer 2.[57] Significantly, as to Event 3 (the delayed access due to cultural heritage issues), the experts agreed that CMC was not able to commence the Team 1, layer 1 works as at 23 November 2011 due to the conditions that prevailed at the time, in that CMC had to complete a significant amount of Team 2 Bund works before it would be able to reach the Team 1 Bund works.[58] As at 23 November 2011 the only access to the Team 1 Bunds was via access point A, and CMC commenced the Team 1, layer 1 works on 1 February 2012.[59]

[116] At that part of the joint experts' report Mr King expressed this opinion:

> "Due to the only access point (Access Point A) and delayed access at Access Point C, CMC were constrained in how they constructed the Team 1 bunds and needed to build across from the Team 2 bunds adjacent access point A. In any event the No Go Zone points to the Team 1 bunds were in place from 18 November 2011 (long before

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52 AB 1044.
53 Reasons below at [249]-[250].
54 Reasons below at [154] and [248].
55 AB 1472.
56 Paragraph 2.2, AB 1475.
57 Paragraph 4.1, AB 1479.
58 Paragraph 5.3, AB 1482.
59 Paragraph 5.3, AB 1482-1483.

> any construction work from the Team 2 bunds to the Team 1 bunds could commence) until 19 January 2012 (based on my instructions)."[60]

[117] The extent of the agreement between Mr King and Mr Abbott, particularly as to the fact that CMC was not able to commence the Team 1, layer 1 works until February 2012, were obviously matters taken into account by the learned trial judge in his rejection of Mr Abbott's criticism of Mr King's approach.

[118] Further, to the extent that Mr Abbott's report attacked Mr King's approach by attempting to show that CMC had suffered no loss of productivity, the learned trial judge had reasons why he might reject that approach. Not only was it affected by the findings referred to in paragraph [112] above, but Mr Vance's evidence was opened as going to CMC's productivity and the impact upon it. The witness summary provided in respect of Mr Vance's evidence identified that he would give evidence in relation to the following issues:[61]

(a) in relation to CMC's limited access to the Reclamation C Bunds;

(b) in relation to the delays that affected progress of the works due to no-go zones;

(c) in relation to a direction to suspend works in the vicinity of the Reclamation C Bunds due to a cultural heritage issue, and the affect and consequential delays that that issue had on the progress of the bunds;

(d) in relation to CMC's completion of the first layer of the Reclamation C Bunds, and the state of access at that point; and

(e) in relation to the effect that the delay and disruption to the construction of the bunds had on the plant and equipment, which had to remain mobilised at the site for a longer period than planned.

[119] CMC's evidence otherwise was directed to the impact upon CMC's productivity in the performance of the earthworks by reason of the delays caused by Event 3 and which resulted in equipment and other resources being on site for a longer period than would otherwise have been the case.[62]

[120] CMC's case, both pleaded and as foreshadowed in the evidence noted above, was that its work was disrupted and delayed by the directions which constituted Event 3, and was thereby prolonged. The delay meant that the completion of the Reclamation C Bunds occurred at a later time than if there had been unimpeded access. Therefore, CMC contended, it was entitled to be paid an amount valued by reference to the applicable rates for those resources kept on site longer than would otherwise have been the case. Its case, at least as it stood at the time when Mr Vance produced the document which became Exhibit 31, was not that all of CMC's plant on site was unable to be used for contracted works. The case was different and relied upon the simple proposition that because access was denied for a time, the Reclamation C Bunds could not be completed as early as they would otherwise have been, and therefore CMC had to deploy various resources to complete that work after the planned time.

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60 Paragraph 5.3, AB 1482.

61 AB 1356-1358.

62 Evidence of Mr Barry and Mr Roberts in his report (AB 1277-1278, para [278]).

[121] There could have been no doubt, in my respectful view, that this was the thrust of CMC's case, given what was said in the opening by Senior Counsel for CMC:[63]

> "The thrust of the witnesses – particularly Mr Vance and Mr Barry will say that the delays that occurred were mainly in the first half and the first three months of the Reclamation C Bunds, and they will say that for the first three months the productivity rate was very low. They were, essentially, confined to one access point in one corner and they couldn't get out of there for the first three months. Once they had – the access was opened up and the bunds were opened up, they achieved better than the 4,000 per cubic metres per day anticipated in the baseline program and the productivity was quite good, but they will say they were delayed for about 90 days, is their evidence?"

The evidence given by Mr Vance

[122] During Mr Vance's evidence on day 3 of the trial he produced and explained a table which recorded the volume of production for each day of the works in relation to the Reclamation C Bunds.[64] The document was eventually tendered as Exhibit 22. The graph showed what Mr Vance described as "daily productivities", based on the actual production of material hauled by the actual number of trucks per day.[65] Part of the document was a table recording the day by day actual production figures, and those days on which no work was done for one reason or another. Mr Vance explained that the production increased as time went on so that by 18 February 2012 CMC had "reached the tertiary bund and their productivities will improve as we have more fronts open and we can go faster"[66] and "in May, with the job opened up, we actually bought a couple more trucks. We had room to run even more gear now and in May you'll see the figures continue to trend upwards".[67] Mr Vance explained the increasing figures over time in this way:[68]

> "What you can see here is that from late February things were improving when you look at the actual days, but from March where we had multiple fronts to work on, we're consistently able to move more dirt per workday."

[123] Mr Vance gave evidence that there was a direct relationship between the trends shown in a graph (Increasing Production) to the events occurring during construction of the bunds:[69]

> "And are you able to relate the trends shown in this graph to the events occurring during the construction of the bunds you've been giving evidence about? --- Absolutely. Late in February we get to have more fronts and we're able to – our production goes up, as you would expect. So we're able to get our dozer and our geofabric crews separated and working better and … we're able to work in

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63 Trial Transcript T1-26 lines 3-40; AB 1584.
64 The document is CMC.514.002.0008; AB 1506.
65 AB 1597.
66 AB 1598 line 14.
67 AB 1598 line 35.
68 AB 1599 line 45 to AB 1600 line 2.
69 AB 1600 lines 4-10.

> parallel on those works; not constrained to work in a straight line, as we mostly had been up till then."

[124] No objection was taken to the relevance of that evidence or the admission of that graph as Exhibit 22.

[125] On day four of the trial Mr Vance continued to give evidence relating to CMC's ability to do "productive work". He was asked to address a point made by Mr Abbott, namely that even though access was delayed due to the current cultural heritage issues, CMC could nonetheless undertake productive work. Mr Vance's response was:[70]

> "Sure. So I guess from my point of view, yes, some work was done, and we definitely did some productive work. The issue is with a lack of fronts we couldn't do as much productive work as we should have been able to do. So he's talking about the OLC platform here. Yes, we did some work there in January and February. It was all short haul work south of Beales Creek. Most of that material actually went to the BMD spoil and given the haul was about two, 300 metres, it involved two trucks. Our issue in this period was that with the very limited fronts, as we went through in some detail yesterday, we couldn't use effectively the equipment we had on site. We couldn't progress the works as we should have been able to."

[126] Mr Vance was asked if equipment sat idle because it couldn't be used on the Reclamation C Bunds, and he responded: "Up to December my recollection is there was always equipment idle. From January onwards we usually kept most of it moving to some extent, but it was impeded … by the access we had in terms of progressing the bunds".[71]

[127] No objection was taken to that evidence by Mr Vance.

[128] In that context Mr Vance was then asked to address the Vance Measurement which became Exhibit 31. Objection was taken by Senior Counsel for WICET on the basis that it was irrelevant on the pleading, in part because the delay period was not that identified in the pleadings. Eventually that objection was overruled but in the course of submissions on that objection various statements were made by Senior Counsel for CMC upon which reliance was placed before this Court as confining the use of Exhibit 31 so that its eventual use by the learned trial judge was impermissible. Those statements are dealt with below in paragraph [137].

[129] On day four of the trial Mr Vance explained how his Vance Measurement (Exhibit 31) was constructed. In the first column it contained the actual tonnages for material moved on every individual day. The figures in that column were the same figures as in Exhibit 22, which had been admitted into evidence the previous day.[72]

[130] The second column was simply the cumulative actual production. The third column was headed "Theoretical Production", the fifth column was headed "Theoretical

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70 AB 1604 lines 27-35.
71 AB 1604 lines 38-41.
72 AB 1615.

Production with Eq[73] on site". Mr Vance explained this as follows: he took the months of April, May and June 2012, which were months during which there was no impediment to access, and derived an average daily production; the average was about 4,600 cubic metres per day; he then examined the actual number of trucks on site and from that derived an average quantity of material moved per truck in unimpeded months.[74]

[131] Adjustments were then made for the first three days of the relevant period, simply to account for the fact that CMC was setting up and getting things underway. From that point Mr Vance used the actual number of trucks on site by the average production, to derive a theoretical figure of what could have been achieved had there been no impediment to access.[75]

[132] Mr Vance said that from those calculations he was able to derive a figure of the extra days that CMC was delayed because of limited access and any delays to the commencement of work on the haul roads. This was achieved by taking the quantity of material that was required to complete the Reclamation C Bunds, and noting that actual completion occurred on 4 July 2012. By applying the theoretical average during the period where there was unimpeded access, Mr Vance was able to determine that if no access impediment had occurred the bunds would have been completed on 28 May 2012. There was therefore a delay due to limited access of 37 days.[76]

[133] Mr Vance's evidence, and the table and graph in Exhibit 31, made a number of things clear. First, Mr Vance was not attempting to determine a value for delay or disruption. All he was determining was how many days delay had occurred because of, amongst other things, limited access. Secondly, the base figures for the daily production up to the time of actual completion on 4 July 2012 were all taken from the records of the daily actual production. Those figures had already been admitted into evidence in Exhibit 22. Thirdly, the theoretical daily average was achieved by looking at three months (April, May and June 2012) in which there was no impediment to access. Fourthly, the calculation of the theoretical production with the equipment on site was adjusted to the actual number of trucks and other equipment on site at each point in time. Fifthly, as Mr Vance stated, his only assumptions were that if days were actually lost to rain, days off or shut down, those days off would remain the same in the theoretical production column.

[134] Mr Vance explained his calculation in fairly simple terms:[77]

> "So on that basis I've gone through and worked out when we achieved the same amount of material moved as we had to move. That's based on how much material we move to complete the project, which was on the 4th of the 7th, when the bulk earthworks at the bunds were substantially complete we'd moved 527 cubic metres down there of clay, rock, bund material, and the OLC figures are in these figures as well because it's all one structure and it was written down that way. So these quantities look a bit higher than what's in

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73 "Eq" meant "Equipment".
74 AB 1616 lines 4-16.
75 AB 1616 lines 20-31.
76 Exhibit 31, AB 1509.
77 AB 1616 line 45 to AB 1617 line 11.

> the bill of quantities, but that comes out in the wash the way this is done. If we had had that access these production figures tell me we'd have been finished on the 28th of the 5th. I've then said, right, okay, the no access at all period was from the 14th of the 10th to the 23rd of the 11th which is 40 calendar days and the limited access period was from the 28th of the 5th to the 4th of the 7th. The loss of production, if you like, adds about another 37 days, and totals about 77 days of lost time, which, as I said, was a little bit less than the three months I thought when I was asked off the cuff."

[135] Thus explained, the Vance Measurement was no more than a calculation of the number of days that CMC were delayed because of impeded access issues. Mr Vance sought to say nothing about overall productivity on the entire project, nor anything to do with the valuation or compensation.

[136] Further, it was in my respectful view clear that Mr Vance was not suggesting that delays had occurred between 28 May and 4 July but rather had CMC not been delayed in the November-February period it would have completed the bunds on 28 May. Instead, the bunds were not completed until 4 July, which enabled Mr Vance to estimate that the impeded access period delayed CMC by 37 days.

[137] When objection was taken to Exhibit 31 the purpose of the Vance Measurement was explained by Senior Counsel for CMC. The following exchanges occurred between Senior Counsel and the learned trial judge:

(a) having explained the way in which the Vance Measurement was compiled, it was described as "an exercise in looking at how much earlier would the Reclamation C Bunds have been completed but for the various impediments";[78]

(b) the learned trial judge asked whether it was a document he could use for quantum, and Senior Counsel responded "no", and that it was not intended to be used for quantum;[79] Senior Counsel also said that it could not be used for the purpose of valuing a disruption claim;[80]

(c) Senior Counsel also explained that the Vance Measurement was "not suggesting the delay occurred between the 28th of May and 3rd of July, it's rather saying that had the delay events not occurred, we would have finished the job by 28th of May, therefore, we wouldn't have been on site for those days";[81]

(d) when asked by the learned trial judge to identify the purpose of the Vance Measurement in terms of relevance, Senior Counsel responded:[82]

> "As evidence that there was, in fact, delays and they were at least of this order. The total is some 77 [days]. The plaintiff's claim as pleaded is the delays were something over a hundred days delay and then the quantification of that is applying a daily rate for each day of plant and equipment and so on for the number of days delay. Mr Abbott's response in his report is he does a very detailed

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78 AB 1610.
79 AB 1610 lines 37-44.
80 AB 1610 line 46 to AB 1611 line 1.
81 AB 1611 lines 19-22.
82 AB 1612 lines 7-22.

> calculation and he, in effect, says there was no delay. This was always going to take – [Reclamation C Bunds] were always going to take the time they did. They were always going to take far longer than allowed in the baseline program and, therefore, there's no net delay. This is asking someone who was there on site at the time, who's in a position to speak of his own knowledge about these things, to do an estimation – it's only an estimation – as to had they not had these delay events, when could the volumes they had to transport realistically have got to the end result and when could the job realistically have been completed?"

(e) having given that explanation, Senior Counsel affirmed that the document's relevance was limited to that.

[138] Before this Court Senior Counsel for WICET contended that Exhibit 31 had been confined in terms of its intended use, particularly by the response that it was not a document to be used for quantum. Those responses must be seen in context. Senior Counsel for CMC at the trial explained, in the passages referred to above, that the document had been prepared and was being tendered in order to prove the length of the delay caused by the Event 3 directions. The purpose of Exhibit 31 was directly explained as "evidence that there was, in fact, delays and that they were at least of this order". Senior Counsel for CMC at the trial also made it clear that the Vance Measurement was not intended to replace the evidence of Mr King or to depart from the pleadings. It was explained as being "a more considered way of arriving at [Mr Vance's] estimate" of when the Reclamation C Bunds could have been finished had there been no delays.[83] Plainly it was evident, then, that CMC intended to rely upon the Vance Measurement for the purpose of establishing the length of the delays attributable to Event 3 (the Flora and Cultural Heritage directions which limited access). The Vance Measurement did not seek to establish the quantum of the claim that would result from such a delay and that is the sense in which the response about the use of the document for quantum was understood, and should be understood now.

[139] Further, the approach taken by CMC at the trial to establishing quantum was a disruption productivity analysis which valued the claim by multiplying the cost of plant and equipment on site in each week by a percentage figure reflecting CMC's assessed productivity in that week. The Vance Measurement did not seek to replicate that form of analysis as a way of valuing the claim. All it did was provide some evidence of an assessment of the length of delay caused by WICET's directions, estimated by CMC's senior project manager on site.

[140] With those matters in mind it is possible to address the specific complaints which form the basis of WICET's appeal.

[141] In my view the contention that Exhibit 31 (the Vance Measurement) was irrelevant because it was contrary to the pleadings, should be rejected. On the face of the pleadings as they stood at the time that Exhibit 31 was admitted into evidence there were at least the following live issues:

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83 AB 1613 line 36.

(a) whether an impediment to access to CMC's multiple work fronts and dual access points would affect the efficiency of the construction of the Reclamation C Bunds;[84]

(b) whether WICET had issued directions to CMC which had the effect of delaying the Team 1 works or the Team 2 works;[85]

(c) whether the effect of the Further Flora Directions and Cultural Heritage Directions (Event 3) was to delay the Team 1 works between 24 November 2011 and 19 January 2012, and if so, for how long;[86] and

(d) whether the effect of that delay was to delay the completion of the earthworks as a whole.[87]

[142] In the joint experts' report (between Mr King and Mr Abbott) item 4.2 raised the issue of whether CMC executed the work using two discrete teams. The joint view expressed in the report was that human resources and equipment moved between the teams with the consequences that two discrete teams were not used. However, Mr Abbott added a comment expressing his view that in a particular period CMC worked "with no demonstrable impact to its rate of progress". That comment matched the defence which alleged there was no relevant delay because CMC undertook productive work in the relevant period.[88] It also echoed that part of the defence which contended that the cultural heritage directions would have only prevented work from occurring in an area around Access B, and productive work could occur on other parts of the bunds.[89] Though not perfectly expressed, it raised the case that there was no relevant delay because work was carried out elsewhere, employing the machinery on site.

[143] The approach by Mr Abbott highlighted that one of the issues joined at the commencement of the trial was identifying how much productive work was being done by CMC's resources at Team 2 and not at Team 1. The converse is also the case, namely that a joined issue was to identify what productive work was being done by Team 1 at the relevant time.

[144] Exhibit 31 was an estimation, based on actual production figures and equipment on site, of how long CMC had been delayed by the Event 3 directions. As such it was not contrary to the pleading, and plainly relevant.

[145] I reject the contention that the evidence was adduced in an unforeshadowed fashion. The general nature of it had been foreshadowed in Mr Vance's witness summary[90]and the issue of whether disruption or delay to the completion of layer 1 in the Reclamation C Bunds would have a "knock on" effect to the completion of other layers, and delay CMC's resources on site, had been a feature of the evidence of Mr King. In that respect Mr King's evidence included his analysis that as at 23 November 2011, when the haul road was completed, a no-go zone was in place in respect of the Team 1 bunds, and that remained in place until 19 January 2012. Further, in the joint report Mr King made his position clear, that the delayed access

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84 Statement of Claim para 132E and 132F and para 109E of the Defence.
85 Para 134B of the Statement of Claim and para 113A of the Defence.
86 Paras 160AD and 160AAC of the Statement of Claim and paras 113W, 113AV and 113AB of the Defence.
87 Para 16AAC of the Statement of Claim and para 113AB of the Defence.
88 Para 113W(c) of the Defence.
89 Para 113W(d)(ii)(b) of the Defence.
90 See paragraph [118] above.

at access point C meant that CMC were constrained in how they constructed the Team 1 bunds and the no-go zone plans affected the period between 18 November 2011 and 19 January 2012. Mr Abbott agreed with Mr King that CMC only commenced the Team 1 layer 1 works on 1 February 2012.

[146] Finally, in this respect, the evidence of Mr Roberts[91] was that the valuation in respect of Event 3 was based on the fact that CMC's resources associated with the Reclamation C Bunds were on site for a longer period than would have been the case had it not been for the variation in respect of Event 3.[92]

[147] I reject the contention that Mr Vance's evidence, and Exhibit 31 in particular, sought to go beyond what it did on its face, namely estimate the length of delay caused by the limited access which resulted from the Event 3 directions. CMC made it clear that they intended to rely upon Exhibit 31 to prove that delay, but no more. Of course, once the period of delay was proved then the valuation that flowed from that delay was a matter for other evidence, but Mr Vance did not attempt any such valuation. Nor did his evidence suggest a difference in the pleaded case by focusing on prolongation at the end of the works. Mr Vance's evidence in Exhibit 31 was wholly directed to identifying the length of delay during the time in which access was constrained. That was during the period 23 November 2011 to February 2012, consistent with what had been pleaded.

[148] For the reasons given above there was no requirement to give Mr Vance's evidence little weight, nor was it unreliable. Its reliability, as the learned trial judge found, was demonstrated by the fact that CMC needed two access points to complete the Reclamation C Bunds in accordance with the Baseline Program, and the Event 3 directions deprived CMC of a second point of access for some time. Until the cultural heritage issues which were the subject of the cultural heritage direction were resolved, CMC could not utilise two access points or multiple fronts to complete the work. Those were the matters to which Mr Vance's evidence, and Exhibit 31 in particular, were directed. In that respect Mr Vance's evidence was supported by that of Mr Barry, a general superintendent for CMC. His evidence was that the cultural heritage direction meant that CMC could not utilise a second work front.[93] Further, the effect of the no-go zones was to constrict the area available to be worked by CMC.[94] Mr Barry said the practical effect of not being able to access a second work front was that it kept CMC "at one crew so it halved production", and delayed construction.[95]

[149] The support for Mr Vance's evidence otherwise was recognised by the learned trial judge:[96]

> "In spite of WICET's objections to the Vance Measurement, I am content to rely on it. The Vance Measurement is simply an assessment by him as to how much earlier the Reclamation C Bunds would have been finished but for the relevant directions given by WICET. The main source of material used by Mr Vance in

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91 CMC's quantum expert who's report (Exhibit 2A) is at AB 1277.
92 Report of Mr Roberts, para 278, AB 1277-1278.
93 AB 1637.
94 AB 1643.
95 AB 1639.
96 Reasons below at [254].

> compiling Exhibit 31 is contained in a document to which no objection was taken.[97] The Vance Measurement ultimately confirmed Mr Vance's and Mr Barry's evidence as to the effect of the directions on the completion of the Reclamation C Bunds."

[150] The reference to the evidence of Mr Vance and Mr Barry at the end of that passage is to the estimation by each of them of the time delay caused by the Event 3 directions. Mr Barry estimated it was two months based on the production figures for that period.[98] Mr Vance estimated the time at about three months.[99]

[151] There was, therefore, substantial support for Mr Vance's evidence, and it was open to the learned trial judge to accept it and rely upon it.

[152] For the reasons already outlined above, there was no requirement to reject the Vance Measurement or Exhibit 31 on the basis that it went beyond Senior Counsel's assurance as to its purpose. It was therefore not improperly used for quantum, nor unfairly.

[153] There is an additional consideration which touches upon the contention that the admission of Exhibit 31 was unfair. Mr Vance's evidence was on days three and four of the trial (25 and 26 May 2016). Between then and when Mr Abbott gave evidence on 15 August there was an adjournment of nearly three months. That was more than enough time for Mr Abbott to prepare a response in relation to the Vance Measurement (Exhibit 31). There was also adequate time in which the legal representatives of WICET could have investigated Exhibit 31, and received expert instructions upon it. Upon the resumption of the trial there was no request to have Mr Vance recalled, nor was there any evidence given by Mr Abbott touching upon this issue. Subject to questions of case management there can be no credible suggestion, given that the two parties to the trial were well resourced and with highly experienced legal representation, that had WICET sought to adduce evidence in relation to Mr Vance's position or Exhibit 31 itself, WICET would have been denied that opportunity.

[154] In the result, in my view, this ground of appeal lacks merit.

WICET appeal, grounds 6-8: actual costs

[155] These grounds of appeal relate to an issue of quantum in respect of Events 1 and 2[100] of the earthworks claim which the learned trial judge determined in the sum of $239,850.[101] That finding was based upon expert evidence from Mr Roberts, valuing a claim by applying the subcontractors' rates plus a mark-up. WICET's expert, Mr Tsipis, gave evidence that the CMC had not paid its subcontractor anything additional by reason of Events 1 and 2, essentially because that subcontractor's claim was time-barred under the subcontract.[102] On that basis WICET claimed below, and contended again before this Court, that CMC was not

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97 This is an evident reference to Exhibit 22.

98 AB 1644.

99 AB 1614.

100 Event 1 related to a delay caused by directions regarding a permit to excavate the haul road and Event 2 related to a delay in the construction of the haul road.

101 Reasons below at [261].

102 Report by Mr Tsipis paras 164-174, AB 1201-1206.

entitled to any money for this claim, because it could not demonstrate that it had actually incurred additional cost by reason of those events.

[156] There was no contest before this Court that the learned trial judge correctly determined that the directions given rise to Events 1 and 2 were directions issued under clause 33.1 of the contract.[103] That clause provides:

> "The Principal's Representative may direct in what order and at what time the various stages or parts of the work under the Contract shall be performed. If the Contractor can reasonably comply with the direction, the Contractor shall do so. If the Contractor cannot reasonably comply, the Contractor shall notify the Principal's Representative in writing, giving reasons.
>
> If compliance with the direction causes the Contractor to incur more or less cost than otherwise would have been incurred had the Contractor not been given the direction, the difference shall be valued under Clause 40.5."

[157] The learned trial judge held that clause 33.1 provided a valuation mechanism and did not involve consideration of actual costs, nor an audit in relation to any actual costs.[104] In doing so the learned trial judge distinguished the decision of the High Court in *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd*.[105]

[158] Before this Court WICET contended that the learned trial judge was in error because the mere use of the word "valued" in clause 33.1 did not detract from the fundamental task required by that clause, which was to adjust actual costs, either by reason of the additional cost or by reason of the reduced costs. It was said that the learned trial judge was in error to find that the fact that CMC had not actually paid its subcontractor in respect of Events 1 and 2 was irrelevant.

[159] There was an additional contention, namely that there was no proper evidential basis for Mr Roberts' assessment of the valuation, because Mr Roberts did not concern himself with difference in cost.

[160] CMC submitted that once it was established that the contractor had incurred some additional costs, the valuation exercise was to be undertaken under clause 40.5, by applying agreed rates (if applicable) or otherwise reasonable rates or prices. Clause 33.1 did not call for an exercise in identifying the actual amount of the cost paid by the contractor, but by applying objectively ascertained rates or prices for the relevant plant, equipment, materials and personnel affected by the direction. It was submitted that the learned trial judge correctly distinguished *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd.* Further, the valuation undertaken by Mr Roberts applied reasonable rates to the plant and equipment affected by the directions. That was an appropriate approach to valuation under clause 33.1.

Discussion

[161] The contract between CMC and WICET contained a number of provisions which bear upon the proper construction of clause 33.1.

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103 Reasons below at [199].
104 Reasons below at [205]-[213].
105 (1972) 127 CLR 253.

[162] The "work under the Contract" was defined to mean the work which CMC "is or may be required to execute under the Contract and includes variations …".[106] Subject to the question of set-offs, WICET was obliged to pay CMC for work carried out and completed, in accordance with the payment schedule in the contract. For work for which WICET accepted a lump sum, CMC was to be paid the lump sum. For work for which WICET accepted rates, CMC was to be paid "the sum ascertained by multiplying the measured quantity of each section or item of work actually carried out under the Contract by the rate accepted by [WICET] for the section or item".[107]

[163] Under Clause 9.2 CMC required the written approval of WICET if it wished to subcontract part of the work. However, Clause 9.3 provided that approval to subcontract "shall not relieve [CMC] from any liability or obligation under the Contract". In the case of subcontractors[108] CMC was to ensure that the provisions of the subcontract were fully expressed and complete in themselves, and included provisions that nominated subcontractors will undertake obligations to CMC which would enable CMC to discharge its obligations to WICET.[109]

[164] However, except as provided in clause 10.4, and subject to any reasonable objection made by CMC pursuant to Clause 10.4, WICET "shall have no liability to a Selected or Nominated Subcontractor arising from the subcontract between [CMC] and the Selected or Nominated Subcontractor".[110]

[165] Only in the case of nominated subcontractors, that is to say subcontractors to whom CMC is directed by WICET to subcontract part of the works, or one such named in the contract and with whom WICET has entered into a prior contract, was WICET obliged to make payment directly to the nominated subcontractor.[111] No such provision is to be found in respect of "Selected Subcontractors".

[166] In respect of provisional sums, clause 11(b) provided that where, at the direction of WICET, the work or item to which the provisional sum relates is performed or supplied by a subcontractor to CMC, WICET "shall pay [CMC] the amount payable by [CMC] to the subcontractor for the work or item, disregarding any damages payable by [CMC] to the subcontractor or vice versa, and the amount payable to a subcontractor for materials or goods is to be taken to be the net cost to CMC, disregarding any deduction of cash discount for prompt payment.

[167] Clause 33.1 deals with directions by WICET as to how, in what order and at what time various stages of the work are to be performed. If such a direction is given then:

> "If compliance with the direction causes [CMC] to incur more or less cost than otherwise would have been incurred had [CMC] not been given the direction, the difference shall be valued under Clause 40.5."

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106 Clause 2.

107 Clause 3 of the Special Conditions; Clause 3.1 of the General Conditions.

108 Whether "selected subcontractors" because they have been identified by CMC in its tender, or "nominated subcontractors" meaning one to whom CMC is directed by WICET to subcontract part of the work.

109 Clause 10.3.

110 Clause 10.4(a).

111 Clause 10.5.

[168] There are a number of clauses that have similar wording. Examples are:

(a) clause 8.1 which provides that if WICET gives a direction as to how to interpret a particular document in carrying out the work, and that direction causes CMC "to incur more or less cost than [CMC] could reasonably have anticipated at the time of tendering, the difference shall be valued under Clause 40.5";

(b) clause 27.5 deals with obligations on the part of CMC to take care of valuable minerals, fossils and other articles; it goes on: "If compliance under obligations under Clause 27.5 causes [CMC] to incur more or less cost than [CMC] could reasonably have anticipated at the time of tendering, the difference shall be valued under Clause 40.5";

(c) clause 28.2 deals with the care of survey marks, and provides that if someone disturbed or obliterated a survey mark (other than CMC) "the costs incurred by [CMC] in reinstating the survey mark shall be valued under Clause 40.5";

(d) a similar provision exists in clause 28.3, dealing with errors in setting out, and providing that in the circumstances "the cost incurred by [CMC] in rectifying the error shall be valued under Clause 40.5;

(e) clause 30.4 provides that if WICET directed a variation under clause 40, the variation is to be valued under clause 40.5; further, "If the variation results in [CMC] incurring more or less cost than would reasonably have been incurred had [CMC] been given a direction under Clause 30.3, regard shall also be had to the difference";

(f) clause 33.3 deals with the circumstance where WICET directed CMC to accelerate performance of the work; if compliance with that direction caused CMC "to incur more or less cost than otherwise would have been incurred had [CMC] not been given the direction, the difference shall be valued under Clause 40.5"; and

(g) clause 34.4 provides that if "the suspension causes [CMC] to incur more or less cost than otherwise would have been incurred but for the suspension, the difference shall be valued under Clause 40.5".

[169] The common theme in all of those clauses is that the difference in cost is in relation to what CMC incurred, rather than paid. The concept of incurring a cost is similar to that of incurring a debt. That is to say, one incurs a debt when one sustains or becomes liable for money, goods or a service. That is a distinct concept from paying a debt or paying the cost.

[170] That the use of the word "incur" signified something other than payment is supported by the fact that in each of those cases the difference in the cost incurred was something that was to be valued under clause 40.5. If the difference was a set figure represented by what had been paid by CMC to a subcontractor, there would be no point in valuation.

[171] Further, where the parties desired to do so, they were able to specify that the consequence of a direction by WICET was to be calculated by reference to payment, rather than cost incurred. For example:

(a) under clause 11, dealing with provisional sums, the amount payable to a subcontractor is to be the net cost disregarding any deduction of cash discount for prompt payment;

(b) under clause 44.6, dealing with adjustments on completion of the work when it is taken out of the hands of the contractor, the difference between the two concepts recognised: "If the costs incurred by the principal is greater than the amount which would have been paid to the contractor if the work had been completed by the contractor, the difference shall be a debt due from the contractor to the principal"; and

(c) in clause 11(b), dealing with the payment for provisional sums where WICET directs the work or item to which the provisional sum relates is to be performed or supplied by the subcontractor, WICET shall pay CMC "the amount payable by [CMC] to the subcontractor for the work or item, disregarding any damages payable by [CMC] to the subcontractor or vice versa."

[172] Further, the contract is structured in such a way that it maintains a separation between WICET and CMC's subcontractors, except in specific cases dealt with in clause 10. Apart from them, clause 10.4(a) provides that "the principal shall have no liability to a selected or nominated subcontractor arising from the subcontract between the contractor and the selected or nominated subcontractor". The separation of WICET from CMC's subcontractors suggests that when clause 33.1 uses the word "incur" it is not the equivalent of "pay". To read it that way would be to introduce a relationship between WICET and CMC's subcontractor that clause 10.4 is careful to avoid.

[173] Further, it is possible that the valuation exercise under clause 40.5 might be finalised before the contractual obligations between CMC and its subcontractor are finalised. There is nothing in the wording of clauses 33.1 or 40.5 which would suggest that the valuation exercise is dependent upon what CMC ended up actually paying its subcontractor, as opposed to "incurring" in respect of its subcontractor.

[174] These considerations lead me to conclude that the learned trial judge was not in error when he construed clause 33.1 as not involving a valuation of actual costs, nor an audit of actual costs but rather a valuation of additional costs.[112]

[175] In my view, *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd* is distinguishable. The clause under consideration there used different terminology from that in consideration here. That clause entitled the builder to recover, where the builder was involved in loss and expense beyond that provided for in the contract, "the amount of such loss or expense", as ascertained by the architect. As Stephen J recognised in that case, the clause was directed at compensating the builder in a way which did not refer to valuation, but instead the amount of a specific loss or expense. As the learned trial judge found, that is not the case here.

[176] When regard is had to clause 40.5, and the valuation process, it becomes apparent that the parties drew a distinction between costs incurred and costs actually paid. The distinction comes in clause 40.5(h) which provides that "Daywork shall be valued in accordance with Clause 41". Clause 41 provides, in turn, that where the value of Daywork is being determined, regard shall be had to:

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112 Reasons below at paras [212]-[213].

(a) the amount of wages and/or allowances paid or payable;

(b) the amount "paid or payable" in accordance with any statute or award for day labour in addition to wages;

(c) the amount of hire charges in respect of Construction or Plant;

(d) the amounts paid for services, subcontracts and professional fees;

(e) the actual cost to the Contractor of all materials supplied and required; and

(f) for the work.

[177] The use of phrases such as "amount … paid or payable" or "amount of hire charges" is similar to the wording of the relevant clause in *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd*. Thus, they suggest an ascertainment of loss or expense. That is made clearer by those subparagraphs of Clause 41 which specify that regard is to be had to "amounts paid" and "actual cost". That approach is to be contrasted with the wording of Clause 33.1.

[178] This ground fails.

WICET's appeal on interest – grounds 9-11

[179] CMC's earthworks claim was submitted on 19 November 2012.[113] Reference to it reveals the essential basis upon which it was advanced. Thus, in the introductory section CMC claimed that:

(a) during the early part of the works WICET "failed to obtain the required access permits to allow the Bulk Earthworks to progress as reasonably expected";

(b) the works were subject to restrictions from the no-go zones, whereas the Baseline Program showed access to all areas;

(c) there were progressive and unexpected changes in site access resulting in a variation to the works;

(d) the works were impacted by cultural heritage issues which, amongst other things, constricted the work fronts;

(e) CMC's ability to carry out the works was impacted by the delay caused by the lack of access; and

(f) therefore those works were significantly changed in character, sequence and scope.[114]

[180] The claim was based upon a "Measured Mile" approach, which was said to represent a reasonable measure of the change resulting from altered work conditions. Then, after setting out the scope of works and the no-go zones the claim identified a number of key access dates which were delayed.[115] The claim then set out a chronology of events in relation to Reclamation C Bunds including the fact that on

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113 Exhibit 115, AB 870.
114 AB 873-874.
115 Para 28, AB 877.

the commencement date no clearing permit was in place for any works whatsoever.[116]

[181] The constrained access due to the no-go plans was identified in some detail.[117] In the course of that recitation the Event 3 directions as to removal of flora were particularised.

[182] Further, the claim identified that there were delays caused by ongoing cultural heritage issues which restricted the work fronts on the reclamation bunds.[118] The claim then identified that a second access point to the bunds was not achieved until 9 January 2012, and even then it did not occur because of other restrictions.[119]

[183] A later section of the claim particularised the effects of the claimed events. These were:

(a) that WICET had caused events leading CMC to incur additional costs with respect to the bulk earthworks;

(b) that the chronologies, diagrams and analysis produced illustrated the changes in scope; and

(c) the extent of the impact by the detailed event.

[184] Three different phases during the work were illustrated, comparing how the works were impacted by the various events, and how the works progressed once they were unhindered.[120]

[185] In that respect phase 1 represented the commencement phase from October 2011 through to January 2012 when, instead of unhindered access, there were numerous hindrances and events "which caused the actual productivity rate to be substantially lower than required to support the planned rate of progress".[121] Phases 2 and 3 were contrasted, and in particular phase 3 represented a time of unhindered actual productivity.[122]

[186] The claim then set out the asserted entitlement to additional costs under the contract, including under clauses 33.1, 40.1 and 40.5.

[187] The basis of that claim as articulated was, as the learned trial judge found,[123] not so different in substance from the claim as finally articulated as to warrant that the entitlement to interest should be postponed from the time when the claim should have been assessed.

[188] WICET's case as articulated before this Court was that the Measured Mile approach had fundamental flaws. Even if that were so, it does not deny the conclusion that the claim as properly assessed should have been allowed. The findings at trial, and on appeal, make that evident. The fact that WICET had a contrary view, or advanced competing evidence, in relation to the factual basis for the claim[124] does

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116 Para 38, AB 878.
117 Commencing at para 44 on AB 879.
118 For example, para 83 at AB 885.
119 Para 88, AB 886.
120 AB 905.
121 Paras 225-226, AB 906.
122 Paras 230-231, AB 907.
123 Reasons below at [164].
124 Such as the delays to access, the no go zones, the restriction to only one access point for a period of time, and the impact of those events.

not lead to a conclusion that the entitlement to interest should be postponed. Had WICET properly assessed the claim and paid the earthworks variation that would have occurred in January 2013.

[189] WICET contends that interest should only run from when CMC finally articulated its claim, namely 29 January 2016.[125]

[190] In my view, the learned trial judge correctly concluded that the essential factual basis for the claim remained the same from when it was first articulated. Had WICET properly assessed and paid that variation, CMC would have been paid in January 2013. The learned trial judge ordered that interest run on the assessed claim accordingly. I am unable to conclude that he was in error to do so. CMC articulated a claim factually based upon hindrances to the access points for Reclamation C Bunds, impacts upon the work by the restricted access as well as the no-go zones and the Event 3 directions issued by WICET. That factual basis did not fundamentally alter, and was the basis upon which the learned trial judge assessed damages. Even though the formulation of the claim might have changed from a Measured Mile approach to that which succeeded at trial, that is no basis upon which to deny the entitlement to interest so that it runs from when the claim, as properly assessed, should have been paid. The learned trial judge has, in effect, found that the entire sum was always due and payable from January 2013. There is no basis upon which this Court should interfere with that conclusion.

[191] This ground fails.

Conclusion

[192] The appeals by each of WICET and CMC should be dismissed. I propose the following orders:

1. In CA 4068 of 2018, the appeal is dismissed, with costs.

2. In CA 4286 of 2018, the appeal is dismissed, with costs.

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125 This was when CMC's pleading articulated the claim which succeeded, on 5 January 2016.