SUPREME COURT OF QUEENSLAND

CITATION:	*Thiess Services Pty Ltd v Mirvac Q P/L* [2005] QSC 364
PARTIES:	**THIESS SERVICES PTY LTD (ACN 010 725 247)** (applicant) **v** **MIRVAC QUEENSLAND PTY LTD (ACN 060 411 207)** (respondent)
FILE NO/S:	BS4205 of 2005
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	24 November 2005
JUDGE:	Muir J
ORDER:	**Application is dismissed.**
CATCHWORDS:	CONTRACTS – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – TERMS ESSENTIAL TO ENABLE PERFORMANCE – UNCERTAINTY – applicant contractor and respondent principal entered into a lump sum contract whereby contractor would remediate site owned by principal – principal requires land to be remediated to undertake large scale residential and commercial development on it – portions of site 'contaminated land' under s 374 of *Environmental Planning Act* 1994 (Qld) – statutory requirement of Remediation Action Plan ("RAP") to be formulated by parties identifying process by which site is to be remediated – whether contractor obliged to remediate site rendering it suitable for land use only if such can be done "economically" or to an absolute standard as contended by principal – construction of commercial documents – whether obligation to remediate is to be determined by reference to the RAP *Environmental Protection Act* 1994 (Qld), s 374, s 375, ss 390-397 *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191

Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99
Charter Reinsurance Ltd v Fagan [1997] AC 313
Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337
Hide and Skin Trading Pty Ltd v Oceanic Meat Traders Ltd (1990) 20 NSWLR 310
Homburg Houtimport BV v Agrosin Private Ltd [2004] 1 AC 715
Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749
Manufacturers Mutual Insurance Ltd v Withers (1988) 5 ANZ Insurance Cases 60-853
Pacific Carriers Ltd v BNP Paribas [2004] 78 ALJR 1045
Reardon Smith Line Ltd v Hansen-Tangen [1976] 1 WLR 989
Sirius International Insurance Co (Publ) v FAI General Insurance Ltd [2004] 1 WLR 3251
Sola Basic Australia Ltd v Morganite Ceramic Fibres Pty Ltd (CA 11 May 1989, unreported)
Toll (FBCT) Pty Limited v Alphapharm Pty Limited (2004) 219 CLR 165
Trawl Industries of Australia Ltd v Effem Foods Pty Ltd (1992) 27 NSWLR 326
Wickman Machine Tool Sales Ltd v L. Schuler AG [1974] AC 235

COUNSEL: W Sofronoff QC with him D Williams for the applicant
R A Holt SC with him D Logan for the respondent

SOLICITORS: Minter Ellison for the applicant
Clarke & Kann for the respondent

Introduction

[1] In these proceedings the applicant contractor seeks a declaration as to the content of its obligations under a lump sum contract entered into between it and the respondent principal to remediate a 17 hectare parcel of land which includes the site of the former gas works at Newstead, Brisbane. In broad terms, the Contractor contends that its obligation is to remediate the Site to the extent necessary to render it suitable for any land use, only if that can be done economically. The Principal asserts that the Contractor's obligation to remediate all of the land to such standard, with the exception of the site of the remaining gas holder, is absolute.

[2] The Principal requires the Site to be remediated so that it can undertake a large scale residential and commercial development on it.

[3] The gas works ceased operation by 1968 but the land which it occupied remains heavily contaminated with, amongst other pollutants, "unwarranted fractions from the distillation process which had been disposed of by dumping on site or disposal into facilities on site which subsequently leaked". Other parts of the Site are also

extensively contaminated as is its groundwater. A Brisbane City Council depot and railway yards were located on other parts of the Site for many years. Some of the railway land was used between about 1935 and 2001 for the production of bituminous emulsions for road repair. Above and below ground storage tanks for petroleum products were also located on the land for lengthy periods.

[4] The history of the Site and its extensive contamination were made known to the Contractor prior to the Contract being entered into. In that regard, the Contractor was furnished with the Remediation Action Plan to which extensive reference is later made. It was also given various technical reports on the contaminants.

[5] Portions of the Site are listed on the Environmental Management Register maintained under the *Environmental Protection Act* 1994 (Qld) ("the Act"). Land may be placed on the Environmental Management Register if the authority administering the *Environmental Protection Act* 1994 (Qld) ("the Authority") decides that the land has been or is being used for a "notifiable activity" or if it is "contaminated land".[1]

[6] The process of removal of land from the Register is normally commenced by the preparation of a site investigation report under s 375 of the Act. The work necessary to remove the contamination identified in the site investigation report is required by the Authority to be spelt out in a remediation action plan. Such plans have no statutory authority. The Act focuses instead on the "validation report" which must be submitted after the remediation work has been done and which must be accepted by the Authority if the land is to be removed from the Register.[2]

[7] The Authority has issued terms of reference providing for the voluntary use of an appropriately qualified independent third party reviewer to assess site contamination and oversee its remediation. A third party reviewer is engaged by the site owner or developer and consented to by the Authority prior to the adoption of the remediation action plan for that site. Conformably with the terms of reference, a remediation action plan was prepared for the Site, a third party reviewer was appointed by the Principal and the third party reviewer approved the content of the plan.

The relevant provisions of the Contract and related materials

[8] The primary contractual document is the "Australian Standard Form of Formal Instrument of Agreement" dated 25 September 2003 which recites that the agreement "sets out the rights and obligations of the parties with respect to the remediation of the Site". In clause 2 it identifies the other instruments which comprise the Contract, stating:

> "It is agreed that each of the following documents shall together comprise the Contract between the parties:-
> (a) AS2124-1992 General Conditions of Contract;
> (b) Annexure to AS2124-1992;
> (c) Special Conditions of Contract AS2124-1992;
> (d) The Contractor's 'Tender Schedule: Lump Sum Price 12 September 2003'
> (e) Annexures comprising:-

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1 *Environmental Protection Act* (Qld) 1994, s 374.

2 *Environmental Protection Act* (Qld) 1994, ss 390-397.

…
Part H – Lump Sum Rate and Volume Breakdown; and
Part I – Further Contract Documents;
– Extracts from Conditions of Tender;
– Extracts from Notice to Tenderers;
– Extracts from Principals and Contractor's Correspondence

(f) Technical specifications …"

[9] Clause 1A of the Special Conditions of Contract provides that "…the Special Conditions take precedence over the General Conditions of Contract to the extent of any inconsistency between them …". Clause 1.1 of the Technical Specification provides:

> "Nothing in this Specification shall be taken to limit or alter or otherwise affect the obligation of the parties as set out in the Conditions of Contract. The Specification will always be read as being subject to the rights and obligations of the parties under the Contract."

[10] "Conditions of Contract" is not a defined term, but it seems reasonable to conclude that the term encompasses the General Conditions and Special Conditions. The requirement that the Technical Specification "be read as being subject to the rights and obligations of the parties under the Contract", makes reference to rights and obligations under parts of the Contract other than the "Technical Specification".

[11] The Contractor's warranties clause in the special conditions ("the Warranty") requires that the Works, when completed "comply with the Contract, other requirements of the RAP and the requirements of all Authorities".

[12] "Works" is defined in the Special Conditions as being:

> "(a) the whole of the work to be executed in accordance with the Contract, including variations provided for by Contract, which by the Contract is to be handed over to the Principal; and
> (b) the remediated site."

[13] The General Conditions of Contract relevantly provide:

> "**3.1 Performance and Payment**
>
> The Contractor shall execute and complete the work under the Contract
> **…**
> **8. Contract Documents**
>
> **8.1 Discrepancies**
>
> The several documents forming the Contract are to be taken as mutually explanatory of one another. … In the event of an ambiguity

or discrepancy being discovered and brought to the attention of the Superintendent, or discovered by the Superintendent, the Superintendent shall direct the Contractor as to the interpretation to be followed by the Contractor in carrying out the work."

[14] The **Special Conditions of Contract** relevantly provide:

> "15 Without limiting the generality of Special Condition, Contractor's Planning Obligation, the Contractor warrants that:
>
> …
>
> (c) *the Works will when completed comply with the Contract, other requirements of the RAP and the requirements of all Authorities. RAP means the Remediation Action Plan as amended and approved by the Third Party Reviewer.* Third Party Reviewer means the person carrying out the Third Party Reviewer role as set out in the Queensland EPA Third Party Reviewer Terms of Reference." (emphasis added)

[15] The "Tender Schedule: Lump Sum Price" is contained in part 2d of the Contract which provides:

> "The Contract shall be for a *fixed lump sum price of $24,486,082 based on the Contractors own assessment of volumes and methodology.*
>
> The Contract Fixed Lump Sum Price shall be calculated from the Lump Sum Items listed in Tender Schedule: Lump Sum Price 12 September 2003.
>
> The Lump Sum Items for the remediation works are payable by instalments in accordance with the percentage complete as assessed by the Superintendent. Such instalments shall be included in payments due to the Contractor for the remediation works.
>
> …
>
> The Lump Sum Items Tendered in the Tender Schedule: Lump Sum Price 12 September 2003 shall, in so far as it is otherwise provided under the Contract, include all mobilisation, establishment, demobilisation … together with all general risks, liabilities and obligations set out or implied in the Contract." (emphasis added)

[16] Part H of the Contract entitled "Lump Sum Price Rate and Volume Breakdown" provides:

> "The parties acknowledge that the quantities in the "Lump Sum Price Rate and Volume Breakdown" were provided by the Contractor for the purpose of assisting the Superintendent in valuing progress claims. These quantities, however, are in no way warranted by the

Principal. The Contractor remains responsible for completing the work under the Contract for the agreed Lump Sum Price regardless of the actual quantities any work or item carried out under the Contract. Any difference in quantities will not constitute a variation to the work under the Contract."

[17] The **Technical Specification** relevantly provides:

> **"1.1. General Description**
>
> Nothing in this Specification shall be taken to limit or alter or otherwise affect the obligations of the parties as set out in the Conditions of Contract. The Specification will always be read as being subject to the rights and obligations of the parties under the Contract.
>
> The work under this Contract comprises all the work required to remediate ground and groundwater contamination at the Newstead Riverpark Site, Brisbane. The work involves an extensive ground remediation program and groundwater collection, treatment and management program (including but not limiting any other works which are required to be performed by the Contractor) as follows:
>
> 1) all approvals, permits, licences and the like;
>
> …
>
> 3) Demolition of all structures, except gasholder No 2, concrete footings/foundations/piles, pipework, services and slab removal will be undertaken to access contaminated material or to validate the underlying material to an extent that the material can be rendered as suitable for any land use. All structures and infrastructure must ultimately be removed, except as otherwise agreed by TPR;
>
> …
>
> 6) undertake remediation work incorporating excavation, validation and backfill as appropriate. Implementation of groundwater collection, treatment and management measures as required to facilitate excavation of impacted soil. Note that each excavation area or corridor will be validated and TPR sign off required prior to any subsequent infrastructure works. The Works include, but is not limited to:
>
> - all works to remediate the Site including, but not limited to, excavation, management of miscellaneous in-ground material such as asbestos and pipes including disposal, stockpiling, sampling, segregation, drying/draining, treatment and stabilisation, transport, management, material classification, all environmental, all health and safety management including all monitoring, disposal off-Site, on-Site backfilling and compaction of suitable material to various locations.

- remediation work from western portion of Site towards eastern sector including along proposed gas main and 110kV high voltage power cable diversion route …

- validation and progressive TPR sign off on validated parcels of land no longer required for remediation purposes.

…

8) remediate gasholder and associated infrastructure …

9) remediation works incorporating excavation, validation and backfill as appropriate for eastern portion of QRail Area 1 and QRail Area 3 to be undertaken during services realignment;

10) remediate area between services realignment and river wall boundary;

…

12) all validation, reporting, liaison and final TPR sign-off;

…

1.2 Third Party Reviewer

Mirvac has appointed Mr Roger Parker of Golder Associates' Melbourne Office as Third Party Reviewer (TPR) for the project. The role of the TPR is to review all relevant documentation associated with the proposed Remediation Action Plan, sign off on the proposed remediation strategy and when appropriate sign off that the Site is suitable for any land use or specific land uses if necessary. A detailed outline of the TPR Terms of Reference issued by the EPA is presented in the RAP.

The TPR will play a critical role in determining that the Works (in part and as a whole) have been completed to the required standard. The TPR's decision will be a fundamental factor taken into account by the Superintendent and Principal when approving claims by the Contractor for progress in, and completion of, sections of the Works. The Contractor should be aware that the TPR, in the absence of EPA advice, will adopt a regulatory position regarding all environmental issues. (emphasis added)

…

1.3 Objective of the Contract

The objective of the Contract is to safely and efficiently remediate the Site in order to achieve "any land use" with the Site removed from the Queensland EPA Environmental Management Register with no management of the Site required.

The Intent of the Remediation as accepted by the TPR is stated in the TPR approved RAP dated 11 April 2003.

1.4 The Remediation Action Plan

The contractor may adopt the methodology of the TPR approved RAP. The Principal makes no representation as to the extent of the remediation, including volumes, required to remediate the Site.

The Contractor may submit a remediation methodology which is different to that in the RAP. It is the Contractor's responsibility to obtain (at the Contractor's cost) the TPR's approval for any remediation methodology which is different to the RAP methodology.

The Contractor may adopt other components of the RAP including but not limited to the EMP and OH&S Plan in whole or part. The Contractor shall obtain, at the Contractor's cost, all approvals including but not limited to the approval of the TPR for any work or methodologies which differ from those outlined in the RAP and associated documents.

13.0 Material treatment

…The Contractor must make his own determination of the volumes of the various types of materials requiring treatment and of the extent of treatment required to meet the remediation objectives.

The Contractor shall only use methods for treating materials that were nominated in the RAP and associated documents or which have otherwise been approved. Any variations to the agreed methods proposed by the Contractor shall only be used following a written approval from the Superintendent and the TPR."

[18] The Remediation Action Plan is not identified in the "Formal Instrument of Agreement" as one of the documents comprising the Contract.

[19] The **Remediation Action Plan** relevantly provides:

"1.3 Remediation objectives

"The primary objective of the project is to fully remediate the contaminated material in order to render the entire site suitable for any land use in accordance with the National Environmental Protection (Contaminated Lands) Measure, (NEPM) 1999, Queensland EPA guidelines, NSW EPA, Dutch Intervention and site specific risk-based criteria. In achieving the proposed remediation objective, it is intended that the site not be subject to inclusion on the Queensland EPA Environmental Management Register and that no long-term management of the site be required. Further …

Other objectives of the remediation project include:

[seven bullet points follow]

Site specific target clean up goals based upon human health and environmental risks have been developed for the site. These target clean up goals were developed to allow for a contingency in the event that contamination encountered at the site could not economically be remediated to allow any land use. The risk based criteria was developed based upon proposed land uses including 'standard' residential with garden/accessible soil, high density residential, commercial/industrial (including shops, offices and industrial) and open space parkland. Long-term management and the amendment of the Site Management Plan to reflect the management measures would be required if the primary objective of remediating the site to a level which allows any land use is not achieved.

Given the complexity of the site and the objective of rendering the site suitable for any land use, the intention and implications associated with various validation outcomes have been clearly outlined in this RAP. Section 10.1b provides a discussion of the remediation intent based upon several validation outcomes.

1.3.1 Remediation Intent

The intent of the remediation program is to clean up soil and groundwater across the entire site to a condition such that EPA will remove the site from the Environmental Management Register (EMR). Failing this, the intent is to remediate as much of the site as possible so that the areas remaining with residual contamination have the least possible on-going management requirements in the resulting Site Management Plan. In particular, the objective is to achieve remediation of the site that does not require any on-going requirements for groundwater monitoring."

A number of possible outcomes from validation of soil remediation and groundwater monitoring at the end of remediation have been discussed with the TPR. The preferred options of the developer are listed in descending order of preference as follows:

[three alternatives or possibilities are then listed].
…"

"1.6 Third Party Reviewer"

[20] This provision contains terms which are virtually identical to those of clause 1.2 of the Technical Specification.

"5.4 Preferred Remediation Strategy"

[21] Table 5.4 headed "Remediation Strategy for Nominated Waste Streams" provides in relation to tarry stringers:

> "Excavation of all significantly impacted material. *Tar stringers to be removed where economically feasible* and where volume of residual tar may affect proposed development. (Refer Section 4.4)" (emphasis added)

Section 4.4 addresses groundwater remediation.

[22] Paragraph 6 of section 7.8.3.2 provides:

> "Piles encountered during the excavation works which extend below the remediation excavation depth will be cut off at the excavation base, or at the proposed excavation depth for development with the balance of the pile remaining in situ. All pile locations will be identified by survey. A test pit will be excavated around piles where tar staining is evident to define whether or not the area around the pile is a potential contamination pathway. An assessment of the volume of tar (if any) around a pile at the proposed remediation or development excavation base (whichever is deeper) will be carried out.
>
> *Where feasible and economically viable, all tar will be removed* … The occurrence of significant quantities of residual tars around the piles will need to be considered in the evaluation of potential ongoing sources of groundwater contamination. The outcome of these measures will be assessed by the TPR in consideration of whether or not full remediation of the site has been achieved." (emphasis added)

[23] The first paragraph of 10.1, under the heading "Threshold Criteria and Site Suitability" provides:

> "The nominated soil target clean up goals are based upon criteria that enable the site to be suitable for any use. The nominated clean up goals for the proposed 'any use' designation are presented in Section 4. Alternative risk-based threshold criteria derived from the detailed Health Risk Assessment are also discussed in Section 4. *Note that these criteria are provided as a contingency in the event that the remediation works cannot economically achieve the desired remediation criteria.*" (emphasis added)

Summary of the Contractor's submissions

[24] The Contract and, in particular, the Technical Specification, imposes no obligation of full remediation on the Contractor. Clause 1.3 states the "objective of the Contract" not "an obligation on the Contractor". That objective is qualified by the words "safely and efficiently" and there is the further qualification introduced by the reference to "the Intent of the Remediation".

[25] The Remediation Action Plan is also part of the Contract incorporated by numerous references in the Technical Specification and the contractual obligations in the Specification are "defined and informed by the provisions of the RAP". It is clear from the provisions of the Remediation Action Plan that the parties expressly

contemplated that remediation of the land to a standard where it was suitable for any use might not be economically achievable. With that in mind, the Remediation Action Plan expressly provides for remediation of the site or part of it to a lesser standard. Other contemporaneous documents provided as part of the tender process, namely the amended Site Management Plan dated 16 May 2003 and the Health Risk Assessment, referred to in the Remediation Action Plan, contemplate the prospect of less than full remediation.

[26] There are many references in the documents forming part of the Contract and the tender documents which make it plain that the site is highly contaminated and the outcome of remediation work uncertain. Consequently, it would not be surprising if some limitation were placed on the Contractor's obligations to remediate.

[27] The plain meaning of the word "objective" is "something one is trying to achieve or to reach or capture"[3] and "an end towards which efforts are directed; something aimed at".[4]

[28] In looking at "the Intent of the Remediation" attention should not be confined to clause 1.3.1. The Remediation Action Plan is not a formal legal document and should not be construed as such and there are parts of it, other than clause 1.3.1 (particularly clause 1.3), which are relevant to an understanding of the intent of the remediation. Clause 1.3 acknowledges that not all of the site can "economically be remediated to allow any land use". So too does clause 10.1 and the Health Risk Assessment referred to in clause 10.1.

[29] The statement of "objectives" is most unusual in construction contracts which generally require construction to a particular standard or quality. It is thus significant that the word "objective" is stated. It recognises that the aim may not be achievable. As clause 1.3 states the objective as being to "safely and efficiently" remediate the site, the principle's construction does not acknowledge that the objective may not be achievable if it is unsafe to perform the work.. Nor does the Principal's construction give weight to the references in the Remediation Action Plan to the fact that full remediation may not be economical.

Summary of the Principal's submissions

[30] The Contract was entered into in circumstances in which it was well-known that the site was highly contaminated but that the full extent of the contamination was unknown. The tender documents, and later the Contract, were careful to ensure that any risk arising from any unexpected additional extent of the contamination and consequent increases in costs of remediation were the responsibility of the Contractor. To this end, the Contract was for a lump sum.

[31] Special condition 22 states that the existence of any form of contaminant or of any contaminated material or contaminated water of any nature and in any quantity or concentration, in or on the Site, will not constitute a Latent Condition for the purposes of the Contract.

[32] What is physically possible should not be confused with notions of what is economically or commercially feasible or efficient. The fact that the Contract went

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3 *Australian Oxford Paperback Dictionary.*

4 *The Macquarie Dictionary.*

to considerable lengths to place the risk of unforseen contamination upon the Contractor should of itself be sufficient to displace the implication of terms concerned with economic feasibility or efficiency. The requirements of efficiency and safety are not stipulations for the benefit of the Contractor; they impose an obligation on the Contractor.

[33] Economic feasibility is a topic mentioned in the Remediation Action Plan only. It is not a contractual document. The phrase "other requirements of the RAP" in Special Condition 15 and the introduction of a special condition giving primacy to the Technical Specification over the RAP in the case of inconsistency suggest that there is a partial incorporation of select parts of the RAP as and when picked up by reference in the Technical Specification. There are numerous examples in the Technical Specification of incorporation of the RAP but there is nothing in the Technical Specification or the remainder of the Contract that picks up a lesser standard of performance based on notions of what might be "economical" or "efficient". The standard required remains that set out in clause 1.3 in terms of the three objectives.

[34] The Contractor's construction is at odds with an extensive regime which places the risk of cost and time overruns as a result of contamination squarely upon the Contractor. It is also inconsistent with the latent conditions clause 12.1(b).

[35] The Remediation Action Plan was prepared by a third party for the Principal. It was in turn disclosed to tenderers as part of the process of enabling tenderers to make their own investigations for a contract that places all risk of concealed contamination on the tenderer. That is why notions of what is economical are to be found in the Remediation Action Plan and in that document only.

Principles applicable to the construction of commercial documents.

[36] Commercial contracts are to be construed with a view to making commercial sense of them.[5]

[37] In *Wickman Machine Tool Sales Ltd v L. Schuler AG*[6] Lord Reid said –

> "The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."

[38] In *Antaios*[7], Lord Diplock expressed even stronger views concerning the imperative to make business sense of commercial contracts, stating -

> "If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts

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5 *Hide and Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 at 313-314; *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at 201; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 771; *Wickman Machine Tool Sales Ltd v L. Schuler AG* [1974] AC 235 at 251.

6 [1974] AC 235 at 251.

7 [1985] AC 191 at 201.

> business commonsense, it must be made to yield to business commonsense."

[39] The role of the court in construing a contract is to "ascertain and give effect to the intentions of the contracting parties".[8] That intention, to be determined objectively, is "what a reasonable person would have understood [the words of the contract] to mean". And to ascertain that, "normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.[9]

[40] Lord Wilberforce stated the latter principle a little differently in *Reardon Smith Line Ltd v Hansen-Tangen*[10] in the following passage referred to with approval by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*[11] and by the Court in *Pacific Carriers Ltd v BNP Paribas*:[12]

> "In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

[41] In *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd*[13] Lord Steyn, referring in particular to the passage from the reasons of Lord Diplock in *Antaios Compania Naviera SA v Salen Raderierna*,[14] referred to above, remarked on the existence of "a shift from literal methods of interpretation towards a more commercial approach". In that regard he referred to *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*[15] in which he explained the rationale of this approach as follows:

> "In determining the meaning of the language of a commercial contract … the law … generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language."

[42] Lord Steyn (in *Sirius*) added:

> "The tendency should therefore generally speaking be against literalism."

[43] Lord Walker, also in *Sirius*, cautioned against undue literalism, observing:

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8 *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715 at 737.
9 *Toll (FBCT) Pty Limited v Alphapharm Pty Limited* (2004) 219 CLR 165 at 179.
10 [1976] 1 WLR 989 at 995-996.
11 (1982) 149 CLR 337 at 350.
12 [2004] 78 ALJR 1045 at 1050, 1051.
13 [2004] 1 WLR 3251.
14 [1985] AC 191, 201.
15 [1997] AC 749, 771.

> "Meticulous verbal analysis of this paragraph is not appropriate, at any rate not to the exclusion of common sense, or its commercial context."

[44] In *Manufacturers Mutual Insurance Ltd v Withers*,[16] McHugh JA, in a passage referred to with approval in a later decision of the New South Wales Court of Appeal,[17] also drew attention to the need to go beyond purely linguistic considerations when considering the meaning of words in contracts. He said:

> "… few, if any, English words are unambiguous or not susceptible of more than one meaning or have a plain meaning. Until a word, phrase or sentence is understood in the light of the surrounding circumstances, it is rarely possible to know what it means. In my view evidence of surrounding circumstances will generally be admissible if it is known to both parties or sufficiently notorious to be presumed to be within their knowledge."

[45] A rather similar point is made in the following passage from the reasons of Lord Hoffman in *Charter Reinsurance Ltd v Fagan*:[18]

> "I think in some cases the notion of words having a natural meaning is not a very helpful one. Because the meaning of words is so sensitive to syntax and context, the natural meaning of words in one sentence may be quite unnatural in another. Thus a statement that words have a particular natural meaning may mean no more than that in many contexts they will have that meaning. In other contexts their meaning will be different but no less natural."

[46] These principles are usually much simpler to ascertain and recite than to apply. That is particularly so where, as is the case with this contract, the competing constructions are each supported by quite cogent arguments. I now turn to a consideration of the matters which assist the Principal's case.

Matters favouring the Principal's construction

[47] A consideration which operates strongly against the Contractor's construction is the difficulty which that construction would cause the Contract's administration. Were the Contract to be so construed, full remediation would not be required on parts of the site which could not "economically be remediated" or, perhaps, where it would be unreasonable to require full remediation on grounds that such remediation would be uneconomic.

[48] Whenever the Contractor asserted that full remediation of part of the Site was uneconomic or unreasonable the parties would need to negotiate a compromise or submit the dispute to litigation. One matter to be determined in any such litigation would be the criteria to be taken into account in determining whether the site "could not economically be remediated".

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16 (1988) 5 ANZ Insurance Cases 60-853 at 75-343.

17 *Trawl Industries of Australia Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 358 and *Sola Basic Australia Ltd v Morganite Ceramic Fibres Pty Ltd* (CA 11 May 1989, unreported).

18 [1997] AC 313 at 391.

[49] A construction which imposes burdens of this nature on the contracting parties ought not be reached lightly.

[50] The fact that the Contract is for a lump sum[19] tells against the Contractor's construction. The parties have negotiated a price with regard not only to careful estimates of the quantum of the works made by the Contractor but also to the risk that site conditions might be worse, and necessary remedial works might be more difficult than anticipated.

[51] The tender documents made it plain that the proposed contract was for a lump sum price. It was specified that:

> "The Contractor remains responsible for completing the work under the Contract for the agreed Lump Sum Price regardless of the actual quantities any work or item carried out under the Contract. Any difference in quantities will not constitute a variation to the work under the Contract."

Generally similar in effect are other contractual provisions quoted earlier and, in particular, Part H of the Contract and "Tender Schedule: Lump Sum Price".

[52] Clause 17 of the Special Conditions expressly excludes any warranties or representations by the Principal in respect of "the existing Site or subsurface conditions".

[53] Clause 13 of the Technical Specification requires the Contractor to make its own "determination of the volumes of the various types of materials requiring treatment and of the extent of treatment required to meet the remediation objectives".

[54] Clause 12 of the General Conditions of Contract has been amended so that:

> "…the existence of any form of contaminant or of any contaminated material or contaminated water of any nature and in any quantity or concentration, in or on the Site, will not constitute a Latent Condition for the purposes of the Contract."

[55] This amendment to clause 12 is consistent with a contractual intention that the Contractor accept the risk posed by unforeseen site conditions. So too are the other provisions referred to above.

[56] An exception to the requirement that the Contractor take the Site as it finds it is created by clause 43 of the special conditions which makes provision for "tarry stringers". They are "non laminar discontinuous non liquid contaminated material" of a certain defined surface area "remaining after removal of contaminated material *to a standard in accordance with the validation criteria of Newstead Riverpark Remediation Action Plan of 11 April 2003 for unrestricted land use without management*".[20] (emphasis added)

[57] Clause 43.2 provides that the sum attributed to tarry stringers in the Tender Schedule is a provisional sum only and prescribes the per cubic metre rate "for all

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19 Clause 3.1.

20 Clause 43.1.

work constituting or in any way associated with the removal and disposal of Tarry Stringers". The Remediation Action Plan requires tarry stringers to "be removed where economically feasible".[21] But, significantly, clause 43.2 provides that the work under discussion "be at the absolute discretion of the Superintendent as to the extent of the work carried out".

[58] Clause 43, by providing a limited exception to the obligation on the Contractor to remediate to the extent required regardless of quantities or work required is inconsistent with a generally applicable obligation to remediate fully only where that can be done economically. The same is true of clause 18 of the Technical Specification which, in respect of some 300 timber piles thought to be on the Site,[22] specifies that "Residual contamination at the piles shall form part of any risk assessment" and that "contamination shall be removed to the extent practicable".

[59] Clause 43.3 makes express provision for groundwater but, unlike clause 43.2, it suggests that the Contractor assume the risk of restoring groundwater so as to permit any use of the land without management. Reference is made to the Tender Schedule and it is stated that:

> "The fixed Lump Sum Price includes all ground water work to achieve the validation criteria of the … Remediation Action Plan … for *unrestricted land use without management* …" (emphasis added)

[60] Consequently, with one other possible exception (and putting aside for the moment the provision of the Remediation Action Plan) the provisions of the Contract to which reference has just been made make it plain that the Work is to be undertaken by the Contractor at its risk for the lump sum price. However, identification of the scope of the work required to be undertaken by the Contractor is critical to the resolution of the problem under construction. Also necessary is an analysis of the language of the Contract in that regard and of the words alleged to limit the Contractor's duty to perform the works. I will come to those matters shortly.

[61] The other possible exception is to be found in clause 42 of the Special Conditions. It provides:

> "The Principal acknowledges that the Contractor's remediation methodology is reliant on disposal of high level contamination material to a mono cell."

[62] A related provision is clause 44B, inserted by Special Condition 10, which gives the Principal the right to terminate the Contract "for its sole convenience" including, without limitation, "a right to terminate if high level contaminated material cannot be disposed of to a mono cell because the … Agency does not permit the disposal of high level contaminated material to a mono cell". The latter provision implies a limitation on the obligations of the Contractor. It was argued on behalf of the Principal that clause 44B supported its construction. The basis for this was that if the Contract was to be construed in accordance with the Contractor's argument it would end up with a somewhat similar right to that explicitly given the Principal by clause 44B. If it discovered that it was "economically incompatible for it to perform" it could refuse to do so.

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21 Table 5.4.

22 Remediation Action Plan section 7.8.3.2.

[63] The strength of the argument depends, to a degree, on what is meant by "economically feasible" "or economically possible". It also depends on the extent to which, at the date of the Contract, the parties contemplated that the whole or substantial parts of the Site may not be able to be remediated economically.

Matters favouring the Contractor's construction of the Contract

[64] It will be recalled that "Works" means, in essence, "the whole of the work to be executed in accordance with the Contract" and that it is warranted that "when completed" the Works will comply with the Remediation Action Plan. In order to ascertain the extent of the "Works", it is necessary to go to the Technical Specification. The second paragraph of clause 1.1 of the Technical Specification states the requirement to remediate "ground and groundwater contamination at" the Site in terms which, essentially, are unqualified. But the paragraph, referring as it does, to "all the work required to remediate ground and groundwater contamination" does not, necessarily, identify the extent of the restoration required. "Remediate" is defined in the 1993 edition of the *New Shorter Oxford English Dictionary* as "remedy, redress". The definition in the *Environmental Protection Act* 1994 (Qld) is:

> **"remediate**, contaminated land, means –
> (a) rehabilitate the land; or
> (b) restore the land; or
> (c) take other action to prevent or minimise serious environmental harm being caused by the hazardous contaminant contaminating the land."

[65] The term "remediate" is therefore capable of encompassing work of rehabilitation or restoration falling short of the removal of all contaminants from the Site. And the subsequent elaboration in clause 1.3 of the remediation required to attain the "objective of the Contract" provides an indication, if any is needed, that "remediate" or "remediation" in clause 1.1 is unlikely to be used in the sense of restoration of the land to a pristine uncontaminated condition.

[66] The balance of clause 1.1, whilst stipulating various works of remediation, does not specify the extent of the remediation required, except perhaps in paragraph (3) where there is a reference to the rendering of materials "suitable for any land use". Paragraph (6) of the clause states that "the works include, but is not limited to: all works to remediate the Site … remediation work from western portion of Site".

[67] The first sentence of clause 1.3, which states the "objective of the Contract", defines the remediation required as that necessary to achieve "'any land use' with the site removed from the Queensland EPA Environmental Management Register with no management of the Site required." For convenience, I refer to such remediation in these reasons as "full remediation". The stated objective suggests that references to "remediate" or "remediation" in clause 1.1 are to full remediation. Presumably, the obligations imposed by that clause were intended to be consistent with the "objective of the Contract". This conclusion is supported by paragraph (3) of clause 1.1 and clause 43 of the Special Conditions.

[68] It is necessary, however, to read clause 1.1 together with the other provisions of the Technical Specification. As was remarked in *Australian Broadcasting Commission*

v Australasian Performing Right Association Ltd[23] "…the whole of the instrument has to be considered, since the memory of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious, one with another". Clause 1.2 contains an implicit acknowledgement (in specifying the role of the Third Party Reviewer ("TPR") to "sign off that the Site is suitable for any land use *or specific land uses if necessary*") that full remediation may not be possible in all circumstances, or even required. The second limb of clause 1.3 states that the "*Intent of the Remediation as accepted by the TPR* is stated in the TPR approved RAP". (emphasis added)

[69] Section 1.3.1 of the Remediation Action Plan is headed "Remediation Intent" and addresses that topic. It is, or is included in, the part of the Remediation Action Plan to which the second limb of clause 1.3 of the Technical Specification refers. Section 1.3.1 states "The intent of the remediation program is to clean up soil and groundwater across the entire site to a condition such that EPA will remove the site from the Environmental Management Register (EMR)". But the section goes on to acknowledge, implicitly, that full remediation may not be possible, failing which "the intent is to remediate as much of the site as possible so that the areas remaining with residual contamination have the least possible on-going management requirements in the resulting Site Management Plan". Consequently, the "Intent of the Remediation … stated in the TPR approved RAP" is not merely full remediation. The section also states the three "preferred options of the developer" in descending order of preference, and by so doing, implicitly acknowledges again that the "primary objective" of full remediation may not be achievable, at least in practical terms. In order to understand the circumstances addressed by the second and third sentences of section 1.3.1, it is necessary to go to section 1.3 which explains how alternative "target clean up goals" become relevant.

[70] Section 1.3 of the Remediation Action Plan identifies full remediation as "the primary objective of the project". The provision thus implicitly accepts that full remediation may not be able to be achieved. It is explained in it that the "Site specific target clean up goals … developed for the Site … allow for a contingency in the event that contamination encountered at the Site could not economically be remediated to allow any land use". The concluding paragraph of the section refers to the "complexity of the Site" and the objective of full remediation. It states that, given these matters, "the intention and implications associated with various validation outcomes has been clearly outlined in this RAP".

[71] The first limb of clause 1.3 states the "objective of the Contract" to be full remediation. The second limb refers to the "Intent of the Remediation" which contemplates something less than full remediation in some circumstances. As the Contractor's argument in relation to the first limb of clause 1.3 points out, the language of that part of clause 1.3 is not appropriate for the imposition of a contractual obligation. Moreover, to state an objective, at least in this context, is to state "an end to which efforts are directed, something aimed at"[24] as opposed to a required or certain result.

[72] The statement of the Contract's objective in this way suggests that the intention of the parties was not to impose on the Contractor an absolute obligation to fully

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23 (1973) 129 CLR 49 at 109.

24 *The Macquarie Dictionary.*

remediate. That impression is strengthened by the second limb of the clause which refers the parties to an "Intent" which acknowledges that remediated areas may be left with "residual contamination" and require "on-going management requirements" even though a particular "objective is to achieve remediation of the Site that does not require any on-going requirements for groundwater monitoring".

[73] If clause 1.1 imposes an absolute obligation that the Contractor effect full remediation of the whole of the Site, there would be no need for the statement of objective in the first limb of clause 1.3. The second limb would be equally puzzling and, additionally, would tend to confuse, if not mislead, unless it was intended that the obligations imposed in clause 1.1 be qualified by clause 1.3 or understood in the light of that clause. But, conversely, if, as I accept, the language of clause 1.3 is not appropriate for the imposition of a contractual obligation, it would seem to follow that it is equally inappropriate to limit contractual obligations. What is good for the first limb of clause 1.3 applies equally to the second.

[74] The Technical Specification, by clause 1.2, accepts implicitly that the Third Party Reviewer, in performing his functions, will have regard to the terms of the Remediation Action Plan. Clause 1.3 specifies that the Third Party Reviewer has accepted "*the Intent of the Remediation … stated in the … RAP*". As has been seen, the "intent" accepts that full remediation may not always be possible. It is provided further that the Third Party Reviewer "will play a critical role in determining that the Works … have been completed to the required standard".[25]

[75] The Third Party Reviewer's role, after adoption of the Remediation Action Plan, is confined to: approving amendments to it or departures from its terms; ensuring compliance with the Act and the Authority's terms of reference and certifying in the course of the validation process. His obligations and functions are to be fulfilled with reference to the terms of the Remediation Action Plan, the provisions of the Act and the requirements of the Authority's terms of reference. The requirements of the Contract, except to the extent that they are to be found in the Remediation Action Plan, are not relevant to his duties or functions. Nevertheless, he is to "play a critical role in determining that the Works (in part and as a whole) have been completed to the required standard". Also his decisions "will be a fundamental factor taken into account by the Superintendent and Principal when approving claims …"

[76] These considerations, to my mind, support the conclusion that the obligation to remediate imposed by the Contract is not absolute but is required to be determined by reference to the Remediation Action Plan.

[77] I am not confident that I understand the separate functions of the "objective of the project" referred to in section 1.3 and the "intent of the remediation program" referred to in section 1.3.1. One would think that the intent of the program would be to achieve the primary objective of the project, to the extent possible. I note that the "primary objective of the project" stated in section 1.3 is "… to render the entire site suitable for any land use in accordance with the National Environmental Protection (Contaminated Lands) Measure, (NEPM) 1999, Queensland EPA guidelines, NSW EPA, Dutch Intervention and site specific risk-based criteria". The remediation intent though, is limited to remediation "to a condition such that EPA will remove

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25 Clause 1.2 of the Technical Specification.

the Site from the Environmental Management Register". I do not consider, however, that it was intended that the primary "intent" was to remediate to a lesser standard than that contemplated by the "primary objective". That was not suggested in argument and is inconsistent with the statement of the three possible outcomes of remediation in clause 1.3.1. The final paragraph of section 10.1 appears to refer to these outcomes. It provides:

> "Given the complexity of the site and the need for a degree of certainty with the final remediation outcomes, consideration of the intent of the remediation work and the likely outcomes of several validation scenarios were considered and agreement on the site's suitability outlined. These intents have been discussed in detail in section 1.3."

[78] This provision, like sections 1.3 and 1.3.1 contemplates that remediation, in some cases, may not be able to be effected to the standard of "the primary objective of the project". Section 1.3 identifies as the circumstance for which "target clean up goals were developed", the situation where "contamination encountered … [can] not economically be remediated to allow any land use". In such a case the "intent" "is to remediate as much of the Site as possible so that the areas remaining with residual contamination have the least possible on-going management requirements in the resulting Site Management Plan [and so that] on-going requirements for groundwater monitoring"[26] are not needed.

[79] The Principal argues that the provisions in the Remediation Action Plan which contemplate limits to the extent of the works where full remediation is uneconomical are of historical interest only. It is said that such provisions were included by the author of the Remediation Action Plan to provide the Principal with a range of options for its consideration. It was never intended, the argument goes, that such provisions would limit the contractual obligations of the Contractor to effect full remediation.

[80] A letter dated 13 March 2003 from the Principal to the Contractor, which is specified to be a contractual document, states the desire of the Principal to proceed with the calling of tenders for the remediation concurrently with the amendment of the Remediation Action Plan and its approval by the Third Party Reviewer and the Agency. It may be seen therefore that the Remediation Action Plan was developed on the basis that the work of remediation would be undertaken by a contractor which would have regard to its terms in tendering, and if successful, in performing the work of remediation.

[81] Apart from this, clause 1.3 of the Technical Specification makes express reference to "The Intent of the Remediation" and notes that it is "as accepted by the Third Party Reviewer". The Principal's three choices in descending order of preference are contained in section 1.3.1 which explains the "remediation intent". As has been discussed, it is the Third Party Reviewer who plays a critical role in determining that the Works "have been completed to the required standard" and who "when appropriate sign(s) off that the Site is suitable for any land use or specific land uses if necessary". Consequently, although the role of the provisions under consideration may be difficult to understand, it cannot be said that they are of historical interest only.

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26 Remediation Action Plan clause 1.3.1.

[82] The argument that it is unlikely that the parties intended that the Contractor's obligations be defined by reference to a concepts as elusive as economic possibility or economic feasibility is weakened a little by the fact that parts of the Remediation Action Plan, other than sections 1.3 and 1.3.1, propose works by reference to what can be achieved economically[27] and contemplate changes should the existing plan not be economically possible.[28] Such provisions though are not to be found in the Contract itself.

[83] The removal of the obligation to effect full remediation where "contamination encountered … [can] not economically be remediated to allow any land use" does not entirely negate a general obligation to remediate fully regardless of cost. The extent to which it may have that effect will depend on the meaning given to "economically". As Senior Counsel for the Contractor observed in the course of submissions, in giving a meaning to the concept "some weight would have to be given to the fact that [the Contractor] adopted a risk under the Contract". One would think also that what could or could not be done "economically" would be unlikely to be defined by reference to whether or not full remediation would result in a profit or a loss to the Contractor.

[84] What the subject provisions seem to me to be addressing are circumstances in which it becomes apparent that, when regard is had to any presently intended or reasonably foreseeable future use of any part of the Site, the cost of its full remediation is so disproportionate to any financial benefit to be gained as a result of the remediation that no reasonable person would undertake it. The meaning of the phrase under consideration was not one of the issues for my determination and the above views are necessarily tentative. I express them merely for the purpose of showing that the construction advanced by the Contractor may not lead to a commercially unrealistic result or affront common sense.

[85] It is also not particularly remarkable that, in respect of a large highly contaminated site with a considerable variety of soil and groundwater conditions, provision be made for some reduction in remediation standards in circumstances such as those just discussed.

[86] There is also the consideration that if the Principal's intention was to impose on the Contractor an unqualified obligation to effect full remediation for the whole of the Site the obvious course to follow would have been to state such an obligation clearly and directly. That was not done. Instead, the part of the Contract chosen to identify the extent of the remediation, the Technical Specification, stated "the objective of the Contract", the "Intent of the Remediation" and the fact of acceptance of that "intent" by the Third Party Reviewer. That had the inevitable consequence of rendering uncertain what a simple unqualified statement of the nature and extent of the obligations of the Contractor would have made certain.

[87] The difficulty with an argument along these lines though is that applies, probably with greater force, to the Contractor which the Contract places in a more exposed position.

Conclusion

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27 Sections 10.1 and 7.8.3.2.

28 Sections 1.5, 4.1, 4.1.5.

[88] It is apparent from the foregoing that, although there are strong indications in favour of the construction advanced by the Contractor, it is possible to arrive at that construction only by a circuitous route which attributes substantial contractual roles to provisions which are not worded in the usual language of contract. This gives rise to the concern that such a construction might give clauses 1.2, 1.3 and 1.4 of the Technical Specification an effect which was never intended. Neither clause 1.2 nor clause 1.3 of the Technical Specification expressly provides that the obligation to remediate imposed by clause 1.1 of the Technical Specification is limited or qualified by provisions of the Remediation Action Plan. It may be accepted that the Contract contemplates that the remediation work be done in accordance with the Remediation Action Plan, as varied, and the Warranty requires that "the works … when completed comply with … other requirements of the" Remediation Action Plan as amended and approved by the Third Party Reviewer. But, acceptance of these matters does not necessitate the conclusion that there is incorporated in the Contract, by reference to a document external to the Contract, a substantial limitation on the fundamental obligations of the Contractor to remediate the Site.

[89] Not even section 1.3 of the Remediation Action Plan expressly provides that where part of the Site cannot "economically be remediated to allow any land use" a particular result will follow. It speaks of a "primary objective", "other objectives" and "target goals". The critical reference to contamination which "could not economically be remediated to allow for any land use" is to be found in a narrative explaining why "target clean up goals were developed".

[90] Section 1.3.1 speaks in terms of "intent" of **remediation** and "objective" of the **project**. Reference is made in it to "a number of possible outcomes from validation of soil remediation and groundwater monitoring at the end of remediation" having been discussed with the Third Party Reviewer. The Principal's "preferred options" are then recorded. Neither this section nor section 1.3 refers to the "objective" of the **Contract** or provides for a mechanism by which the scope of the Works is to be altered should a "contingency" of the type referred to in clause 1.3 arise.

[91] Provisions which refer to "intent", "objectives", goals and "preferred options", normally, are not regarded as appropriate for fixing contractual obligations. There is more than usual difficulty in giving them such a role where they have not been given contractual force in any direct way by a provision of the Contract and are included in a document which the parties deliberately excluded from the instruments comprising the Contract. It is of some relevance also that the parties are substantial corporations experienced in entering into contracts of this kind. I regard it as unlikely that, despite clauses 1.2 and 1.3, a reasonable person would expect that the extent of the remediation required of the Contractor had to be teased out of imprecise and discursive language in a secondary instrument.

[92] A possible explanation for sections 1.3 and 1.3.1 is that they merely acknowledge the reality that, irrespective of the desires of the Principal and the contractual obligations of the Contractor, full remediation may not be able to be achieved. In that eventuality, they provide a guide to alternative courses of action, rather than providing a mechanism under the Contract for determining when less than full remediation is required and to what extent.

[93] Clause 1.4 of the Technical Specification also tells against the Contractor's construction. The third paragraph of the clause permits the contents of the

Remediation Action Plan to be changed in their entirety, or not followed by the Contractor, as long as a substitute regime is put in place with the approval of the Third Party Reviewer and the Authority. That strongly suggests that the Remediation Action Plan was not intended to play a role in delimiting the extent of the remediation work required. The Environmental Management Plan "which sets minimum standards to be adopted in the execution of the Works" may also be "adopted by the Contractor in whole or in part".

[94] Although, as I indicated earlier, clause 1.2 supports the Contractor's arguments, there are limits to its usefulness in determining the construction question. The first paragraph of clause 1.2 of the Technical Specification is explanatory in nature. The second limb is also explanatory but has a promissory character as well. Although describing the Third Party Reviewer's decisions as "a fundamental factor", such decisions are nevertheless not the only matters to be taken into account by the Superintendent and Principal when making the determinations referred to in the clause. Plainly they are bound by the Technical Specifications and other contractual provisions. Neither in clause 1.2 nor anywhere else is the Third Party Reviewer given a role in deciding the extent to which the Site or parts thereof are to be remediated.

[95] I conclude that the considerations just discussed and those set out under the heading "matters favouring the Principal's construction" outweigh those favouring the Contractor's construction, substantial though they are.

[96] Accordingly, I order that the Contractor's application be dismissed. I can see no reason why costs should not follow the event, but will hear submissions in that regard if the Contractor wishes to resist a costs order.