SUPREME COURT OF QUEENSLAND

CITATION:	*J M Kelly (Project Builders) Pty Ltd v Toga Development No 31 Pty Ltd (No 5)* [2010] QSC 389
PARTIES:	**JM KELLY (PROJECT BUILDERS) PTY LTD (ACN 010 280 142)** (plaintiff) **v** **TOGA DEVELOPMENT NO 31 PTY LTD (ACN 103 796 854)** (first defendant) AND **SUTERS ARCHITECTS PTY LTD (ACN 003 842 635)** (second defendant) AND **GEOFFREY MURPHY** (defendant by counterclaim)
FILE NO:	BS3651 of 2006
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	10, 17-21, 24-28, 31 May, 3 June 2010
JUDGE:	Martin J
ORDER:	**CLAIM DISMISSED**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – VARIATIONS – where the parties agreed a price for construction – where variations were subsequently entered – where there were substantial changes to the original proposal – whether the contract documents record the true agreement between the parties CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – MATTERS NOT GIVING RISE TO

BINDING CONTRACT – VAGUENESS AND UNCERTAINTY – where the parties agreed a price for construction – where variations were subsequently entered – where there were substantial changes to the original proposal – where the first defendant sent the plaintiff a contract-set of documents for signing – where the plaintiff signed and returned only some of the documents and made hand-written insertions on others – where the first defendant then returned a copy of the documents without the hand-written amendments – where the plaintiff signed these documents without checking whether the amendments had been inserted – where the building has been completed – whether a counter-offer was made by the plaintiff – whether the contract was concluded

EQUITY – GENERAL PRINCIPLES – MISTAKE – EQUITABLE REMEDIES – RECTIFICATION – where the parties agreed a price for construction – where variations were subsequently entered – where there were substantial changes to the original proposal – where the first defendant sent the plaintiff a contract-set of documents for signing – where the plaintiff signed and returned only some of the documents and made hand-written insertions on others – where the first defendant then returned a copy of the documents without the hand-written amendments – where the plaintiff signed these documents without checking whether the amendments had been inserted – where the building has been completed – whether the parties had a common intention – whether there was a unilateral mistake

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337
Crane v Hegeman Harris Co Inc [1939] 1 All ER 662
Franklins Pty Ltd v Metcash Trading Ltd (2009) 264 ALR 15
Johnston v Arnaboldi [1990] 2 Qd R 138
Maralinga Pty Ltd v Major Enterprises Pty Ltd (1973) 128 CLR 336
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451
Pukallus v Cameron (1982) 180 CLR 447
Riverlate Properties Pty Ltd v Paul [1975] Ch 133
Ryledar Pty Ltd v Euphoric Pty Ltd (2007) 69 NSWLR 603
Slee v Warke (1949) 86 CLR 271
Taylor v Johnson (1983) 151 CLR 422
The Olympic Pride [1980] 2 Lloyd's Rep 67
Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd [1981] 1 WLR 505
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165
Tutt v Doyle (1997) 42 NSWLR 10

COUNSEL: W Sofronoff QC SG with D Piggott for the plaintiff
R G Bain QC with D Clothier for the first defendant

SOLICITORS: Tucker & Cowen for the plaintiff
Clayton Utz as agents for Speed and Stracey for the first defendant

INTRODUCTION

[1] In 2003, the first defendant ("Toga") wanted to redevelop the Burleigh Heads Hotel site and construct some 230 residential and hotel apartments. The proposed development was called "Swell". Toga sought preliminary estimates from builders and the plaintiff ("JMK") provided an estimate of $48.8 million. Using that figure as a basis for calculations, Toga:

(a) developed a model with a completion cost of $53.4 million;
(b) obtained a finance facility for that amount; and
(c) began to market the units.

[2] In November of 2003, Toga invited five builders to tender on the development. JMK was one of them. It submitted a tender of $64.9 million. That tender was subject to a number of exceptions and conditions and so was non-compliant. Toga did not accept it, but favoured JMK as the builder.

[3] Toga was facing a rather obvious problem. It had finance approval for $53.4 million. It had obtained development approval. It had already sold all the units off the plan. But, on the basis of JMK's tender, it faced a cost to complete of nearly $12 million more than it had expected.

[4] Representatives of JMK and Toga embarked on a process by which they hoped to substantially reduce the cost of the development. In April 2004 a figure of about $50 million was reached. After further negotiation, JMK took possession of the site and began to build in June 2004. From then until February 2005 all of JMK's claims were paid but, when Variation 69 for more than $8 million was claimed, this happy situation ceased.

[5] The building has been completed but since Variation 69 the parties have been in dispute about the scope of works required by the contract.

[6] JMK claims:

(a) that the contract documents do not record the true agreement and that they should be rectified; or
(b) if the parties were never of the same mind, then it is entitled to be paid a reasonable price for its work.

[7] There is other relief sought by JMK but, by orders made in May 2009 and March 2010, Daubney J ordered that the issues relating to the claim for rectification be tried separately.

Rectification – relevant principles

[8] Equity will rectify a written contract where there has been a mistake made by both parties as to the contents or effect of the written document or, in more confined

circumstances, where only one of the parties is so mistaken. There need not be a concluded antecedent contract. What is required is that there be a common intention of the parties that continues to the time of execution of the relevant document: *Slee v Warke* (1949) 86 CLR 271 at 280-281; *Pukallus v Cameron* (1982) 180 CLR 447 at 452, 456.

[9] It follows that the first question to be considered is whether the parties had a common intention (whether or not it amounted to a contract) with respect to the particular parts of the written document which are in contention.

[10] What, then, are the requirements to establish the necessary common intention? It must be recognised that the term "common intention" is used differently according to the stage of analysis being undertaken.

[11] In the first stage, that of deciding whether a contract has been formed, the common intention sought to be ascertained is what is sometimes referred to as the "objective intention" of the parties: *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 at [262].

[12] In *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, the High Court confirmed (at [22]) the principle of objectivity by which the rights and liabilities of the parties to a contract are to be determined. Those aspects are relevant to this situation. In determining the objective intention the following matters are to be borne in mind:

(a) that the subjective beliefs or understandings of the parties about their rights and liabilities are not to be taken into account;
(b) that consideration of what each party by words and conduct would have led a reasonable person in the position of the other party to believe be considered;
(c) that reference to the common intention of the parties to a contract is to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement;
(d) that the meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean; and
(e) ordinarily, that will require consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40].

[13] That is to be contrasted with the use of the term "common intention" when considering the manner in which the written contract is to be rectified. At this point it is the subjective intention or actual intention of the parties which is relevant. "Rectification ensures that the contract gives effect to the parties' actual intention …": *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 346 per Mason J.

[14] In making a claim for rectification a plaintiff must, of course, prove what it says was the settled common intention which has not been reflected in the written document. In attempting that, a plaintiff will be required to demonstrate it by "clear and convincing proof": *Ryledar* at [161]-[165]; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 264

ALR 15 at [451]. An applicant for relief must be able to prove in clear and precise terms what the "omitted ingredient" is: *Pukallus* at 452.

[15] In demonstrating that "clear and convincing proof", parol evidence may be called in aid to establish what the intention of each of the parties was: *Ryledar* at [269].

[16] The manner in which the intention of one party can be established and how it might have become known to the other party was considered by Campbell JA (with whom Mason P agreed) in *Ryledar* at [281]:

> "[281] In my view, when the fundamental requirement for granting rectification is a continuing common intention of the parties, it is of more assistance to concentrate on what is needed before an intention of the parties to a negotiation counts as a common intention. In my view, when that intention relates to the terms upon which they will contract with each other, it is still necessary for them to know enough of each other's intentions for it to be said that there is a common intention. They might come to know of each other's intentions in this way through those intentions being directly stated, or they might come to know of them through the various other means by which one person's intention can become known to another person. Those means can sometimes involve a process of conscious and deliberate inference. Those means can sometimes involve simply perceiving a gestalt in a series of events. Those means can depend to some extent on the people involved sharing a common understanding of how particular bodies of knowledge or markets or social institutions they are operating in work – the experienced surgeon, or the experienced chess player, can sometimes see what another surgeon, or chess player, is seeking to do, in a way that an inexperienced person cannot. What matters for present purposes is that for a negotiating party to perform actions or say words from which the other party can gather his or her intention is itself a form of communication. Negotiation of any contract takes place in a context in which various facts are known or assumed by the negotiating parties. Sometimes, for example, if a contract is negotiated in a context where there are well understood business practices and conventions, and nothing is said about those practices and conventions not applying, it can be legitimate to conclude that both parties to the contract intended to act in accordance with those practices and conventions, even if they did not expressly communicate to each other that they intended to act in accordance with those practices and conventions. This view of what is needed before an intention is a common intention, accords, it seems to me, with the Australian case law since *Joscelyne v Nissen* [1970] 2 QB 86]."

[17] In the conclusion to his reasons in *Ryledar*, Campbell JA noted:

> "[316] For the reasons I have given, the common intention that is required to grant rectification is subjective. Even though there is a requirement for the intention to be disclosed before it can count as a common intention, that disclosure need not be by words that say in

> substance 'this is my intention'. The need for disclosure fills the role of being a limitation on the types of subjective intention that can be enforced through the remedy of rectification, or a limitation on the circumstances in which a subjective intention must exist before it can be enforced through the remedy of rectification. It still remains that proof of the subjective intention of the parties to the contract is fundamental to the grant of rectification."

[18] The history of this case is such that the words of Simonds J (later Lord Simonds LC) in *Crane v Hegeman Harris Co Inc* [1939] 1 All ER 662 are relevant where, at 664, he said:

> "It is a jurisdiction which is to be exercised only upon convincing proof that the concluded instrument does not represent the common intention of the parties. That is particularly the case where one finds prolonged negotiations between the parties eventually assuming the shape of a formal instrument in which they have been advised by their respective skilled legal advisers. The assumption is very strong in such a case that the instrument does represent their real intention, and it must be only upon proof which Lord Eldon, I think, in a somewhat picturesque phrase described as 'irrefragable' that the court can act."

[19] In *The Olympic Pride* [1980] 2 Lloyd's Rep 67, Mustill J (as he then was) explained (at 74) why such a high degree of satisfaction is required:

> "The Court requires the mistake to be proved with a high degree of conviction before granting relief. There are sound policy reasons for this. The Court is reluctant to allow a party of full capacity who has signed a document with opportunity of inspection, to say afterwards that it is not what he meant. Otherwise, certainty and ready enforceability would be hindered by constant attempts to cloud the issues by reference to pre-contractual negotiations. These considerations apply with particular force in the field of commerce, where certainty is so important."

[20] Rectification on the basis of unilateral mistake is available where there are additional factors that render unconscionable reliance on the document by the party who has intended that it should have effect according to its terms: *Riverlate Properties Pty Ltd v Paul* [1975] Ch 133; and *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336 at 350.

[21] This issue was considered in *Johnston v Arnaboldi* [1990] 2 Qd R 138 by Connolly J (with whom Carter and Moynihan JJ agreed) where, at 144, he said:

> "For one party to a contract to permit the other to execute it, knowing that he is mistaken about a particular term, the mistake being to the advantage of the former, has been categorised as dishonest and will entitle the mistaken party to rectification: *A. Roberts & Co. Ltd v. Leicestershire County Council* [1961] Ch. 555. Such knowledge was described by Farwell J. in *May v. Platt* [1900] 1 Ch. 616 at 623, in discussing three cases in which it had occurred, as equivalent to

> fraud. In *Riverlate Properties Ltd v. Paul* [1975] Ch. 133 the type of situation in A. Roberts was described as involving a degree of sharp practice. The problem in this case however is not in the form of the contract, which reflects precisely the intention of the parties, but in the additional payment made on the settlement to the Land Administration Commission, which was to the advantage of the purchasers as they well knew, and which had the result that the vendors did not receive the net consideration on sale contracted for. The conduct of the appellants answers the descriptions applied to such a situation in *A. Roberts* and the succeeding cases."

[22] The type of unilateral mistake which would justify rescission (*Taylor v Johnson* (1983) 151 CLR 422) will also allow rectification – *Tutt v Doyle* (1997) 42 NSWLR 10. The principles which these cases require to be applied were those identified by Buckley LJ in *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 at 516:

> "… first, that one party (A) erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain; secondly, that the other party (B) was aware of the omission or the inclusion and that it was due to a mistake on the part of (A); thirdly, that (B) has omitted to draw the mistake to the notice of (A). And I think there must be a fourth element involved, namely that the mistake must be one calculated to benefit (B). If these requirements are satisfied, the court may regard it as inequitable to allow (B) to resist rectification to give effect to (A)'s intention on the ground that the mistake was not, at the time of execution of the document, a mutual mistake."

[23] The plaintiff also argues (but faintly), in the alternative, that the contract documents did not constitute a contract because they were incomplete or uncertain or both. I will deal with this further below.

The witnesses

[24] JMK called these witnesses:

(a) David Nelson. He was, from March 2003 to June 2005, the Southeast Queensland Manager of JMK. He was the principal point of contact for Toga in its negotiations with JMK. "He didn't have the authority to actually sign the contract, but he had the authority to do everything up to that stage."

Mr Nelson ceased working on the Swell project in 2005 and had not, while he was working on it, been responsible for the detailed analysis of quantities and prices. That was Mr Schubert's responsibility. Mr Nelson was, I thought, an honest and cooperative witness whose memory on some things was not completely reliable as might be expected given the lapse of time.

Curiously, he had not been asked to go through the documents and work out what had, on JMK's case, been agreed to but which was not included in the final, signed agreement. This omission was not explained.

(b) Geoffrey Murphy – the Managing Director and ultimate decision-maker at JMK. Mr Murphy has a great deal of experience in the building industry. This project was one of the largest ever attempted by JMK. In cross-examination he was not always content with giving a simple answer to a question and frequently engaged in non-responsive or argumentative rejoinders.

I formed the view that his evidence could not be accepted with respect to a number of important matters, an example being the courtyards included in the development. He firmly maintained that the courtyards had not been measured, had not been priced, and were not included in the contract price. This was a certainty for Mr Murphy. In a process not unlike drawing teeth, Mr Murphy eventually accepted in cross-examination that at least some identifiable parts of the courtyards had been measured and priced. His acceptance extended further in re-examination after an adjournment.

In another example, he said that he had, during a telephone meeting on 10 May, expressed his concerns about JMK's ability to price reinforcement and scaffolding. This was denied by both Mr Portelli and Mr Klein. I do not accept that the note ("REIO + SCAFFOLD") in his diary was made contemporaneously or that it truly reflected the discussions. He was particularly unconvincing in cross-examination on this point.

(c) Kevin Bartlett – a solicitor who provided some advice to JMK.

(d) David Schubert – a quantity surveyor who was employed by JMK. He worked on the Swell project until he left JMK in November 2004. Apart from the effect of the effluxion of time, he had worked on over a thousand projects since then, and he had what he described as a "fairly average" recollection of what had occurred.

[25] Toga called these witnesses:

(a) Vince Portelli is a civil engineer who had worked for the Toga group of companies as its Executive Development Manager from 1995 to late-1999. A company he part owned – JPQS Pty Ltd – was retained by Toga in February 2004 to work on the Swell development. He was to assist in negotiating the contract sum and developing the building contract. This involved obtaining more competitive sub-contractor quotes and investigating possible changes to the scope of the project ("the value management process").

Mr Portelli was greeted in cross-examination with this question: "Mr Portelli, I suggest to you that you come to this Court prepared to tell lies on behalf of Toga to advance its case?" Obviously, Mr Sofronoff QC thought that he was not going to extract many concessions. That line of attack continued. Mr Portelli did not keep a diary or take notes of meetings. This is, in my experience, unusual for a person who is engaged in these sorts of tasks. I formed the view that, in giving evidence, he sometimes did what he could to put a "spin" on his answers which was favourable to Toga but that he was, generally, a reliable historian and witness.

(b) Jeffrey Klein is an architect who, in 2003 and 2004, was engaged by the Toga Group as an Executive Project Manager. He worked on the Swell project. He was cross-examined at length and in great detail about the specific issues advanced by JMK as being areas on which the parties had reached an agreement different from that contained in the document finally executed by Mr Murphy. He had a reasonably good memory of what had occurred and presented as a careful man who had been concerned to get the loose ends of the project tied up.

The Tender

[26] As a part of the tender process, prospective tenderers were issued with tender documents, including a specification (Ex 6) and architectural drawings (Ex 7) prepared by the project architect, Suters Architects Pty Ltd ("Suters"). As is the norm with building projects, the drawings were given issue numbers which were used to distinguish the various sets of drawings issued during the design and construction process. Parts of the specification were issue T1 (dated 3 November 2003) and others were issue T2 (dated 11 November 2003).

[27] It is worth identifying those parts of the tender documents which have some relevance to these proceedings:

(a) Section 1 (tendering) and section 2 (preliminaries) identified that the tenders were invited for the construction of the whole of the project, except for demolition and early earthworks, for a lump sum price. Certain documents were issued for information i.e. "for the convenience of the contractor and [which] do not form part of the Contract". The price was not to be subject to cost adjustment for labour and materials.

(b) The existence of a financier was disclosed together with the requirement that the successful tenderer enter into a Tripartite Deed which provided, among other things, that the construction contract could not be varied without the financier's written consent. A draft Tripartite Deed was included.

(c) Reference was made to the early earthworks documents, including drawings, the work the early earthworks contractor had to do and the work the contractor had to do. The successful tenderer would not undertake the demolition and early earthworks.

(d) Section 4 (concrete) contemplated the use of proprietary products and identified that it was for the contractor to prepare shop drawings showing relevant details. It identified that supplied drawings were

indicative of design intent and structural performance requirements only. Express reference is made to void formers in sections 4B.02 and 4L.15. The specification thus required the contractor to undertake the detailed design of any pre-cast flooring system which might include the use of void formers.

(e) Section 5 (masonry) identified in section 5C.01 the use of certain materials and components. In reference to courtyard walls, it required the use of a polished face Boral block.

(f) Section 8 (carpentry - joinery) included specifications for doors and joinery work. Section 8D.08 required solid core doors in steel frames at a height of 2400 mm "except where otherwise required". This was a general specification. There was a door schedule in section 25C which set out the particular requirements for each door. At the time of tender the door schedule was issue T2. By the time of contract it was issue T7. It changed on several occasions prior to contract. Section 8E set out requirements for door hardware. Section 8F.09 set out requirements for kitchen cupboards. This included the use of a particular type of laminate and stone. It referred to the drawings as setting out "the general arrangements and set out of the kitchen cupboards".

[28] In a letter from Suters to JMK of 6 November 2003 (Ex 11) additional documents including structural drawings were supplied. Included in those documents were floor area details "for information purposes only" (Ex 8). The total project area was 57,240.9m^2 – that included areas on slab, areas on grade and landscaped areas.

[29] The timing for the tender was not convenient in that it was shortly before Christmas and it did not allow enough time for a tenderer to undertake the time consuming task of obtaining competitive quotes. Nevertheless, JMK obtained a number of subcontractor quotes, including:

(a) All Painting and Maintenance Services for painting;
(b) Ausco Doors for the supply of doors;
(c) Boral for the supply of various types of block work;
(d) Coastal Interiors for the supply and installation of plasterboard;
(e) Complete Construction Consulting for the installation of Humeslab;
(f) Harvey Norman for the supply of appliances and sanitary ware;
(g) Humes for the design, supply and installation of Humeslab, a proprietary pre-cast flooring system;
(h) Kawana Kitchens for the supply and installation of cabinetwork;
(i) Kone for the supply and installation of lifts;
(j) Master Kelwin for the supply and installation of floor coverings;
(k) Precast Solutions for the design and installation of Smartfloor, an alternative proprietary pre-cast flooring system;
(l) Q Electrical Services for the provision of electrical services;
(m) Regency for the supply and installation of bath screens, shower screens and mirrors; and
(n) Surfside Pools for the construction of pools.

The "Contract"

[30] The contract which the plaintiff says does not mirror the continuing common intention of the parties was executed by Mr Murphy for JMK and Mr Klein for Toga in the middle of June 2004. It is in the Australian Standard Form of Formal Instrument of Agreement (AS 2124 -1992).

[31] The documents which form part of the contract are listed as being:

> "1 Specification by Suters Architects (Project No. 1064-01) inclusive of all other consultant specifications contained within same.
> Dwg Nos: Refer to Section 1 of Specification
> 2 Letter of Intent dated 21 April, 2004.
> 3 Trade Cost Allocation and Scope Clarifications
> 4 Special Conditions
> 5 Development Approval
> 6 Building Approval
> 7 Construction Programme
> 8 Works-As-Executed Plan of Delta Siteworks
> 9 Tripartite Agreement"

What needs to be rectified? The plaintiff's case.

[32] JMK pleads that it reached an agreement with Toga on 14 May 2004 but that did not have a great presence in the case as it was presented at trial. I will deal with that later in these reasons. The respects in which JMK says that the contract documents do not record the true agreement are:

> (a) the drawings to be used to identify the works;
> (b) the subcontractor quotations to be used to identify the works;
> (c) the use to be made of the Revised Area Drawings and the Coloured Marked-Up Wall Plans in identifying the works;
> (d) the exclusion of courtyards at grade from the works to be done for the agreed price;
> (e) the treatment of the gross maximum price trade packages; and
> (f) the treatment of reinforcement, scaffolding and waterproofing.

[33] JMK submits, correctly, that it must show that:

> (a) JMK and Toga had a continuing common intention, whether or not amounting to an agreement, in respect of particular matters, which are set out in the preceding paragraph, in the contract documents; and that
> (b) by mistake, the contract documents did not reflect that common intention.

The post-tender meetings and other activity

[34] Toga had to find a way to bring the building cost within the limit of its finance facility. It retained Mr Portelli and engaged new engineers – Bond James Norrie Marsden ("BJNM").

[35] From 15 December 2003 JMK and Toga negotiated in an attempt to agree on a price for Swell which was lower than JMK's tender. They sought to do that by (among other

things): changing the design, reducing the scope and quality of the works, and obtaining further or revised quotations from subcontractors. Both Suters and BJNM commenced redesigning various parts of the complex. There was a series of meetings at which these and other matters were discussed.

First Post-Tender Meeting – 11 February 2004

[36] This meeting was attended by, among others, Messrs Klein, Nelson and Schubert. Discussion took place regarding design changes and working through the value management process. The minutes record the commencement of consideration of choosing a pre-cast flooring system and wall types. Significantly, Toga submitted that Mr Klein referred to a Gross Maximum Price ("GMP") contract at this meeting, and suggested that this manifested an intention on behalf of Toga to enter into a contract for a maximum lump sum.

[37] Following this meeting Toga retained Mr Portelli to assist witha number of things, including obtaining quotes. This was not his task alone – JMK was also to seek new quotes.

Second Post-Tender Meeting – 25 February 2004

[38] At this meeting, Mr Klein suggested a target price for the project of $54-$55 million – a figure with which neither Mr Nelson nor Mr Schubert disagreed. The minutes of that meeting show that there was re-tendering of trade packages in an attempt to reduce risk, something that Toga says demonstrated that the quotes that had been obtained at this early stage were not intended to have contractual effect. Mr Portelli attended this meeting.

Third Post-Tender Meeting – 10 March 2004

[39] At this meeting, Mr Klein indicated a target price of about $52 million and, again, Mr Nelson and Mr Schubert did not disagree with it. Mr Portelli provided details of various savings he had identified through changes to the tender documents. Representatives of Humes were asked to provide a quote. Humes was provided with the revised area drawings on 12 March 2004 for a design which was generally smaller than that tendered for. A quotation was provided to JMK. Toga argued that following this meeting both parties sought out further sub-contractor quotes; not, as suggested by JMK, that Toga controlled the entire process of engaging sub-contractors. Indeed Toga suggested that a large number of the quotes obtained by Mr Portelli were obtained from sub-contractors that had initially been included in JMK's tender.

Fourth Post-Tender Meeting – 24 March 2004

[40] Mr Klein and Mr Nelson agreed that a new price of approximately $51 million would be achievable if appropriate design and specification changes were made. An agreement was reached that Suters and BJNM would provide JMK with further drawings for the purpose of pricing, including drawings of various different wall types ("Coloured Marked-Up Architectural Drawings"). These were issued by Suters on 31 March 2004.

[41] A fair reading of the minutes discloses an important discussion about the status of subcontractor quotes under the heading "Preliminaries/Contract". It was accepted that they were not to be novated to JMK, that quotes obtained by Toga were to be

considered indicative only (item 2.3(ii)), and that JMK was not required to use Toga's tenderers. There was no suggestion that these quotes were to have any contractual importance. This was made clearer by the note that JMK was to review the scope prior to agreeing the contract. It follows, then, that Mr Nelson knew from this that JMK were not bound to use the quotes and that he had to conduct a review by reference to the contractual documents. In any case, this was to JMK's advantage because it was free to re-tender after contract and, in the case of fixed price items, keep any further savings its could negotiate.

[42] After that meeting Suters issued the "coloured wall type drawings". It was clear to Mr Klein and JMK that these were not sufficiently detailed to allow JMK to give a price.

The Letter of Intent

[43] On 20 April 2004 Mr Klein, having realised that not all tender drawings and components of the specification would be prepared in time to have the contract executed, advised Suters that Toga would "sign the contract on the older drawings and the detailed scope statements we are currently preparing". Toga submitted that this was significant in that it demonstrated that Mr Klein had intended that the specification and tender drawings were to be contractual documents, though subject to any revised drawings prepared in time and the Scope Clarifications. It was argued that Mr Klein's discussion and apparent agreement with Mr Nelson to proceed in this fashion defeated the suggestion that Mr Klein considered that the specification and tender drawings were 'obliterated' from the equation.

[44] On 21 April 2004 a Letter of Intent was executed between JMK and Toga. Based on quotations, it recorded an intention to contract at a price of $50,018,219 (excluding GST). Toga says that the letter reflected an agreement to contract for a lump sum of up to that amount. The letter itself relevantly states:

> "I refer to our negotiations over the past two months and more recently to discussions on 19 April, 2004, where it has been agreed that a lump sum contract price of up to a maximum amount of $50,018,219 (excl GST) is achievable. This may be reduced further due to design development and/or more favourable sub-contractor quotations, prior to determining the final contract sum.
>
> Attached is a draft Trade Cost Allocation which identifies three types of trade costs, which are either fixed sums, gross maximum prices or provisional cost/sum items. This is a draft and may vary, however, the intention is to have mostly trades of fixed sums, with only a few gross maximum price items or provisional cost items.
>
> Based on the above criteria and the ability of J.M. Kelly to meet the requirements of our financiers, I am pleased to advise that it is the intention of Toga Development No. 31 Pty Ltd to enter into a building contract with J.M. Kelly (Project Builders) Pty Ltd with site possession by 10 May, 2004.
>
> This letter of intent is issued to enable you to arrange appropriate resources, purchase orders and commitment generally to achieve the above commencement date. The final contract details will be resolved over the coming weeks, however, the contract will be AS 2124- 1992 as agreed,

> with Annexures as per the original Tender documents and Special Conditions which have generally already been discussed.
>
> Accordingly, if you concur with the above could you please formally sign your acceptance of same below and return a copy to our office as soon as possible, such that the formal contract documents can be developed."

The letter is then signed by both Mr Klein for Toga and Mr Nelson for JMK.

[45] On 26 April 2004, BJNM issued drawings IN40 and IN41. These were, for JMK, very important. Mr Nelson said:

> "So, upon the receipt of drawings IN40 and IN41, what did you accept them as showing? What was their status? What were they for?-- They were - they were - the drawings that were to show the Hume[s] slab - the typical Hume[s] slab throughout the whole of the project, we were told to adopt these as the typical sections for Hume[s] slab, which included showing all of the reinforcing details and all of the concrete required to complete the structure in accordance with the engineer's requirements.
>
> And who told you that?-- I was told that by both Mr Klein and also Mr Norrie from Bond James Norrie Marsden.
>
> Did those drawings have any bearing upon the estimation of the cost of construction?-- Yes, they did, they had total bearing upon it, because we were told that we were to assume that these were typical throughout the whole of the project. So, we then proceeded to price all of the project structure on the basis of these drawings." (T4-56)

[46] On about 11 May 2004, a "contract set" of drawings and specification was issued to Toga and JMK. (Although the cover sheet is dated 7 May, there are documents attached which are dated 10 May.) The cover sheet has the reference: "CONTRACT DOCUMENT ISSUE". That is followed by:

> "Find attached Contract documents including:
>
> - Architectural Drawings as scheduled
> - Architectural Specification
> - Structural Drawings as scheduled
> - Electrical Services Drawings as scheduled
> - Fire Services Drawings as scheduled
> - Hydraulic Services Drawings as scheduled
> - Drawing Transmittals for the above documents."

[47] The schedule contained references to both tender drawings and drawings issued as recently as 10 May. It also referred to both IN40 and IN41.

[48] At about the same time Suters sent a letter containing two compact disks. The letter provided:

> "Reference Contract Document Issue – CAD Files
> …
> Re: Contract Document Issue – CAD Files
>
> David,
>
> Find attached Contract documents in CAD (.dwg) format.
>
> Note that these drawings are issued for approval as Contract Documents and are not 'For Construction'.
>
> We will be progressively issuing documents 'For Construction" as soon as possible."

[49] The disks did not contain any of the BJNM drawings including IN40 and IN41. I do not regard that as being of great importance. Neither side sought to call evidence about the provenance of the disks or whether the omission of the engineer's drawings was anything more than an oversight.

Scope Clarifications

[50] The changes that were being made to the original proposal were quite substantial and so, in order to capture them, a "Scope Clarifications" document was prepared. It was intended to record changes to the scope of works and every trade element. In order to prepare the Scope Clarifications, Messrs Nelson, Schubert, Klein and Portelli met on 14 May 2004. The meeting lasted a number of hours and, JMK says, the parties went through the Buildsoft database line-by-line to ensure the costs accurately reflected the most recent quotations and drawings. ("Buildsoft" is a proprietary database program used in the construction industry.) Toga disputes that any agreement arose out of this meeting. It says that the very name of the Scope Clarifications document suggests that it was a clarifying rather than contractual document.

[51] Following the meeting, Mr Nelson sent a selection of pages from the draft Scope Clarifications, which he had annotated in order to show the changes he wanted, to Toga. It included specific increases in allocation for reinforcement supply and installation, as had been discussed on 12 and 14 May 2004. Also, on 17 May 2004, Mr Schubert provided a price for slab on ground works following a review which necessarily would have included the Scope Clarifications, including courtyard works. Toga submits that whatever Mr Murphy contends JMK understood about courtyards from earlier drawings, it did not price the slab on ground until after reviewing the Scope Clarifications which specifically refers to concrete in courtyards and other courtyard work. It argues that there is no reason to think that Mr Schubert did not price the whole of the courtyard work and that there is no basis for concluding that Toga thought that to be the case.

[52] Mr Klein emailed the final Scope Clarifications document to Mr Nelson on 17 May 2004.

[53] On 21 May Mr Klein sent an amended Preliminaries section of the Specification to Mr Nelson to be incorporated into the contract documents. It was reviewed by Mr Nelson and, later, by Mr Murphy.

[54] On 27 May 2004, Mr Murphy, Mr Nelson and Mr Schubert met to review the project including the Scope Clarifications.

[55] JMK took possession of the site and commenced construction on 1 June 2004.

The Meeting of 14 May

[56] JMK pleads that an agreement was concluded on 14 May in these paragraphs of its Third Further Amended Statement of Claim (3FASOC):

> "29. On about 14 May, 2004, JMK and Toga agreed that:
>
> 29.1 JMK would undertake the works identified during the Toga Value Management Process (the "Trade Cost Allocation Works") for the price identified during the Toga Value Management Process as the sum of the trade packages plus a 6% margin (the "Agreement"), being an agreed total price of $50,018,219 (the "Agreed Price").
>
> PARTICULARS
>
> The Agreement was partly written, partly oral and partly implied. Insofar as it was written it was constituted by the Subcontractor Quotations, the Contract Set of Drawings, the Revised Area Drawings, the JMK Tender Clarifications and the General Conditions of Contract AS 2124-1992 (the 'General Conditions').
>
> Insofar as it was oral, it was constituted by conversations between Klein, Portelli, Nelson and Schubert on 14 May 2004, at the meeting on that day, at JMK's Fortitude Valley offices and which were to the effect alleged.
>
> Insofar as it was implied, it was implied by:
>
> (a) those said conversations;
>
> (b) the said written components of the Agreement;
>
> (c) the provision to the parties of those documents;
>
> (d) the conduct of the negotiations, and those negotiations and the statements and the conduct of Toga and its representatives and JMK in the Toga Value Management Process detailed in paragraphs 9 to 28 hereof;
>
> (e) JMK being granted access to the site and commencing the Trade Cost Allocation Works on about 1 June 2004; and
>
> (f) so as to give business efficacy to the written and oral parts of the Agreement, and at law.
>
> 29.2 the scope of the Trade Cost Allocation Works was to be recorded in a document to be produced by Toga (the "Trade Cost

Allocation") as clarified by the "*Scope Clarifications*" for each of those trades (collectively, the "Scope Clarifications").

PARTICULARS

…

(c) detailed particulars of the work allowed in each trade package, as agreed between JMK and Toga on or about 14 May 2004, are as set out in the Buildsoft database for the Agreed Price provided in Annexure C hereto;

(d) JMK otherwise refers to and repeats the particulars provided under paragraph 29.1 hereof.

30. The Agreement included the following terms:

30.1 JMK would be given possession of the site on 17 May, 2004 to commence the Trade Cost Allocation Works;

30.2 The obligations imposed on the parties by the following documents were to be construed in the following order of precedence and any conflict between them overridden by reason of that precedence:

30.2.1 the Scope Clarifications and the Trade Cost Allocation;

30.2.2 the General Conditions;

30.2.3 the Contract Set Of Drawings;

30.2.4 a specification.

30.3 That once the design had been developed and/or the subcontracts let, if it was found that any quantities allowed in the Trade Cost Allocation as clarified by the Scope Clarifications were not correct or that works required had not been specifically allowed for therein or that the actual cost of those quantities or allowances made therein were not as specified therein, then such matters would be dealt with as extras if they could not be set-off against other cost savings for the Project that would keep the cost of the works for the Project within the Agreed Price.

PARTICULARS

The term in paragraph 30.3 was partly oral and partly to be implied or arises as a matter of the proper construction of the terms of the Agreement as a whole.

Insofar as it was oral, it was constituted by statements, the substance of which was to the effect alleged, made by Klein and/or Portelli to Nelson and/or Schubert during the course of the Toga Value Management Process and also stated by Portelli to Geoff Murphy ("Murphy") of JMK during the phone conversation referred to in paragraph 46 hereof.

Insofar as it is to be implied, it arises from the said express statements and as a matter of the proper construction of the terms of the Agreement as a whole in the context of its matrix of facts as set out in paragraphs 1 to 29 hereof and, in particular, the level of development of the design for the Project at that time, the fact that the prices obtained from

subcontractors were only quotes and were not the subject of any binding agreements with those subcontractors and the agreement to change the order of precedence as set out in paragraph 30.2 hereof (which was subsequently sought to be recorded in amendments to the Specification as set out in paragraph 35 and 36 hereof).

Further, that term or the proper construction of the Agreement is also to be implied from the matters set out in paragraphs 31 and 32 hereof."

[57] In its Defence to those allegations, Toga pleaded:

"29. With respect to paragraph 29 of the Third Further Amended Statement of Claim, the Defendant:

(a) denies that, on or about 14 May 2004, the Plaintiff and the Defendant reached the alleged Agreement or any agreement at all for the reasons pleaded in this paragraph and paragraphs 9 to 28 hereof;

(b) says that it had no intention to create any contractual relations on 14 May 2004;

(c) says that neither Klein nor Portelli had any authority from the Defendant to enter the alleged Agreement;

(d) says the JMK Tender specified that as a condition of the JMK Tender, there would be no binding agreement until a formal contract was executed by both parties;

(e) says that by letter dated 4 May 2004 from the Plaintiff to Klein of the Defendant, the Plaintiff dispatched a draft deed of agreement (which draft deed was not accepted by the Defendant) intended by the Plaintiff to regulate the rights and obligations of the parties until a formal instrument of agreement was signed by both parties;

(f) says that the parties otherwise conducted their negotiations during the Negotiation Period on the basis that there would be no agreement or, alternatively, no final or binding agreement until a formal contract was executed by both parties and repeats and relies on its pleading in paragraph 9(d) hereof;

(g) says that the parties executed a formal Instrument of Agreement bearing the date 11 June 2004 comprising the following documents:

(1) General Conditions of Contract ("**General Conditions**") in the form AS 2124-1992 including annexure Part A thereto;

(2) specification by Suters (Project No. 1064-01) ("**Specification**") inclusive of all other consultant

specifications contained within same comprised of:

(A) the revisions of the architectural specification listed in the Register; and

(B) the Amended Preliminaries Specification;

(3) drawings numbered and referred to in section 1 of the Specification;

(4) letter of intent dated 21 April 2004;

(5) TCA dated 17 May 2004 and Scope Clarification dated 17 May 2004 ("**Scope Clarifications**");

(6) special conditions to AS2124-1992 General Conditions of Contract (**"Special Conditions"**);

(7) development approval PN28068/01/DA1 dated 23 September 2003;

(8) building approval;

(9) construction program (provided by the Plaintiff by email on 15 June 2004);

(10) single page works as-executed plan of Delta site work;

(11) Tripartite Agreement (in draft form);

(12) extra sheets being the Register (incorporating the documents referred to in the Register), the tender form dated 11 June 2004 and signed by Mr Murphy on behalf of the Plaintiff and the lift services drawing by Multitech Solutions dated 10 May 2004, Issue B,

(together "**Executed Contract**");

(h) says that the Plaintiff, together with the Defendant and National Australia Bank Limited, signed a deed ("**Tripartite Deed**") dated 23 July 2004 which:

(1) in recital A, acknowledged that the Plaintiff had entered into the Building Contract (as therein defined) to carry out the works under the Building Contract ("**Works**");

(2) in clause 1.1, defined the Building Contract as meaning the Executed Contract;

(3) in addition to regulating various rights and obligations of the Plaintiff in connection with the Executed Contract:

(A) in clause 9.1(a), required the Plaintiff to duly and punctually perform its obligations under the Executed Contract;

(B) in clause 10.2(a), required the Plaintiff and the Defendant not to waive, amend or vary the terms of the Executed Contract in any material respect without the prior written consent of National Australia Bank Limited;

(C) in clause 16.2, embodied the agreement of the Plaintiff and the Defendant that, subject to the provisions of the Tripartite Deed, the Executed Contract and their respective rights and obligations embodied in it, were in full force and effect;

(D) in clause 18.10, acknowledged that the Tripartite Deed constituted the entire agreement of the parties about its subject matter and superseded all previous agreements, understandings and negotiations on that subject matter,

(i) says that in the circumstances pleaded in paragraphs (d) to (h) hereof, the Plaintiff is estopped from alleging the existence of the alleged Agreement;

(j) in relation to subparagraph 29.1;

(1) repeats and relies upon its pleading in paragraph 29;

(2) denies any agreement for the Plaintiff to undertake the alleged Trade Cost Allocation Works upon the basis, or upon the terms and conditions, alleged by the Plaintiff because the agreement was for the Plaintiff to construct the Works as defined in the Executed Contract for a lump sum price of $50,018,219 and upon the terms and conditions of the Executed Contract.

(k) in relation to sub-paragraph 29.2:

(1) repeats and relies upon its pleading in paragraph 29;

(2) denies that the "Scope Clarifications" as pleaded set out the entirety of the agreed scope of the Works because:

(i) that scope was to be determined by reference to all the documents forming part of the Executed Contract; and

(ii) clause 9.4.6 of the special conditions forming part of the Executed Contract states that the TCA is declared to be a contract document only for the purpose of clause 9.4 and shall not have any other force or effect in connection with the agreement between the Plaintiff and the Defendant;

(l) says that in the premises the rights and obligations of the parties are to be determined by reference to the Executed Contract pleaded in paragraph 29(g) hereof and for that reason denies the allegations that the Plaintiff and the Defendant made an agreement on about 14 May 2004."

[58] Those present at the meeting were Messrs Nelson, Schubert, Klein and Portelli.

[59] In his evidence, Mr Nelson said:

(a) That he understood the purpose of the meeting to be that "we were all going to sit around the board room table at J M Kelly and sit there until such a time as we finalised and agreed on the price and the scope of works".
(b) That the meeting lasted at least three to four hours.
(c) That Mr Schubert brought his laptop which contained the Buildsoft software and that it was available for anyone to inspect.
(d) "I recall having some drawings, in particular, the BJNM drawings, IN 40 and IN 41, and there may have been some other minor drawings, but certainly there wasn't a lot of paper documentation. It was primarily centred around the Buildsoft program and the subcontract quotes and to clarify those and to enter into the program the agreed quotations and the agreed scope of works so that the price could be finalised."
(e) He didn't recall having the original specification and the original tender drawings.
(f) There was a general discussion about specifications and drawings.
(g) "The discussions at the meeting revolved around the issuance of revisions to the - the original tender specification and the original drawings."
(h) "Basically the meeting was concluded with the agreement that the price of 50 million and 18,000 represented what was in the trade

scope clarifications and that we were getting on with the building of the project."

(i) "I don't believe there was anything else that we were required to do. We'd been through the pricing and the scope of works and all parties had agreed to that and we were simply waiting on preparation of contract documentation by Toga."

(j) He was asked: "What would your reaction have been - what would you have said to Mr Klein if it was put to you by Mr Klein or Mr Portelli that Kelly's was about to agree to erect a structure in accordance with the specification, Exhibit 6, and the drawings in it for the price of 50 million and 18,219? What would you have said?" He answered: "Well, I would have said that that was incorrect because the price of 50 million and 18,000 was formed using a number of subcontractor quotes as per the meeting we had on the 14th of May where we agreed quite specific scopes of work, that did not include these drawings but, rather, included what was later to become the contract set of drawings, but, certainly, had no reference back to these, particularly the joinery, where it was extensively at Mr Klein's request in order to minimise the price."

[60] Mr Nelson did his best to recall what occurred but much of what he said was not a recitation of what did occur but more his sense of what had occurred. I formed a clear view that what he said about the meeting was informed more by what happened after the meeting than what was actually discussed at the meeting. He gave evidence about reviewing the quotes using the Buildsoft program and was cross-examined (and criticised in submissions) on the basis that he changed his evidence about how that task was undertaken. He did shift from describing a very detailed review to a consideration on a much broader basis and, with respect to "Preliminaries", that it was not really discussed.

[61] In evidence-in-chief he identified a bundle of quotes as being "the same quotations that we had to hand at the meeting of the 14th of May." The bundle became Ex 222. He had clearly not checked the bundle before accepting that they were the documents used on 14 May – some are marked as superseded, one is dated 14 May, and some are tender quotes. It was submitted by Toga that the unreliability of this evidence tends against a finding that every item had been considered and agreed upon by reference to a quote at the meeting.

[62] Mr Nelson kept diary notes of the various meetings he attended during and after the commencement of building. His note for the meeting of 14 May is similar in form and detail to many of his notes of other meetings and does not suggest that this was the meeting at which an agreement as pleaded was reached.

[63] In cross-examination Mr Nelson agreed that the parties were in arms length negotiation about a contract both at the 14 May meeting and after, and that things changed progressively after 14 May.

[64] The plaintiff did not ask Mr Schubert about his recollection of the meeting.

[65] The pleaded case for JMK rests heavily on the agreement said to have occurred on 14 May but the evidence called to support that allegation only demonstrated that the meeting of 14 May was important and that a considerable degree of work was done in

advancing the negotiations between the parties. It was not established that an agreement was reached of the type pleaded; rather the evidence of Mr Nelson satisfied me that the meeting only constituted part of the process leading to agreement.

[66] That finding is consistent with Mr Nelson's activities in the three days following the meeting. In that time he undertook a reasonably detailed exercise of putting together some changes which he wanted to be made which, if accepted, would become a formal part of the contractual scope. These proposals were sent by Mr Nelson to Toga on 17 May.

Negotiations continue

[67] The negotiations continued when, on the same day, Mr Klein sent an adjusted Trade Cost Allocation and Scope Clarifications to JMK. In it Mr Klein said: "Please review as we require that this document will form part of the contract which we propose we execute at our meeting on Wednesday 19 May, 2004."

[68] The contract was not executed on that date. On 21 May, Mr Klein sent an amended preliminaries specification to Mr Nelson for incorporation into the contract. Both he and Mr Murphy reviewed that document.

[69] On 1 June 2004 Mr Nelson sent a bundle of documents to JMK's solicitors, Hunt & Hunt. These documents had previously been put together by Mr Murphy. The bundle included the tender form, Annexure A, a typed formal instrument, the trade cost allocation, the scope clarifications and the draft Special Conditions.

[70] On 8 June 2004 a meeting took place at the offices of Hunt & Hunt between Mr Murphy and Mr Nelson, and Mr Bartlett, a solicitor at that firm. Mr Bartlett gave advice on the draft Special Conditions and their effect on the trade cost allocation for the purposes of the contract. Mr Bartlett gave evidence that Mr Nelson had telephoned him on 7 June and told him that JMK had been on site for a week. He also said that there had been several months of negotiations. Further, Mr Nelson said to him that JMK wanted to take a commercial approach in negotiations with Toga and that they would only seek to amend a condition in the documents provided if they were definitely advised that they should do so by Hunt & Hunt.

[71] On the next day Mr Nelson sent a fax to Mr Portelli which contained a list of proposed changes to Annexure A and the draft Special Conditions. In it Mr Nelson said that the amendments proposed were arrived at after a final review by JMK's solicitors and Mr Murphy. He also noted that JMK was still reviewing the Tripartite Deed. No other changes to the contractual documents were sought.

[72] A telephone conference took place among Mr Murphy, Mr Nelson, Mr Klein and Mr Portelli on 10 June 2004. Mr Nelson said that there were a number of discussions in regard to proposed amendments to the contract such as the Special Conditions and that both parties were attempting to resolve any amendments that they sought before the contract was signed. He also said that the primary discussion points concerned the margin which would be applied to the bottom line price and that it was agreed that it would be 6%. He said it was also agreed that site possession would be regarded as having taken place on 1 June. Further discussions concerned payment terms with respect to some subcontractors.

[73] Mr Murphy's recollection of what occurred during this telephone conference is unsatisfactory. People can be mistaken about when a telephone call might have taken place on a particular day but Mr Murphy was also mistaken about the length of time taken by the call. He said that it lasted about 20 minutes when in fact it lasted over an hour. He could not recall that Mr Nelson had asked for documents to be e-mailed to him during the course of the meeting.

[74] Mr Murphy's diary note for 10 June contains an initial brief reference to the conversation and then, rather than a continuous note appearing, there is a reference to Mr Murphy's flying home on that day and meeting someone else. The note then continues with a reference in which he sets out a concern about drawings and quantities which he said he expressed. His evidence with respect to this telephone meeting was vague and unsatisfactory. He prevaricated when being cross-examined and I do not accept his version unless it is consistent with that of someone else who took part.

[75] During the meeting, Mr Nelson asked Mr Klein to send him certain documents and he did. Those, though, were in a form which could not be altered and Mr Nelson repeated the request after the meeting. The following documents were then e-mailed to Mr Nelson: amendments to the Special Conditions of Contract, Annexure to the Australian Standard, and Form of Formal Instrument of Agreement. Mr Nelson then had further telephone discussions with Mr Klein and Mr Portelli about proposed amendments to the contract.

[76] At some time on the 10th of June Mr Murphy and Mr Nelson compiled a set of documents (Ex 179) which was proposed by JMK as the final version of the contract (apart from the tripartite deed). The cover sheet was the AS 2127 Form of Formal Instrument of Agreement on which various details were inserted (by hand) by Mr Murphy and Mr Nelson. One or other of them inserted "8th December 2003" as the date of Tender and "21st April 2004" as the date of a letter of acceptance. A line had been drawn through the section designed to contain the details of the specification, the drawing numbers and other documents, and a note was inserted: "see attached schedule" which was initialled by Mr Murphy. Mr Murphy also initialled each page of the bundle of documents.

[77] Mr Nelson then took the bundle with him to Melbourne where he left it for collection by Mr Klein.

Negotiations conclude and the contract is signed

[78] The bundle was reviewed by Mr Klein and Mr Portelli. As a result of that Mr Portelli sent JMK a fax on 15 June (Ex. 181) in which he said:

> "I refer to the documents you left for Jeffrey last Friday. However the following documents given to you have not been returned/executed, which are also key documents forming part of the building contract.
>
> 1. Tender Form
> 2. Form of Formal Instrument of Agreement
> 3. Trade Cost Allocation
> 4. Scope Clarifications
> 5. Tripartite Agreement

6. Construction Programme
7. Works-As-Executed Plan of Delta Siteworks

> It is critical that these executed documents be given to me tomorrow at our site meeting. Should this not occur it is likely that the necessary financial arrangements will not be in place in readiness for first progress claim."

[79] The documents which were referred to in the fax were the same as those which had been provided to JMK on an earlier occasion. They provided, for example, that the documents forming part of the contract included the specification by Suters inclusive of all other consultant specifications and the Tripartite Agreement. These were documents which Mr Murphy had not signed and included in the bundle which he had delivered to Toga. The documents which were eventually signed by Mr Murphy were documents which had been in his possession prior to the creation by him and Mr Nelson of the bundle which makes up Ex 179.

[80] After Mr Murphy had signed the bundle making up Ex 179 he had gone to Melbourne for a week on leave. While he was in Melbourne he received messages to the effect that there were some documents that he had not signed and which needed to be signed urgently. He returned to Rockhampton at the end of the week's leave and was given the bundle of documents which makes up Ex 181. He said that he was rather annoyed at the time because he believed that he had executed all the documents that needed to be executed but, as he had been told that the version he had supplied needed to be typed, he quickly signed them all again and had them despatched.

[81] In examination-in-chief he was taken to Ex 181 and asked whether he had read the documents listed in the second sheet. He said he could not recall but that he would not have taken any notice of it because he had initialled all the drawing registers.

[82] Mr Murphy had given evidence about the manner in which he had considered earlier sets of documents which had been sent to him. He was particularly careful with respect to a set of plans which were sent to JMK to go through the index to those plans and to tick off those plans which were included in the set and thus note which had not been included. Likewise, he gave evidence of being particularly careful with his consideration of other documents such as specifications and similar matters to which he gave consideration. On the occasion of being asked to sign the documents which make up Ex 181, though, he said that he was not concerned because he believed them to be nothing more than a typed up version of what he had signed previously. It is true that Toga was putting pressure on JMK to have the documents in Ex 181 executed. Toga was also under pressure from its financier to have the documents completed. JMK had been told that no payment could be made to them until the documents were executed, and all of this was in the light of JMK's having taken possession of the site and commenced work. Nevertheless, the fax sent by Mr Portelli did not portray the documents attached to it as being nothing more than a typed up version of the documents which made up Ex 179. It specifically identifies the documents as those which had not previously been returned or executed. Mr Murphy said, in cross-examination, that he was of the view that after he had signed on 10 June, "It was done, done deal, finished, that was it." He also said that he did not believe that Toga was asking for anything different to that which he had already signed. I do not accept that. Mr Murphy was engaging in what some might call "commercial brinksmanship" and he did not believe that the contract had been concluded on 10 June.

[83] Mr Nelson said, in cross-examination, that the documents constituting Ex 179 were put together by Mr Murphy as the documents he wanted forwarded to Mr Klein. At the time of doing that, JMK had all the documents that it was re-supplied with in the fax from Mr Portelli of 15 June. He said that in putting together Ex 179, Mr Murphy did identify some documents as documents that he would not use. These were documents which had been forwarded by Toga as constituent parts of the contract. What Mr Murphy did in only returning some of those documents and handwriting some insertions on others was to put forward a counter-offer to Toga. So much was accepted by Mr Nelson. Mr Nelson said that he and Mr Murphy had a general discussion, after receiving Mr Portelli's fax, as to how to keep moving the matter forward or whether they should continue further negotiations. He acknowledged that by Toga sending the fax of 15 June it was making it clear that Toga required those documents in that form for the contract.

[84] Mr Murphy said he could not recall discussing these issues with Mr Nelson but I accept that there was such a discussion as outlined by Mr Nelson in his evidence. He said that once JMK received the fax of 15 June that a conclusion was drawn that there was a difference of opinion between the two proposed contracts. He categorised the documents signed by Mr Murphy on 10 June as an offer and that the response by Toga was a counter-offer.

[85] Mr Nelson's view of the state of affairs after the fax of 15 June was not consistent with that of Mr Murphy. Mr Nelson had a distinct recollection that the Tripartite Agreement was "of great issue" and "particularly upsetting". I am satisfied that Mr Nelson and Mr Murphy did have discussions about what process should be undertaken following the fax of 15 June. I do not accept that Mr Murphy believed that these documents were simply retyped versions of the documents in Ex 179.

[86] Mr Murphy had decided what would be sent to Toga on or about 10 June and he was aware that what was proposed by JMK was unacceptable to Toga. Mr Nelson was not, with the lapse of time, able to recount in any great detail the discussions that he had with Mr Murphy following the fax of 15 June. Mr Nelson was of the view that after the fax of 15 June matters were still in a state of negotiations between the parties.

[87] The parties had been in continuing negotiation for months. Toga had to satisfy its financier with respect to certain requirements and JMK was, quite understandably, attempting to obtain the best deal it could. The documents sent in Ex 179 constituted a response by JMK to the set of documents provided to it earlier by Toga. The response by Toga on 15 June made clear to JMK that it was not going to accept anything other than a contract in the form it had earlier proposed.

[88] It was submitted by JMK that Mr Nelson's evidence supported the view that only the tripartite deed was sought to be further negotiated. His evidence on this point is not completely clear – principally because he was frequently interrupted when giving his answers in cross-examination. Nevertheless, his answers lead me to the conclusion that, while the tripartite deed was of significance, it was not the only part of the proposal for which JMK contemplated further negotiation after the fax of 15 June.

[89] It was also submitted that there was nothing in Mr Portelli's fax to alert a reader to the attached documents being "materially different, replacement documents." But, they weren't. They differed from those first signed by Mr Murphy but they were the documents which Toga had previously submitted to JMK.

[90] I find that after discussions between Mr Murphy and Mr Nelson, Mr Murphy decided that JMK was not going to be able to shift Toga from its position and it is for that reason that he signed the documents (except for the tripartite deed) referred to in the fax of 15 June. I do not accept that he believed them to be simply typed up versions of the earlier 10 June documents. Mr Murphy had attempted to obtain what he regarded as a better outcome for JMK, this was not acceptable to Toga and so JMK accepted what Toga had proposed.

[91] The documents which constitute the contract between the parties (Ex 181) were brought into existence as the result of a long period of negotiation between two commercially sophisticated companies each of whom had access to professional advice. This was the contract which reflected the common intention of the parties at the time of execution.

[92] As I have set out above, in order for JMK to succeed in this case it needed to demonstrate by clear and convincing proof that the parties had intended something different from that which Toga maintained was the contract. It did not do this. It did not establish that the parties had a different common intention which was able to be identified and made the subject of an agreement. In particular, it did not establish that there had been an agreement reached on 14 May 2004 That day constituted one part of the lengthy and detailed negotiations which took place over a period of some months.

[93] It is argued in the alternative for JMK that, if there was no common intention as pleaded by it, then there was a mistake by it which would, in the circumstances, justify rectification. This is reflected in the refrain in JMK's written submissions that Toga had engaged in sharp practice. But,in order for sharp practice to be demonstrated JMK needed to show, at least, that Toga was aware that JMK was mistaken about the contents of the contract. That simply could not be established in the light of the lengthy negotiation and the final exchange of documents. The fundamental weakness in JMK's pleaded case is that most of the terms it says should be inserted into the contract arise out of inferences or a combination of inferences and other facts. This applies to both its allegations of common intention and unilateral mistake. Those inferences could not be drawn in the light of all the evidence and certainly could not be shown to be the only inferences which could have arisen.

[94] For those reasons, I dismiss the claim.

The JMK arguments

[95] Although I have found that the documents signed by Mr Murphy after 15 June do constitute the agreement between the parties I will deal briefly with the arguments advanced by JMK under specific headings.

[96] The respects in which JMK says that the contract documents do not record the true agreement are:

(a) the drawings to be used to identify the works;
(b) the subcontractor quotations to be used to identify the works;
(c) the use to be made of the Revised Area Drawings and the Coloured Marked-Up Wall Plans in identifying the works;
(d) the exclusion of courtyards at grade from the works to be done for the agreed price;

(e) the treatment of the gross maximum price trade packages; and
(f) the treatment of reinforcement, scaffolding and waterproofing.

[97] In the alternative, JMK argues that it is open to find that:

(a) the parties were never *ad idem* about the terms of the contract;
(b) there was never any final agreement leading to a contract; and
(c) JMK, having done the work which was requested by the Defendant, it is entitled to be paid a reasonable price for its work upon a *quantum meruit.*

[98] The major difficulty with the plaintiff's case under these headings is that, in many respects, the conclusions it asks the court to draw can only be reached by a tortuous series of inferences.

[99] With respect to the drawings, the basis of JMK's case relies upon communications between Suters and Toga which deal with document issue. I accept Mr Klein's explanation for what occurred at the relevant time. It was consistent with the history which developed and, in particular, the inability of Suters to keep up to date with drawings.

[100] There was considerable cross-examination about the issue of drawings on 7 and 10 May but much of it was, in my view, based upon an imperfect understanding of the manner in which drawings were issued, the reason for issuing them, to whom they were issued and whether or not other drawings retained some or any relevance. Mr Klein said that his intention was that, by the date the contract was signed, there would be a complete set of contract drawings containing the whole scope of the works. It was frequently put to him that he accepted that only the drawings issued on 7 and 10 May were meant to form part of the contract, but he rejected that on each occasion and explained, to my satisfaction, why he was willing to proceed on the basis of the documents finally signed by Mr Murphy.

[101] It was put to Mr Klein that, so far as Toga was concerned, "the scope of the work that was ultimately to be done, pursuant to a contract entered into, was to be defined, not only by the drawings and the parts of the specification that remained relevant, but also by reference to the quotes …from subcontractors, that had been obtained in the course of the process, … as part of [JMK's] intention to enter into a contract based on Toga's tendering." He rejected that and his evidence on that point was supported by Mr Portelli and, to a limited extent, Mr Nelson, when they described the process of obtaining quotations. The negotiation with sub-contractors was part of the value management process and both JMK and Toga played a part.

[102] In its written submissions, JMK contended that the following finding should be made:

"The true bargain between the parties included:

(a) the works identified in the Humes quotation dated 12 May 2004;
(b) the works identified in the Aus Iron Industries quotation dated 12 March 2004;
(c) the works identified in the Ausco quotations dated 2 and 3 March 2004, adjusted for an additional 89 doors as set out in the 13 May 2004 calculation document;

(d) the works identified in the Procast quotation dated 2 April 2004;
(e) the works identified in the quotation from Imagecom Group dated 5 April 2004;
(f) the works identified in the Bradnams quotation dated 29 April 2004;
(g) the works identified in the Regency Screens quotation dated 4 December 2003;
(h) the works identified in the annotated bill of quantities attached to the quotation from FTF Pty Ltd dated 28 April 2004; and
(i) joinery work not yet designed, but certainly different to what was in the specification."

[103] It was further submitted that the Scope Clarifications document should be rectified by making express reference to those quotations and that joinery should be made a provisional sum.

[104] All of those findings only arise through a series of inferences which the plaintiff says are not only open but also, on its case, must say are the only inferences which can be drawn. Mr Nelson agreed that no one ever said anything to the effect: "The quotes are the basis of what we will agree." He said that the only inference was to be drawn from the financial references through the Buildsoft program. Mr Portelli agreed that there was no suggestion in the meeting of 10 May that the Buildsoft database or quotes obtained during the value management process would define the scope of works.

[105] The value management process of obtaining quotes and using the prices obtained to arrive at a lower overall cost for the construction was not intended by the parties to lead to an informal and disjointed specification for building. It was not intended that they would have the contractual significance advanced by the plaintiff. If they were so intended, then one would expect to have more than the unspoken "agreement" relied upon by JMK.

[106] The revised area drawings and the coloured marked-up wall plans were, says JMK, intended by the parties to be contractual documents. But there was no evidence which would require a finding that the revised area drawings differ from a measurement of the building based on the drawings which form part of the executed contract. Mr Murphy didn't say that such documents were to be included in the contractual documents and, if they were meant to be a part of the contract, then it would have been immediately apparent (and not raised for the first time in this action) when JMK let subcontracts, including subcontracts to entities which had not previously been involved, in to the quotation process. As was submitted by Toga, the fact that they were used in some way by JMK does not make them a contractual document.

[107] JMK seeks to have "courtyards at grade" excluded from the Scope Clarifications. Originally, this was on the basis that the external residential courtyards were not regarded by JMK as being within the scope of the contract and had not been priced. Mr Murphy was particularly certain of this in examination-in-chief. Following cross-examination, Mr Murphy undertook an exercise (which should have been done before he gave evidence) in which he revisited various plans and documents with the intention of showing that all that had been priced were retaining walls which were incidentally associated with the courtyards. What is curious about this whole exercise is that the people most closely associated with this area – Mr Nelson and Mr Schubert – did not give evidence which supported Mr Murphy's unqualified contentions.

[108] The difficulty in JMK's position on this point is that in the Scope Clarifications document provided to Mr Nelson and Mr Schubert on 14 May – which was included by Mr Murphy in JMK's proposed contract (Exhibit 179) and which is pleaded by JMK as forming part of the contract – there are a number of references to courtyard work: excavation, slab on ground, miscellaneous concrete works, masonry, and rendering. Had there been any uncertainty in the minds of those associated with JMK as to whether courtyards were to be built then it should have been dispelled by that document.

[109] The complaint by JMK about the gross maximum price trade packages is not that the contract does not reflect the true agreement of the parties but that the provisions relating to them are uncertain. It was submitted by JMK that:

> "the Court should find that the true agreement between the parties in respect of the gross maximum price trades was that they be provisional costs. The Scope Clarifications and the Trade Cost Allocation should be rectified to that effect. In the alternative, the Court should rectify the Scope Clarifications to identify an obligation on the Defendant to provide a design that could be reasonably delivered for the gross maximum price."

[110] There was no evidence that that was the intention of the parties. There was no evidence that the alleged uncertainty had caused any problem or that JMK had suffered as a result of Toga designing something which could not reasonably have been constructed for the gross maximum price. This was nothing more than an invitation to the Court to rewrite part of the contract. The invitation is declined.

[111] The plaintiff also seeks this relief:

> "The Court should find that the true agreement between the parties was that:
> Reinforcement and scaffolding were provisional sums. Waterproofing was to be by way of membrane, and not by Xypex additive. The Court should rectify the Scope Clarifications to reflect that true agreement."

[112] Mr Murphy gave evidence that he executed the contract partly in reliance on assurances given by Mr Portelli on 10 June 2004 that if there was any change to the quantities that had been allowed for reinforcement and scaffolding by JMK, then JMK would be paid a variation. This was denied by Mr Portelli and Mr Klein. Mr Murphy's recollection of that meeting was generally unreliable and I do not accept that those assurances were given.

[113] There were two major components with which waterproofing was associated: slab on ground (Item 3 in the Scope Clarifications) and for bathrooms, podium levels, courtyard retaining walls and so on (Item 25 in the Scope Clarifications).

[114] Neither of the entries in the Scope Clarifications refers to a membrane although Item 3(7) reads: "Sealant to slabs included". The Specification calls for the use of a waterproofing admixture (such as Xypex) to identified areas including the reinforced concrete basement slabs, concrete pool and terrace decks, roof slabs and so on. Waterproofing for the slab on ground was essential and there was evidence that an

alternative to a concrete additive was a membrane of some sort. This was not the subject of detailed evidence.

[115] In a fax of 17 May 2004 JMK told Toga that the best price JMK could give for the slab on ground works was $627,000. It was noted that JMK had made "no allowance for any Xypex additive to the concrete slabs".

[116] In a responsive fax of the same date, Toga sent JMK an adjusted Trade Cost Allocation in which the Slab on Ground cost was noted as having a fixed price of $627,000. I draw from those faxes and the fact that a membrane was an alternative solution, that the parties had agreed that, rather than a concrete additive, a membrane would be used.

[117] Toga made no submission with respect to this particular matter.

[118] It is not necessary for any order for rectification to be made when the contract, properly construed, reflects the agreement of the parties. On this point, the reference in the Scope Clarifications to "sealant" does not mean a concrete additive but a membrane of some type. The provisions of the Scope Clarifications have precedence over the specification pursuant to clause 2A.03 of the Amended Preliminaries of the Contract. Thus, the requirement for concrete additive is "overridden" by the Scope Clarifications document.

Uncertainty

[119] JMK makes a claim in the alternative that the contract documents did not constitute a contract because they were incomplete, and further or alternatively uncertain, as to the works that JMK was required to undertake for the agreed price. It particularised this claim as follows:

> "(a) The Contract Documents were incomplete in that they failed to articulate, by formula or otherwise, how the Tender Specification, or alternatively how the Tender Specification as amended by the Amended Preliminaries Specification, is to be reconciled with the Trade Cost Allocation, the Scope Clarifications, the Contract Set of Drawings and the JMK Tender Clarifications so as to identify the works to be undertaken for the Agreed Price.
>
> (b) The Contract Documents were uncertain in that they failed to articulate, by formula or otherwise, how the Tender Specification, or alternatively how the Tender Specification as amended by the Amended Preliminaries Specification, is to be reconciled with the Trade Cost Allocation, the Scope Clarifications, the Contract Set of Drawings and the JMK Tender Clarifications so as to identify the works to be undertaken for the Agreed Price."

[120] The particulars contain terms such as "Contract Documents" and "Contract Set of Drawings". These are terms defined in JMK's pleading but they are not consistent with the findings I have made on the rectification claim, for example, the "Contract Set of Drawings" only refers to the drawings issued on 7 May.

[121] In its written submissions, JMK argued:

(a) Mr Klein's evidence was that most of the tender drawings were obsolete. He sought to explain: "There's a lot of obsolete things that are included, but there is a clear mechanism for which of those take precedence, and that's all set – that's why there's a precedence."

(b) But each of the specification, the tender drawings, the "*contract set*" of drawings and the intermediate drawings are given the same level of precedence by the contract.

(c) How then is the Court, the Superintendent, or the parties to know which drawings and which parts of the specification were obsolete, and which were not?

[122] The contract provides, in clause 2A.03, for an order of precedence of contractual documents:

> "2A.03 CONTRACT DOCUMENTS
>
> General
>
> Precedence: - The requirements of Special Conditions of Contract and the Conditions of Contract override conflicting requirements in this section. The order of precedence is to be:
>
> - special conditions,
> - scope clarifications and trade cost allocation,
> - the conditions of contract,
> - the specifications and drawings for the works,
> - any other documents.
>
> Inclusion: - Anything contained or shown in the drawings but not in the specification and vice versa shall be deemed to be included in the works.
>
> Ambiguity or discrepancy: - In the case of any ambiguity or discrepancy between drawings and/or the specification, the work shall be carried out as directed by the superintendent in his discretion to a quality consistent with the nature of the work to the satisfaction of the superintendent at no additional cost to the principal and without extension of time for practical completion.
>
> Levels: - Spot levels take precedence over contour lines and ground profile lines.
>
> Diagrammatic layouts: - Layouts of service lines, plant, and equipment shown on the drawings are diagrammatic only, except where figured dimensions are provided or calculable. Before commencing work, obtain measurements and other necessary information."

[123] The interpretation clause of contract (AS 2124) relevantly provides:

> "'Drawings' means the drawings referred to in the Contract and any modification of such drawings notified to the Contractor by the Superintendent and me under such other drawings as may from time to time be supplied to the Contractor by the Superintendent, or the use of which has been permitted by the Superintendent, for the purposes of the contract;
>
> …

> ‘Specification’ means the specification referred to in the Contract and any modification of such specification thereafter directed or the use of which has been permitted by the Superintendent pursuant to powers contained m the Contract; …”

[124] Further assistance in the resolution of any concerns is found in clause 8.1 of the contract:

> “8 CONTRACT DOCUMENTS
> 8.1 Discrepancies.
> The several documents forming the Contract are to be taken as mutually explanatory of one another. If either party discovers any ambiguity or discrepancy in any document prepared for the purpose of executing the work under the Contract, that party shall notify the Superintendent in writing of the ambiguity or discrepancy. 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.
> If the direction causes the Contractor to incur more or less cost than the Contractor could reasonably have anticipated at the time of tendering, the difference shall be valued under Clause 40.5.”

[125] Those provisions are sufficient to answer the question posed by the plaintiff – they set out clearly how specifications and drawings are to be treated. There is no uncertainty apparent on the face of the documents and the question of whether a particular document is obsolete will, in the ordinary case, be answered by reference to the issue number or date. If there is an ambiguity or discrepancy then Clause 8 of the contract provides a mechanism for resolution.

Counterclaim

[126] Toga has counterclaimed against both JMK and Mr Murphy. No submissions were made by either of them. Toga submitted that I should receive further submissions on this issue after delivering my decision on the rectification claim. I will hear the parties on what directions should be made.

Order

[127] The claim is dismissed.

[128] I will hear the parties on costs.