IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
TECHNOLOGY, ENGINEERING AND CONSTRUCTION LIST

Not Restricted

No. 9759 of 2007

500 BURWOOD HIGHWAY PTY LTD
(ACN 084 871 554) Plaintiff

v

AUSTRALIAN UNITY LIMITED
(ACN 087 648 888)
and
AUSTRALIAN UNITY NOMINEES PTY LTD
(ACN 006 803 041) Defendants

JUDGE:	VICKERY J
WHERE HELD:	Melbourne
DATE OF HEARING:	24–27 September, 1–4, 8, 10 October and 8 November 2012
DATE OF JUDGMENT:	7 December 2012
CASE MAY BE CITED AS:	500 Burwood Highway v Australian Unity & Ors
MEDIUM NEUTRAL CITATION:	[2012] VSC 596

CONTRACT – Quantity Surveyor appointed under the contract to determine the cost of construction to complete works – Whether appointment of quantity surveyor satisfied requirement of "independence" under the contract – Independence of the appointed quantity surveyor - Allegation of bias or partiality in respect of an expert determination – Whether quantity surveyor's report invalidated for bias or lack of impartiality – Actual bias made out - Whether quantity surveyor's report complied with the contract – Failure of contractual mechanism - Principle in *Campbell v Bent* (1879) 5 VLR (L) 337 applied.

PRACTICE AND PROCEDURE – Delivery of final addresses in part by draft judgment – Advantages of the procedure – Promotion of overarching purpose under s 7(1) *Civil Procedure Act 2010*.

SALE OF LAND – Contract for sale of land – Health care building and aged care building under Building Code of Australia – Construction of aged care facility work on property sold not complete – Quantity surveyor appointed under the contract to determine the cost of construction to complete works – Whether appointment of quantity surveyor satisfied requirement of "independence" under the contract – Independence of the appointed quantity surveyor - Allegation of bias or partiality in respect of an expert determination – Whether quantity surveyor's report invalidated for bias or lack of impartiality – Actual bias made out - Whether quantity surveyor's report complied with the contract – Failure of contractual mechanism - Principle in *Campbell v Bent* (1879) 5 VLR (L) 337 applied.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr S. Anderson SC with Ms C. Pierce	Madgwicks
For the Defendant	Mr J. Delany SC with Ms S. Burchell	Russell Kennedy

HIS HONOUR:

Introduction

1 This proceeding arises from a contractual mechanism to facilitate an adjustment to the purchase price of a contact for the sale of land. The mechanism was put in place by the parties and was necessary to accommodate the cost of the construction of an uncompleted development on the land, namely an aged care facility.

2 The plaintiff, 500 Burwood Highway Pty Ltd ("500 Burwood"), was the owner of a property located at 502-514 Burwood Highway, Vermont South (the "Property") and the developer of a residential aged care facility with some 110 beds (the "Facility"), and eight independent living units ("Living Units"),which together comprised the development (the "Development"), on the Property.

3 The first defendant, Australian Unity Limited ("AU") was the purchaser under the contract of sale dated 16 May 2007 (the "Contract of Sale" or the "Contract") and on 3 August 2007, nominated the second defendant, Australian Unity Nominees ("AU Nominees") as a nominee purchaser under the contract.[1]

4 The purchase price of the Contract, entered into between 500 Burwood as the vendor and AU as the purchaser, was $35 million. The Development was under construction and partially completed when the parties entered into the Contract.

5 In essence, the Contract of Sale provided for the purchaser to appoint an "independent" quantity surveyor to assess the cost of the works required to complete the development. The cost so determined was to be deducted from the agreed purchase price at settlement.

6 Issues have arisen in relation to the quantity surveyor appointed under the contract namely:

(a) whether the quantity surveyor was "independent" (as that term was used in the contract);

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1 In these reasons AU and AU Nominees are together or individually referred to compendiously as "AU" for convenience and adopt a precise meaning from the context in each case.

(b) whether the quantity surveyor was actually biased; and

(c) whether the quantity surveyor undertook the task required of him under the contract.

The Development

7 On 8 July 2003, the City of Whitehorse issued a planning permit to 500 Burwood in respect of the Development.

8 500 Burwood entered into a building contract with Redland Building Co. Pty Ltd ("Redland") for the construction of the Facility and the Living Units.

9 The architect for the Development was Mark Allison of Axiom Architects Pty Ltd ("Axiom").

10 The relevant building surveyor for the Development was Mr Hank Van Ravenstein.

11 The lessee of the Development was proposed to be Whitecross Community Care Group Pty Ltd ("Whitecross").

12 The Facility comprised a Victorian-style mansion (also known as "Condominium 1"), which was to accommodate 110 beds, a dining hall and other amenities. This has three storeys and a fourth level, comprised of roof and storage space requiring only periodic maintenance access.

13 The Development also included, as part of Stage 1, the eight Living Units, which were separate from the Facility comprising Condominium 1.

14 500 Burwood originally conceived of the Development as a Class 9A building for the purposes of the Building Code of Australia (the "BCA"), and the building permits for the first three stages of the Development were issued on this basis. Following discussions with Whitecross Community Care Group Pty Ltd, the proposed tenant of the Facility pursuant to a lease with 500 Burwood, the BCA classification of the Facility was changed from 9A to 9C. The difference between those classifications is explained below.

15 The Development was constructed pursuant to a design and construct contract ("D&C contract"), whereby the builder was responsible for producing both the design documentation and undertaking the construction.

16 It was a staged development whereby design documents would be prepared and construction would take place in stages, with building permits being issued for each stage. The result was that when Stage 1 was complete for example, the only documents that would have been produced and available for inspection would be the documents relevant to the Stage 1 building permit, and so on through the various stages until completion. The last stage of the design and construction process involved the issue of the Stage 6V1 building permit, so that a certificate of occupancy could issue.

17 The building permits issued for the various stages of design and construction were issued by Mr Van Ravenstein, the appointed building surveyor.

Essential differences between class 9A and a class 9C buildings under the BCA

18 The BCA classifies buildings and structures according to the purpose for which they are designed, constructed or adapted to be used.[2] The BCA is divided into nine sections (B to J) which relate to particular design features including, fire resistance, access and egress, and energy efficiency. Each section contains specifications detailing how the particular design features must be adapted to comply with classifications within the BCA.

19 Buildings of a public nature are categorised as "Class 9 buildings". A Class 9A building is defined as a "health care building", including those parts of the building set aside as a laboratory. The term health care building is defined as a building "whose occupants or patients undergoing treatment generally require physical assistance to evacuate the building during an emergency and includes a public or private hospital."

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2 *Building Code of Australia* Part A3, paragraph A3.1.

20 A Class 9C building is defined as an "aged care building". The term "aged care building" is defined as a building "for residential accommodation of aged persons who, due to varying degrees of incapacity associated with the ageing process, are provided with *personal care services* and 24 hour staff assistance to evacuate the building during an emergency".

21 In these reasons, the class 9C requirements are referred to as "the 9C classification". The 9C classification was designed to give effect to government policy which made particular provision in the BCA for those buildings that were being used for aged accommodation.

22 The independent consultant appointed under the Contract for BCA 9C compliance was the CH Group, represented by Mr Peter Chenoweth and Mr Paul Bailey.

23 On 1 June 2007, Mr Chenoweth received instructions from Mr Darren Morgan, AU's development manager, to undertake the 9C compliance report. Mr Morgan remained Mr Chenoweth's direct contact with AU. Mr Philip David of AU also maintained contact with Mr Chenoweth in this regard. Mr Bailey of the CH Group had similar contact with Mr Morgan and Mr David of AU.

24 In November 2007, Mr Chenoweth also had contact with AU's solicitor, Ms Wai-Hwoon Low of Russell Kennedy.

25 When the CH Group was engaged by AU on 1 June 2007, it was Mr Chenoweth's understanding was that he was to prepare a 9C compliance report. He did not understand that he had been appointed as the independent consultant under the Contract between AU and 500 Burwood.

The Contract

26 The genesis of the Contract of Sale was a communication on 21 March 2007, where AU sent to 500 Burwood a formal expression of interest in the acquisition of Stage 1 of the Development. (This followed earlier correspondence between the parties in December 2006.) Mr Joel Freeman of 500 Burwood replied by letter the following day;

and on 20 April 2007, James Briant of 500 Burwood replied by letter with further details of the components of Stage 1 of the Development.

27 Mr Briant acted as a liaison between 500 Burwood and AU for the purposes of AU's due diligence exercise. In April 2007, AU requested, and 500 Burwood supplied, information relevant to the due diligence, including a disk containing architectural drawings and other specifications.

28 In early May 2007, drafts of the Contract were exchanged.

29 On 3 May 2007, Ms Low of Russell Kennedy amended the special conditions of the Contract to include, inter alia, mechanics for the settlement of the Contract in a form similar to those which were ultimately contained in Special Condition 14 of the Contract.

30 On 7 May 2007, representatives of AU and 500 Burwood attended at meeting at the offices of Mills Oakley during which the settlement mechanics were discussed.

31 On 16 May 2007, executed counterparts of the Contract were exchanged.

32 In relation to the negotiation and settlement of the Contract, Mills Oakley ("Mills Oakley") acted as solicitors for 500 Burwood, and Russell Kennedy Pty Ltd ("Russell Kennedy") acted for AU and AU Nominees.

33 Given that the Development was incomplete at the time of the sale, the parties agreed to an adjustment to the purchase price to accommodate the works which remained to be done. The task of assessing the cost to complete and the consequent adjustment of the purchase price was assigned by the parties to an independent quantity surveyor. The quantity surveyor was to be appointed by the purchaser, AU, who agreed to be bound by the assessment produced.

34 The mechanism which provided for the adjustment was incorporated in two special conditions in the Contract of Sale: Clause 14.1 and Clause 14.5. They were in the following terms:

14.1 Date of Payment of Balance

The Purchaser shall pay to the Vendor or the Vendor's Solicitors the Balance of the Price on either:

(A) the latest of the following dates:

(a) 1 July 2007; and

(b) 14 days after the Vendor has provided the Purchaser with copies of the Occupancy Permits in respect of the Residential Ages Care Facility and the Independent Living Units and

(c) 14 days after the Vendor has provided the Purchaser with the following certificates which are to be issues by the Vendor's Licensed Building Surveyor:

(A) certificates of practical completion in respect of all contracts associated with the construction and design of the Residential Aged Care Facility and the Independent Living Units; and

(B) confirmation that in respect of the Residential Aged Care Facility and the Independent Living Units, the relevant provisions of the Building Code of Australia have been complied with;

(d) 14 days after the Vendor has provided the Purchaser with a certificate of final inspection issued by the Vendor's Licensed Building Surveyor for the Stage 1 infrastructure; and

(e) 14 days after the Vendor has provided the Purchaser with a certificate by the Independent Consultant that the Residential Aged Care Facility is a building which complies with the Class 9C classification requirements of the Building Code of Australia; and

(f) 14 days after the building notices referred to in the vendor's statement have been withdrawn by the party or authority who issued the notices.

or

(B) in the event that Special Condition 14.5 applies, 15 November 2007.

14.5 Completion Works

(a) If the permits and certificates described in Special Condition 14.1 ("Certificates") have not been issued and provided by the Vendor to the purchaser by 1 November 2007, then:

(i) the Purchaser may not refuse or delay settlement on this basis, but shall be entitled to appoint, at the reasonable cost and expense of the Vendor, an independent quantity surveyor ("Quantity Surveyor") to assess the cost of carrying out the

works necessary to cause the Certificates to be issues and provided to the Purchaser ("Completion Cost"); and

(ii) the Purchaser may provide the Vendor with a copy of the Quantity Surveyor's assessment of the Completion Cost; and

(iii) The Purchaser may be entitled to settle this Contract by paying the Vendor the balance of the Price less:

(A) the Completion Cost; and

(B) all costs and expenses of the Purchaser specifically incurred in connection with this Special Condition including costs payable to consultants and advisers, as reasonably certified by the Purchaser.

(b) If Special Condition 14.5(a) applies, the Price is deemed reduced by the amount of the Completion Cost.

35 The Independent Consultant, referred to in Clause 14.1, was defined in the Contract at Clause 1.1 as follows:

1.1 Definitions

Independent Consultant means CH Group Pty Ltd ACN 080 730 169 or any alternate or substitute building inspector or consultant agreed to by the Vendor and the Purchaser in writing for the purposes of Special Condition 14.1.

36 As there was no alternate or substitute building inspector or consultant agreed upon, CH Group Pty Ltd ("CH Group") remained the Independent Consultant at all relevant times.

37 Special condition 14.1 of the Contract defined the certificates and permits which were required to be provided by 500 Burwood to AU Nominees at settlement of the Contract.

38 The term "Certificates" was defined in the Contract and referred specifically to the certificates and permits identified in sub-paragraphs (b) to (e) of Special Condition 14.1. No additional certificate or permit was required or was required to be provided for the purposes of settlement of the Contract pursuant to Special Condition 14. The "Certificates" which were required defined and delineated the role of the independent quantity surveyor appointed under the Contract: it was the cost of carrying out the

works necessary to cause the Certificates to be issued and provided to AU Nominees which was to be assessed by the appointed person.

39 The certificates and permits which were included in the definition of "Certificates" in special condition 14.1 of the Contract were as follows:

(a) Occupancy permit (14.1(b)): this permit may be issued when all relevant works have been completed and the building is suitable for occupation. In relation to the Development, Mr Van Ravenstein, in his capacity as the Licensed Building Surveyor, was authorised to issue this permit.

(b) Certificate of practical completion (14.1(c)(A)): practical completion commonly refers to work which is complete subject to the rectification of any defective work required by the builder.

(c) Confirmation that the Facility and Living Units comply with the relevant provisions of the BCA (14.1(c)(B)): the Licensed Building Surveyor, Mr Van Ravenstein, was responsible for providing this confirmation under the Contract.

(d) Certificate of final inspection (14.1(d)): this certificate is issued after the issue of a certificate of practical completion, after the expiration of the defects liability period (specified in special condition 18.4 of the Contract).

(e) Certificate of 9C classification compliance (14.1(e)): refers CH Group, as the named "Independent Consultant" (or any alternate or substitute building inspector or consultant agreed to by the Vendor and the Purchaser in writing for the purposes of Special Condition 14.1) certifying that the Facility met the 9C classification.

40 None of the certificates described in Special Condition 14.1 were issued and provided by the vendor 500 Burwood to the Purchaser AU by 1 November 2007. As a result, two things happened under the Contract:

(a) the mechanism of the adjustment of the sale price contemplated by Special Condition 14.5 commenced operation; and

(b) Pursuant to Clause 14.1, by reason that Special Condition 14.5 applied, the settlement date was to be 15 November 2007.

Appointment of the Quantity Surveyor and Assessment

41 AU appointed Mr Timothy Hogg ("Mr Hogg") of Donald Cant Watts Corke Pty Ltd ("DCWC") as the quantity surveyor (the "quantity surveyor") to undertake the assessment required by Special Condition 14.5 of the Contract of Sale.

42 Mr Hogg has been a quantity surveyor for approximately 24 years and is a fellow of the Institute of quantity surveyors. He commenced working with DCWC in July 1999 as an executive director and continued in that capacity until 10 September 2010. In October 2010, Mr Hogg was appointed Project Director of Grocon. Since July 2011 he has been a director of a property and construction advisory company specialising in quantity surveying and project management called North Projects Pty Ltd. He employs 11 quantity surveyors. I am satisfied that Mr Hogg was a competent and experienced quantity surveyor.

43 Mr Hogg delivered his report on the cost to complete the Development on 14 November 2012 (the "DCWC Assessment Report"). Mr Hogg assessed the completion costs of the works at $2,862,704.

Settlement Deferred

44 The settlement conference was arranged for 15 November 2007 at the offices of Mills Oakley, solicitors for the vendor, 500 Burwood. Mr Joel Freeman, a director of 500 Burwood, attended the settlement and was presented with a copy of the DCWC Report. Russell Kennedy, solicitors for the purchaser, also attended and sought to effect settlement by payment of the purchase price which had been reduced by $2,862,704 on the basis of Mr Hogg's DCWC Assessment Report. The amount of $28,637,296 (exclusive of GST) was tendered as the balance of the purchase price.

45 Mr Freeman was of the view that the cost to complete the Development as reflected in the DCWC Assessment Report was excessive. He was in possession of a report of another quantity surveyor from Napier & Blakeley (the "Napier & Blakeley Report") dated 9 November 2007. The Napier & Blakeley Report had been prepared for the financier, Suncorp Metway, for the purposes of a finance draw down. This disclosed a net cost to complete the works estimated to be $522,917 (exclusive of GST). Mr Freeman was also concerned as to the independence of Mr Hogg in acting as the appointed quantity surveyor.

46 Accordingly, settlement of the sale did not take place on 15 November 2007.

47 In further negotiations the parties agreed that the settlement date for the sale of the Property would be 3 December 2007, on the basis that the AU would pay to the 500 Burwood the sum of $28,654,148.47 (GST exclusive). This sum was arrived at after deduction of the sum of $2,862,704, representing the DCWC assessment of completion cost and on the basis that 500 Burwood reserved their rights at and after settlement to pursue recovery of the amount retained in respect of alleged completion cost pursuant to Special Condition 14.5(a) of the Contract.

48 The offer to settle on 3 December 2007 was referred to in a letter dated 26 November 2007 from 500 Burwood's then solicitors, Mills Oakley, to the AU's solicitors, Russell Kennedy. This letter relevantly stated:

> Settlement is to be held today at 3.00pm at Esperon, Level 20, 585 Bourke Street, Melbourne.
>
> At and following settlement our client reserves its rights in all respects in relation to:
>
> (a) the appointment by your client of Donald Cant Watts Corke Pty Ltd ('DCWC') as the Quantity Surveyor under special condition 14.5(a)(i) of the Contract of Sale;
>
> (b) the assessment by DCWC of the cost of carrying out the works necessary to cause the Certificates to be issued and provided to the Purchaser purportedly made in accordance with special condition 14.5(a)(i) of the Contract of Sale;

(c) the amount deducted from the Balance of the Contract Price by the Purchaser at settlement purportedly in accordance with special condition 14.5(a)(ii) of the Contract of Sale;

(d) all loss and damage suffered by the Vendor as a result of the shortfall in the Contract Price referred to in paragraph (d) above;

(e) any shortfall in GST payable in respect of the supply to the Purchaser under the Contract of Sale (including any penalties and interest payable);

(f) penalty interest under the Contract of Sale; and

(g) all its rights under the Contract of Sale and at law generally.

49 AU's acceptance of the settlement terms is set out in a letter from Russell Kennedy to Mills Oakley dated 30 November 2007, which relevantly stated:

> Our client agrees to settle the contract dated 16 May 2007 ("Contract") on the terms of the Contract and in accordance with the attached statement of adjustments. Our client further acknowledges that your client intends to reserve its rights in relation to the matters listed in paragraphs (a) and (c) of your letter. (We note that there is no paragraph (b) in your letter).

50 Settlement of the Contract was effected on this basis on 3 December 2007.

51 However, at the settlement, AU not only deducted from the purchase price the sum of $2,862,704 (GST exclusive), but the further sum of $75,000 in lieu of a Bank Guarantee to secure performance of the vendor's obligations pursuant to the defects liability provisions of the Contract as set out in Clause 18. As settlement took place on 3 December 2007, the 6 month defects liability period was to expire on 3 June 2008. 500 Burwood, says that at no time prior to the expiration of the defects liability period did it receive any notice from AU in accordance with Clause 18.3 asserting the existence of defects or other faults which it was required to rectify during the defects liability period. AU however says that it was entitled to deduct the sum of $75,000 and says further that a sum of $91,666.66 was owing by 500 Burwood in respect of a lease security.

Principal Issues for Determination

52 Whether the assessment of Mr Hogg and DCWC as to completion cost as reflected in the DCWC Assessment Report should be set aside as not binding on the parties raises several principal issues for determination namely:

(a) whether Mr Hogg and DCWC were relevantly "independent" as the quantity surveyor appointed by AU within the meaning of Special Condition 14.5 of the Contract;

(b) whether Mr Hogg was actually biased; and

(c) whether the DCWC Assessment Report complied with the requirements of the assessment exercise contemplated by Special Condition 14.5 of the Contract.

The Counterclaim

53 On the first day of trial counsel for AU advised that in August 2012, AU informed 500 Burwood that they would not be pressing the misleading and deceptive conduct claim at trial following enquiries into 500 Burwood's financial position. Accordingly, the only paragraphs of the counterclaim agitated at trial involved the security deposit provided by Whitecross.

54 By letters dated 13 June 2008 and 19 June 2008 from 500 Burwood's solicitors to AU's solicitors, 500 Burwood demanded the release of the sum of $75,000 retained in lieu of the Bank Guarantee which related to the defects liability period. AU failed to release the sum of $75,000 retained in lieu of the Bank Guarantee, and continues to refuse to release the sum.

55 This, together with a claim from AU that 500 Burwood failed to provide a lease security in the sum of $91,666.66, forms the substance of the counterclaim.

Final Addresses by Draft Judgment

56 During the course of the hearing, topics for final address were progressively settled by the Court in conjunction with the parties. Final addresses were directed to be delivered in two parts, namely:

(a) a written draft judgment, in which each party was called upon to submit its best case on the findings of fact and law in relation to the outstanding issues; and

(b) an optional component, which was to include any further submissions by way of a supplement to each party's draft judgment.

57 Commendably, the parties collaborated in this exercise and produced a single document where uncontested matters of fact and law were set out, and the submissions of each party in relation to the matters in contention were also clearly identified. The document has been of considerable assistance to the Court in the formulation and timely delivery of these reasons in what is a factually dense and intricate case.

58 I have found that provision of a draft judgment in aid of the delivery of final addresses is particularly useful in cases which present a multitude of issues to be determined, or which are factually and technically complex. In the written draft judgment the parties are required to address, in seriatim, the topics previously identified in the settled list of issues. This ensures that the parties meet each other directly in the submissions advanced and deal with the issues which remain live at the conclusion of the trial. The procedure, in my view, also imposes a discipline on the parties to put forward their best cases on each issue in a written form which in turn focuses on the real issues in dispute, appropriately drawn with due care, thought and precision, rather than blurring the final submission with rhetorical commentary which is of little assistance in the ultimate determination of the case. The procedure also serves to engage the Court in a manner which ensures that all of the key issues are addressed in its final judgment, thereby reducing the prospect of appealable error on such matters. The procedure, as it has in this matter, may contribute to the

preparation and delivery of the Court's judgment in a timely manner, thereby utilising the resources of the Court to good effect, mindful of the demands upon it imposed by other litigants. The procedure does not compromise procedural fairness. The parties were not inhibited from addressing in the Court in the traditional way through the delivery of supplementary submissions, whether orally or in writing. The procedure goes some way to advancing the overarching purpose reflected in s 7(1) of the *Civil Procedure Act 2010* (Vic).

Summary of Plaintiff's Contentions

59 500 Burwood's arguments on the issues in contention are summarised below.

Independence of the Quantity Surveyor

60 On the question of the "Independence" of the quantity surveyor appointed under the Contract, 500 Burwood advanced the following principal contentions.

61 Special Condition 14.5 of the Contract requires the completion cost, as that term is defined in the clause, be assessed by an "independent" quantity surveyor. AU appointed DCWC pursuant to Special Condition 14.5 of the Contract. However, it was submitted that DCWC was not capable of appointment under Special Condition 14.5 as an "independent" quantity surveyor because of its prior involvement in the Development on behalf of both 500 Burwood and AU.

62 It was submitted by 500 Burwood, in order to give effect to the intentions of the parties, the express inclusion of the word "independent" in Special Condition 14.5 of the Contract qualifies the role of the "Quantity Surveyor" and cannot be ignored. Having regard to the parties' deliberate inclusion of the criterion of independence, and considering the importance of the quantity surveyor's task,, in order to be meaningful in the context of the present Contract, the requirement of independence in Special Condition 14.5 should be construed to mean that the appointed quantity surveyor has had no prior involvement in the Development. Because Mr Hogg and DCWC were not relevantly "independent" within the meaning of Special Condition

14.5 of the Contract, the assessment contained in the DCWC Assessment Report should be set aside.

Actual Bias

63 It was common ground that unless actual bias is made out, and subject to any qualification provided for in the relevant contract, there is no basis to set aside the assessment of a contractually appointed expert on the grounds of an apprehension of bias or apparent partiality. Here the Contract did not provide otherwise.

64 500 Burwood submitted that the Court ought to find on the facts that Mr Hogg was biased in favour of AU in the preparation of his assessment report. In support of this assertion, 500 Burwood argued that Mr Hogg failed to conduct himself impartially in the course of carrying out the assessment and Mr Hogg's lack of impartiality actually infected the DCWC Assessment Report such that it ought to be set aside.

65 It was further submitted that even if DCWC was capable of being appointed as an independent quantity surveyor, its assessment of the completion cost, in any event, was not carried out impartially.

66 500 Burwood relied in particular on an exchange of instructions and correspondence between AU and DCWC on 13 and 14 November 2007, that culminated in the DCWC Assessment Report. It was submitted this demonstrated that the Report could not be considered the product of an impartial assessment.

67 500 Burwood submitted the evidence recording that exchange demonstrates that, for the purposes of the DCWC Assessment Report, Mr Hogg treated AU as his client. It is submitted he did this in circumstances where he was anxious to ensure that he took into account all of the cost estimates provided to him by AU; took into account AU's statements and explanations regarding the lack of documentation and participated in conferences with AU and its consultants to the exclusion , and did not consider it to be either appropriate or important to ask for comment from representatives of 500 Burwood in relation to any matter, and did not consult with 500 Burwood at all during the assessment process.

68 Mr Hogg gave evidence that he considered AU to be his client for the purposes of the DCWC assessment. The provision of successive drafts of the DCWC Assessment Report by Mr Hogg to AU, and his subsequent adoption of the comments of Mr Morgan of AU, and in contrast Mr Hogg not engaging in the same, or any, form of consultation with 500 Burwood, demonstrates more than merely a lack of procedural fairness in his assessment process. While 500 Burwood conceded this would be insufficient to invalidate the DCWC Assessment Report, it was submitted that the report should be set aside on the ground of actual bias.

Assessment Not in Accordance with the Contract

69 In addition to the bias argument, 500 Burwood also submitted that the quantity surveyor appointed pursuant to the terms of the contract failed to undertake his contractual task in the preparation of the assessment report.

70 In support of this assertion, 500 Burwood submitted that DCWC's assessment of costs, as reflected in the Report dated 14 November 2007, was not within the scope of "Completion Cost" as defined in Special Condition 14.5.

71 500 Burwood submitted the CH Group report of 9 November 2007, (the "Update Report") which is to be read with the CH Group Report of 29 June 2007 (the "29 June Report"), and was incorporated into the Assessment Report and costed by Mr Hogg, assessed the availability of Project documentation and not compliance with the 9C classification. It also identified categories of documentation where 9C compliance could not be assessed because the documentation necessary to enable the assessment to be undertaken had not been provided (Table 4.1); items being "suggested Modifications for Consideration" (Table 4.2) where no certain definition of the necessary compliance works could be provided; and items which were the subject of "possible solutions for consideration" (Table 4.3).

72 Without clear instructions of the actual works necessary to be done to achieve 9C compliance, Mr Hogg was left with insufficient information to carry out his

assessment pursuant to the Contract and, to the extent that he purported to cost the exercise reflected in the CH Group report's, he was measuring the wrong thing.

73 In essence, Mr Hogg was assessing the cost of the provision of compliant documentation and the various alternatives put forward by the CH Group in the event that documentation was not available. Although this was clearly connected with 9C compliance, it was not what was called for by Special Condition 14.5 of the Contract.

74 The case of 500 Burwood can be summarised as follows:

(a) The task which the CH Group performed, when completing its 29 June Report and the Update Report, was in the nature of an assessment of compliance documentation.

(b) The CH Group was not assessing, and did not purport to assess, compliance with the 9C classification, despite that being the task assigned to the CH Group as Independent Consultant under the Contract.

(c) The DCWC Assessment Report adopted and "costed" the findings recorded in the CH Group's Update Report. Because the Update Report was not an assessment of 9C classification compliance, the DCWC Assessment Report was not an assessment in accordance with special condition 14.5, namely an assessment of the cost of the CH Group certifying to 500 Burwood the cost of achieving that compliance.

(d) It is not to the point that certain documentation may or may not have been lacking. The CH Group was obliged to assess the extent to which the Facility complied with the 9C classification. It did not do so. Instead, the CH Group compared the documentation available to it against the requirements of class 9C of the BCA. It recorded in 29 June Report and its Update Report where documentation said to be relevant to achieving that compliance was unavailable.

(e) It is not to the point that the CH Group was the nominated "Independent Consultant" appointed under the Contract to certify compliance with the 9C classification. That did not justify DCWC relying on whatever the CH Group produced. The DCWC Assessment Report had to be an assessment of the cost of the CH Group certifying 9C classification compliance. Since the CH Group Update Report was not an assessment of 9C classification compliance, the DCWC Assessment Report could not adopt it and still be found to comply with special condition 14.5 of the Contract.

(f) Nor is it to the point, so 500 Burwood submitted, that Mr Hogg had only a limited time within which to complete the DCWC Assessment Report. The Contract prescribed a time limit which was agreed to by the parties and which required Mr Hogg, within that time limit, to produce an assessment that complied with the requirements of special condition 14.5. For the reasons given above, the DCWC Assessment Report did not comply with the Contract. The extent to which the time constraints imposed upon Mr Hogg and DCWC may or may not have influenced the way in which the DCWC assessment was prepared, is irrelevant.

75 500 Burwood submitted that had CH Group assessed the extent to which each item of work was or was not compliant with the 9C classification, for instance by adopting the approach suggested by Mr du Chateau in his evidence, involving physical inspection and measurement, Mr Hogg could have assessed the cost of achieving that compliance.

76 However given that the Update Report was not an assessment of compliance with the 9C classification (and did not purport to be other than an assessment of the existence of compliance documentation), it was submitted by 500 Burwood that DCWC's costing of the items in the CH Group report could not amount to an assessment of the cost of achieving certification that the Facility complied with the 9C classification.

77 500 Burwood also noted that Mr Hogg's DCWC Assessment Report contains no explanation of the arithmetic and analytical derivation of the risk-weighting applied to each item (H, M and L) and the cost of the capital works identified (for example, the assessment of the cost of capital works required to replace windows at $300,000, assessed as a medium risk, giving a total cost of $150,000 to be added to the other components of that aspect of the Completion Cost). Mr Hogg acknowledged that nowhere in the DCWC Assessment Report was the basis of his calculations made apparent. 500 Burwood submitted that there was simply no evidence to suggest, as AU contended, that Mr Hogg "sought to err on the side of caution" in using a risk-based assessment.

78 Thus, in essence, 500 Burwood submitted that the DCWC Assessment Report did not comply with the Contract and, on this basis, 500 Burwood is not bound by it. Specifically, 500 Burwood submitted the DCWC Assessment Report did not include an assessment of the total costs to be incurred in order for the CH Group, as the Independent Consultant, to certify that the Facility complied with the 9C classification in accordance with special condition 14.5.

79 It was submitted by 500 Burwood that it was critical to articulate precisely what the Contract required the appointed Quantity Surveyor to do. DCWC was required to assess "Completion Cost". Completion cost was defined in the Contract in Special Condition 14.5 as a function of the cost of doing the necessary work to procure the issue of the Certificates. The term "Certificates", as mentioned above, was defined in special condition 14.1, and referred to the specific certificates and permits there described. The Certificates included the certification by the Independent Consultant (CH Group) that the "Facility" complied with the requirements of class 9C of the BCA.

80 It submitted that, having established what the Contract required of DCWC, the question became whether or not DCWC performed the task required of it. Put another way, did the DCWC Assessment Report comply with the Contract?

81 500 Burwood submitted further that in order to understand the DCWC Assessment Report, it is necessary, first, to understand the nature of the task performed by CH Group as the "Independent Consultant" named in the Contract.

82 In its capacity as "Independent Consultant" under the Contract, the CH Group was responsible for certifying to 500 Burwood that the Facility complied with the requirements of class 9C of the BCA. The CH Group produced an Update Report on this issue. It is common ground that DCWC based its assessment of the cost of certifying that the Facility complied with class 9C of the BCA upon the Update Report.

83 The evidence of Mr Chenoweth and Mr Bailey, both of the CH Group, was that the Update Report did not, and did not purport to, assess whether the Facility complied with the BCA 9C classification. Rather, the Update Report was an assessment to determine the documents that were available and the documents that were missing, in order to undertake such task. Where gaps in the documentation were identified, alternative solutions were suggested to overcome that issue.

84 500 Burwood submitted that as a consequence the Update Report could not provide the basis for an assessment of the cost of the Independent Consultant certifying that the Facility complied with the 9C BCA classification as required by the Contract. Accordingly, when DCWC adopted and "costed" the Update Report, as it did in its DCWC Assessment Report, it was not doing what the Contract required of it. Instead, it was put, the evidence shows that DCWC was assessing both the cost of obtaining documentation required to enable an assessment of compliance with the 9C classification and the cost of capital works which *might* be required if that documentation could not be obtained.

85 For these further reasons it was submitted, DCWC's assessment of Completion Cost under Special Condition 14.5 of the Contract is not binding on 500 Burwood.

Summary of Defendants' Contentions

86 AU's arguments on the issues in contention are summarised below.

Independence of the Quantity Surveyor

87 In relation to the issue of the independence of the quantity surveyor, AU submitted the requirement for "independence" as properly construed in Special Condition 14.5 meant no more than that the quantity surveyor appointed by AU had to be "independent" in the sense of not being an employee, officer or director of AU. It was on this basis, AU submitted, both Mr Hogg and DCWC were "independent" within the meaning of the Contract.

Actual Bias

88 AU submitted that it was clear, from his presentation in the witness box and from his evidence, Mr Hogg was not *actually* biased.

89 AU submitted that Mr Hogg presented as an honest, careful, considered and intelligent witness with experience in risk assessment on building projects.

90 Relying on authority AU submitted, an expert in the position of Mr Hogg, is not required by law to afford the parties procedural fairness, to allow each party a hearing or to seek information or to consider their views, unless the specific contract requires those steps be taken. The Contract did not.

91 AU submitted that the highest 500 Burwood could put their submissions in relation to the alleged bias related to the provision of a draft report to Mr Darren Morgan of AU on 14 November 2007, with Mr Morgan inserting in the spreadsheet dollar figures which represented actual quoted costs to complete aspects of the work in lieu of estimates arrived at by Mr Hogg. AU submitted the purpose of that interaction was to provide to Mr Hogg, for his consideration, available assessments of costs by reference to quotes to complete aspects of the works, rather than estimates based on rates. An analysis of the changes allowed by Mr Hogg shows that the net effect was a reduction of the final cost to complete assessed by Mr Hogg. Even if the assessment had increased as a result of Mr Hogg considering information provided by Mr Morgan, such interaction, it was submitted, would not support a finding of actual bias on the part of Mr Hogg. Mr Hogg gave evidence that the figures provided by Mr Morgan were benchmarked by him. There is no reason to refuse to accept his

evidence, nor was it put to him that he was being dishonest when giving evidence about these matters.

92 Evidence that Mr Hogg, or his company DCWC, had previously performed work on the Project for APAC, Hyaline Finance, the ANZ bank and for AU, it was submitted were also not matters capable of supporting a finding of actual bias. Nor were they matters which would disqualify Mr Hogg from either being appointed by AU as the "independent quantity surveyor" or from performing that role under the Contract.

Assessment in Accordance with the Contract

93 In relation to the nature of the assessment which was required pursuant to the terms of the Contract, AU submitted that the quantity surveyor performed the task which the Contract required and contemplated. Accordingly, AU submitted that Mr Hogg's assessment of the cost to complete the work in the sum of $2,862,764, was an assessment made in accordance with the Contract.

94 AU submitted that 500 Burwood's primary obligation under the Contract was to complete the Facility and the eight Living Units, and to provide AU with each of the certificates referred to in Special Condition 14.1(A)(b), (c), (d) and (e). If each of these obligations were not satisfied prior to 1 November 2007, then Special Condition 14.5 would be triggered. 500 Burwood failed to meet those obligations by 1 November 2007, triggering the operation of Special Condition 14.5.

95 AU invited the Court to approach the issues in the following way: In determining whether or not Mr Hogg performed the Special Condition 14.5 task, the key matters to be considered are, first, what the Contract required, assessed as at the date of the Contract and, second, whether or not Mr Hogg performed that task, assessed as at November 2007.

96 AU submitted that the assessment by Mr Hogg is binding if made in accordance with the Contract. It is beside the point that:

(a) it may have proceeded on the basis of error; or

(b) it was a gross over or under value; or

(c) the methodology adopted took into account considerations which, in the view of others, were irrelevant.

97 AU submitted of central importance was the Contract and what it required of the quantity surveyor. If Mr Hogg allowed a greater amount for the cost to complete than other witnesses thought appropriate, whether generally or in relation to a specific item, that is not a matter that goes to validity. If he took into account an irrelevant consideration, that does not of itself provide a basis to impugn his assessment so long as that assessment was in accordance with the terms of the Contract.

98 At the date of the Contract, AU submitted that the following matters were within the knowledge of both parties:

(a) The Contract required the construction of the Facility as described in the lease. It was for this Facility that an occupancy permit, one of the Special Condition 14.1 certificates, was required.

(b) 500 Burwood was required to construct and complete the Facility in accordance with the BCA 2007, Classification 9C and generally in accordance with a plan to be prepared by Axiom Architects and approved by the responsible authority.

(c) The Facility to be completed would include a lower ground floor of 1981m², a ground floor of 1698m² and a first floor of 1753m².

(d) The permitted use of the Development was for a Residential Aged Care Facility for both low and/or high care services with a minimum of 112 single rooms, constructed to meet in all relevant respects the requirements of Commonwealth Victorian and Local Government Regulations and Rules.

(e) The relevant "Deemed to Satisfy" provisions of the BCA provided in relation to such a building, given its size and use, that a Certificate of Occupancy issue for 480 persons.

(f) CH Group was the "Independent Consultant" appointed by the parties to certify compliance with the Class 9C classification requirements of the BCA.

(g) AU would be the operator of the Facility upon settlement of the Contract.

(h) If the permits and certificates for which Special Condition 14.1 provided, including a certificate from CH Group as to 9C Compliance and a Certificate of Occupancy, were not provided by 500 Burwood by 1 November 2007, Special Condition 14.5 would apply. It followed that the $35 million purchase price under the Contract would be reduced by the amount of the "Completion Cost" assessed by an independent quantity surveyor appointed by AU.

99 AU submitted that the Contract referred to, and identified, what was to be built. It stipulated what, on 1 November 2007, may have needed to be the subject of an assessment as to completion costs. The Contract specified both the Stage 2 permit, which issued for the construction of a nursing home and retirement village on 22 March 2005, and the Stage 4 permit for construction of a new building which issued on 16 January 2007.

100 AU submitted further that Special Condition 17.2 of the Contract required 500 Burwood to notify AU of any proposed changes to the "Works" which may directly, substantially, or detrimentally affect the property and prohibited such changes being effected without the prior written consent of AU. Both the Contract and the stamped plans that were approved by the Stage 4 building permit provided for a class 9C building. Level 4 was to be built in accordance with Architectural plan A1-06(J), including a computer room and store. The Contract acknowledged the "Works" were to be carried out pursuant to a D&C contract. It referred to the planning permit plans and limited specifications for finishes and the like prepared by Mr Allison.

101 AU contended that, viewed from the perspective of the contracting parties at the time of entry into the Contract on 16 May 2007, in order for Special Condition 14.5 to be invoked, it was necessary for 500 Burwood to have failed to provide by 1 November 2007 any of the following certificates:

(a) A Certificate of Occupancy in respect of the 112 bed Facility and or any of the eight Living Units (Special Condition 14.1(A)(b)).

(b) A Certificate of Practical Completion for either some or all of the Facility and the eight Living Units issued by 500 Burwood's licensed building surveyor (Special Condition 14.1(A)(c)(A)).

(c) Confirmation from 500 Burwood's licensed building surveyor that the "relevant provisions" of the BCA had been complied with (Special Condition 14.1(A)(c)(b).

(d) A certificate of final inspection for the Stage 1 infrastructure issued by 500 Burwood's licensed building surveyor (Special Condition 14.1(A)(d)).

(e) A certificate by the "Independent Consultant" (CH Group) certifying that the Facility is a building which complies with the Class 9C Classification requirements of the BCA ("9C compliance certificate") (Special Condition 14.1(A)(e)).

102 AU submitted that should Special Condition 14.5 be deemed operative, there was no obligation under the Contract for AU to utilise the services of the existing builder or consultants to complete the unfinished work on the Project. The Contract did not provide for novation of the existing D&C Contract.

103 It pointed out that the Contract provided that in order for the independent quantity surveyor to carry out the Special Condition 14.5 task, he is deemed to have been given all reasonable access to the property. It submitted that the Contract did not contemplate, and did not provide, that the quantity surveyor would have available to him all plans, designs, drawings and other documents prepared regarding the Development in performing the assessment pursuant to Special Condition 14.5. Similarly, it was submitted that it did not contemplate that he would have available a complete set of drawings and specifications showing alterations, additions and improvements "as built". If the building had not reached practical completion, there

could be no such drawings. The provision of all "plans, designs, drawings, and other documents" which had been "prepared regarding the Development" was a matter dealt with in Special Condition 16.1; they were required to be provided by 500 Burwood to AU "on or before settlement". However, there was no obligation to provide any documents which had then not been created or were not then in existence.

104 Based on these matters, it was contended by AU that should 500 Burwood default on its primary contractual obligations, the context in which the task set out in Special Condition 14.5 was to be carried out was:

(a) a failure by 500 Burwood to provide one or any of the required Certificates;

(b) in all likelihood, the development would not be finished and who was to complete the works would be a matter for AU;

(c) incomplete and, potentially missing or incomplete drawings, plans and specifications.

105 Reference was made to the express contractual agreement that, in respect of the 9C compliance certificate, the views of the "Independent Consultant" (CH Group) as to what was "necessary" to achieve 9C compliance would be determinative. The Contract did not prescribe how this would be achieved. This would likely be uncertain given the D&C nature of the project and the absence of any novation or assignment of the building contract.

106 Accordingly it was submitted by AU that the task of assessing the cost to complete in this context, based on assessing an incomplete project and incomplete information, was to be carried out between 1 November 2007 and 14 November 2007. That is, the independent quantity surveyor appointed by AU pursuant to the Contract had a 14 day window in which to make his assessment.

107 As a matter of construction, the task to be performed by the quantity surveyor in November 2007 involved him, first, ascertaining which of the Certificates referred to

in Special Condition 14.1 had not issued. Second, identifying what work was necessary in order to obtain the Certificates (all of them). Third, assessing the cost of carrying out the works to cause the Certificates to issue. In the case of 9C compliance, this involved assessing the cost of the work necessary to satisfy CH Group that it was able to issue the 9C compliance certificate.

108 AU submitted that the quantity surveyor, Mr Hogg, performed the task which the Contract required and contemplated. In this regard, the following was submitted:

(a) As at 1 November 2007, 500 Burwood had not provided any of the Special Condition 14.1 Certificates. As expressly contemplated by the Contract, Mr Hogg assessed the cost to practically complete on the basis of his inspection of the Development as evidenced by his detailed inspection notes and photographs. Appendix A to his report set out his assessment of this element of the cost to complete.

(b) By 1 November 2007, a Certificate of Occupancy had not issued. Mr Hogg had advice from CH Group as to the requirement of the "Deemed to Satisfy" provisions of the BCA regarding maximum occupancy numbers for the Facility, and this was to be 480 persons. He also had advice as to the requirements of the operator, AU, namely occupancy by 435 persons.

(c) Practical completion had not been achieved by 1 November 2007. Mr Hogg costed the works to practically complete against the plans. In the case of the "head end room" on level 4 to which all of the wiring in the building led, there is no evidence that 500 Burwood sought or obtained the consent of AU to delete that room from the building as contemplated by the Contract. Mr Hogg allowed for an independent builder and consultants to undertake the works required to complete. Not only was there no provision in the Contract for novation of the D&C building contract, but by 8 November 2007, the project had been in financial difficulty for many months with subcontractors being paid direct by the financier, Suncorp-Metway. There was also a history of

apparent vandalism by unpaid subcontractors. As a matter of fact, an allowance for an independent builder assessed as at November 2007 was an absolute requirement. In determining to make these allowances, Mr Hogg exercised this discretion as an expert and acted in accordance with the Contract.

(d) Compliance with the relevant provisions of the BCA, to be confirmed by the Vendors' Licensed Building Surveyor, was not an issue that directly impacted upon the cost assessment task. This is because, in addition to this "Certificate", the 9C compliance certificate was required.

(e) No certificate of final inspection regarding Stage 1 infrastructure, had issued. Schedule A items 1.5 and 1.6 of the cost to complete report prepared by Mr Hogg deals with costing of these works.

(f) As at 14 November 2007, CH Group could not issue the 9C compliance certificate because it was not satisfied that the Facility complied with the requirements of classification 9C of the BCA. What was required by CH Group before it would issue the 9C compliance certificate, was the subject of a report by CH Group in November 2007 (the Update Report), which was to be read in conjunction with an earlier report prepared by CH Group in June 2007 (the 29 June Report). Each item identified in the Update Report was considered by Mr Hogg, taking into account the 29 June Report and the possible solutions identified by CH Group in those reports. Works identified by CH Group as necessary before it would be willing to issue the 9C compliance certificate, were assessed as to cost.

(g) Mr Hogg costed the capital works associated with the possible solutions and, rather than simply allow them at 100%, he weighted the risk that the capital works would need to be carried out based upon his assessment of likelihood. These matters were detailed in Appendix B of his report. It was submitted that

this was open and appropriate for him to do so in the context of the task required by Special Condition 14.5.

109 AU provided the following example in relation to balustrades in its submissions. It was put that what is "necessary" in order for the 9C certificate to issue in relation to the balustrades are works which are structurally certified as BCA Part B1 compliant. That could be achieved in a number of ways: either, by the simple provision of a Structural Engineers' Certification relating to the existing balustrade or by removing and replacing the existing balustrading with structurally compliant balustrading and by certification of that balustrading. Mr Hogg was not required to choose between possible approaches to the work to be performed in order to achieve 9C compliance for the balustrading. How the "necessary" certification might in fact be brought about involved alternatives. The task required of Mr Hogg was to "assess" the cost of the works in light of those alternatives, the result being the cost "necessary to cause the certificates" to issue. He applied a risk weighting as part of his assessment of what works would be required so that the necessary certificate would issue. It was within his expertise and the scope of his authority under the Contract to do so.

110 Accordingly, AU submitted that the total of $2,862,764 represented Mr Hogg's assessment of the cost to complete. It was an assessment that was made in accordance with the Contract.

111 AU further submitted that there can be no criticism of the manner in which Mr Hogg performed his task so far as the assessments detailed in Annexures A and B to his report are concerned. Even if the Court disagreed with Mr Hogg's methodology, or concluded that he made significant or substantial error in his assessment, it was put that this was not a basis on which his report can be set aside. On the established authorities, such matters do not constitute grounds for setting aside a contractual determination of this kind.

112 As to Mr Hogg's reduction of completion cost items by the application of a risk based approach, AU pointed out that the Contract did not specify how Mr Hogg was to

assess the cost to obtain the various Certificates. Such matters of methodology were left to Mr Hogg in his expert opinion. The Contract did, however, expressly provide that the 9C compliance certificate was to be issued by the "Independent Consultant" (CH Group). CH Group was therefore the decision maker in terms of what was required before it would be willing to issue the 9C compliance certificate. The Contract did not direct Mr Hogg how he was to assess the cost to complete to cause the CH Group to issue 9C compliance certification. That was a matter for Mr Hogg in his expert opinion.

113 AU referred to criticisms made by 500 Burwood of Mr Chenoweth of the CH Group and suggestions advanced to the effect that his approach to 9C compliance was pedantic and overly technical. AU submitted that such criticisms were not justified. Mr Chenoweth's role was to certify whether the Facility complied with BCA classification 9C. The Contract contemplated that CH Group would perform this role in order to provide a certificate of 9C compliance. In turn, this would enable settlement to take place prior to 1 November 2007. It was contended that 500 Burwood essentially refused and failed to work and cooperate with CH Group. It is because of the skills of the CH Group regarding 9C compliance, that it was nominated under the Contract as the Independent Consultant to certify 9C compliance. Having agreed to entrust that task to CH Group, it matters not if CH Group was overly pedantic or technical, or primarily worked in conjunction with AU. The parties agreed to be bound by the determination of CH Group regarding the issue of the 9C compliance certificate.

114 AU submitted that, contrary to the 500 Burwood opening submissions and cross examination of Mr Hogg, Mr Hogg did not abdicate his role to CH Group. He recognised and acted on the role of the CH Group under the Contract as the 9C certifier. He took into account what CH Group in their binding role required before it would be willing to issue the 9C compliance certificate. He applied a risk assessment approach to the physical or capital works suggested as possible means of achieving 9C compliance. He adopted an approach which is in accordance with Australian

Standards and was in accordance with established quantity surveying practice and procedure. Not only as a matter of fact can no legitimate criticisms be made of his approach, most importantly it was an approach open to him whilst performing his role under the Contract.

115 AU observed that much time was devoted at trial to whether or not particular items forming part of Mr Hogg's assessment ought to have been included in that assessment and, if so, in what amounts. On the evidence, AU submitted that Mr Hogg's assessment of each of the individual items was both rational and reasonable. Further, there is no occasion or cause for the Court to determine or rule on these items. This was a matter for Mr Hogg; if he allowed $1 or more for an item that 500 Burwood believes he ought not to have included that does not invalidate his assessment. The evidence of Messrs Smith and Dresden of Napier & Blakely as to their own reports conducted for the financier, Suncorp-Metway, and as to the appropriateness of Mr Hogg's assessment were submitted to be irrelevant. They were performing different tasks to that which the Contract demanded of Mr Hogg. Even if the tasks were the same and if they took into account the cost of the works necessary to cause CH Group to issue the 9C compliance certificate, which they did not, the parties entrusted the task of assessing that cost to Mr Hogg via the contractual mechanism in Special Condition 14.5.

116 It was further submitted by AU that if the Court had misgivings about the risk based analysis method adopted by Mr Hogg, that too is irrelevant. It matters not how the Court might have approached the task or if some other approach might have been preferred given the uncertainties. No alternative was identified on behalf of 500 Burwood. All that matters is whether a risk based assessment was a methodology prohibited by the Contract. It was not. In fact, AU submitted that it was an entirely appropriate method given the circumstances likely to be in place and, which in fact materialised, as at 1 November 2007, as envisaged at the time the Contract was entered into.

117 AU contended that events that took place after 15 November 2007 are also irrelevant to whether Mr Hogg performed the contractual task assigned to him. His contractual role was to be performed in the 14 day window between 1 and 14 November 2007. It was and is irrelevant to the Contract and to his task whether any or all of the items included as part of his "cost to complete" assessment were ever actually expended thereafter. That is so because AU had no contractual obligation to obtain the "necessary" certificates or to perform such works as might have been needed to secure the issue of the Certificates. The function of Special Condition 14.5 was merely to determine the amount by which the $35m price was to be reduced. The reduction occurred at settlement. How AU then chose to proceed after settlement, including, for example if it had chosen to sell the partially completed Development, it was submitted, is not for the Court to determine.

118 AU submitted that the fact that the information available to Mr Hogg and to CH Group was incomplete was both a function of the terms of the Contract of Sale, which provided the context within which the cost to complete had to be assessed, and a function and a consequence of what it said was the deliberate policy of non-cooperation and non-disclosure on the part of 500 Burwood.

119 By way of conclusion, AU submitted that Mr Hogg approached the task demanded of him under the Contract of sale independently, with significant rigour and in accordance with what was required by Special Condition 14.5. He considered what CH Group identified as "necessary" in order for it to certify 9C compliance. He reviewed alternative scenarios involving suggested works in order to achieve the necessary outcomes. He assessed the cost of those works. Accordingly, there is no basis to overturn or interfere with his assessment.

Whether Quantity Surveyor 'Independent' Under the Contract (Special Condition 14.5)

Construction of the Contract

120 It will be recalled that pursuant to Special Condition 14.5(a)(i), and the events that triggered its operation, AU was entitled to appoint, at the cost of 500 Burwood, an

independent quantity surveyor to assess the cost of carrying out the works necessary to cause the Special Condition 14.1 Certificates to be issued and provided to it.

121 The term "Quantity Surveyor" is defined under Special Condition 14.5(a)(i) of the Contract. The defined term refers to an "independent quantity surveyor" who the purchaser is entitled, at the cost and expense of the vendor, to appoint. Either DCWC met the contractual requirement of independence, or it did not. In determining that question, it is necessary to construe the word "independent" as it was used in Special Condition 14.5 of the Contract.

122 The term "independent" is not defined in the Contract.

123 The well accepted approach to the construction of a contract was described by the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* in the following terms:

> It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. 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. [3]

124 In the more recent case of *Westgate Ports Pty Ltd v Port of Melbourne Corporation* Pagone J explained the applicable principle in similar terms:

> … the relevant contract is to be construed as a whole without individual clauses being considered in isolation. The meaning to be given to the terms of the contractual document is to be determined by what a reasonable person would have understood them to mean taking into account both the text and also the surrounding circumstances known to the parties, and the purpose and object of the transaction. [4]

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3 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 [40] (citing *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451); considered by the Victorian Court of Appeal in *Retirement Services Australia Pty Ltd (RSA) v 3143 Victoria St Doncaster Pty Ltd* [2012] VSCA 134).

4 *Westgate Ports Pty Ltd v Port of Melbourne Corporation* [2011] VSC 331 [9].

125 The contention of AU was that the requirement for "independence" as properly construed under Special Condition 14.5(a)(i) meant no more than the quantity surveyor to be selected by AU had to be 'independent' in the sense of not being an employee, an officer or director of AU.

126 On the other hand, 500 Burwood contended that to be "independent" for the purposes of Special Condition 14.5, when properly read in the context of the Contract as a whole and the significance to the parties of the quantity surveyor's task reflected in the relevant sub-clause, called for a more purpose driven approach. It contended that to give proper effect to this purpose, the requirement of "independence" in Special Condition 14.5 must be construed to mean that the quantity surveyor had no prior involvement in the Development.

127 In my opinion, the construction of Special Condition 14.5 as urged by 500 Burwood is to be preferred.

128 The task assigned to the appointed quantity surveyor under Special Condition 14.5 was of central importance to the parties under the Contract. The appointed expert was to set the purchase price payable under the Contract by determining the extent to which the purchase price payable under the Contract was to be reduced. The transaction was potentially worth $35 million. Both parties would be affected by the determination which fixed the adjustment to the purchase price, and potentially in a significant way.

129 In the context of the present Contract the concept of "independent" as used in Special Condition 14.5 clearly requires independence from the parties who have a direct financial interest in the assessment. Thus, as submitted by AU, a qualifying appointee could not be part of the organisation of the appointing party in any formal way in the sense of being an employee, officer or director of that party. So much is accepted.

130 However, in my opinion, the mechanism established by the sub-clause calls for a broader approach to construction of the concept of "independence". This is dictated

by the nature of the task to be undertaken and the purpose and importance of the assessment once completed.

131 The "independent quantity surveyor" was to be nominated at AU's sole discretion. The only limitation on the appointment of the expert, apart from the description "Quantity Surveyor", was provided by the qualifying term "independent". The description "Quantity Surveyor" called for the appointment of a person with sufficient qualifications and experience to carry out the contractual task. Here, with the appointment of Mr Hogg and DCWC, that is not in doubt. However, the qualifying term "Independent" also needs to be given its full effect to achieve the contractual purpose of the parties. That contractual purpose had two elements.

132 In the first place, the appointed Quantity Surveyor was to undertake the specified task of assessing the cost of carrying out the necessary works for the purpose of determining the purchase price. The concept as imported into Special Condition 14.5 required the appointed Quantity Surveyor to be in a position to carry out his or her work freely and in an objective manner in order to achieve a realistic figure which was as accurate as reasonably possible.

133 In the second place, the purpose of the assessment was to provide credibility to the process in which both parties could have confidence. This was to be achieved by providing a written expert report from an independent source which represented a true and fair view of the cost to complete the necessary works. This not only required the necessary level of expertise on the part of the appointed Quantity Surveyor. The purpose could not be met if one or other of the parties believed that the appointed Quantity Surveyor may have been influenced by extraneous factors, such as prior experience on the project, whether positive or not positive.

134 The parties gave up their respective rights to negotiate a concluded and binding purchase price. In return they agreed to entrust the determination to a system in which they could place their unreserved trust and confidence. They did not intend, in

my view, to bind themselves to an assessment attended with a credible appearance or soundly based apprehension of partiality.

135 Thus, the requirement of independence in Special Condition 14.5 in the contractual context is to be construed as including two elements:

(a) independence of mind, thereby enabling the quantity surveyor to provide an opinion unaffected by influences that might compromise his or her professional judgment, objectivity and impartiality; and

(b) independence in appearance, thereby avoiding circumstances which would cause a reasonable person who knows all relevant information to conclude that the quantity surveyor's objectivity or impartiality might have been compromised.

136 For these reasons, and in order to bring the necessary level of objectivity to the task at hand and provide the necessary level of confidence in the determination to a person in the position of the parties, a reasonable person in that position at the time of entry into the Contract would have been entitled to expect that the appointee would also be independent from the very project the subject of the Contract, such that he or she could not be seen to be subject to influence one way or another, whether consciously or not, by any previous involvement with the Development.

137 In this way the appointed expert, unsullied by prior experience with the Development and its participants, would be in a position to bring a truly independent mind to the task at hand and produce an assessment which was beyond question in its objectivity and in which the parties could have mutual confidence. This was the outcome intended by the mechanism which the parties established for the purpose of determining the purchase price.

138 I arrive at this conclusion in spite of the fact that the task stipulated by Special Condition 14.5 was a complex one, required to be completed within a tight time frame, and that this would objectively have been known to the parties at the time of

Contract, should Special Condition 14.5 be triggered. However, this did not mean, as submitted by AU, that in these circumstances, the person who would be engaged to perform the task would need to be a Quantity Surveyor who had some prior involvement with the Development and that this must have been in the assumed contemplation of the parties. If this was to follow, the result would be a significant erosion of the fundamental purpose of the "independence" qualification provided by Special Condition 14.5 of the Contract. Rather the tight time frame pointed to the imposition of an implied term for an extension of time for the preparation of the assessment report and a consequent extension of time for settlement, should that have become necessary.

139 This approach is not inconsistent with the legal principles establishing the requirement of actual bias of a contractually appointed expert before the expert's opinion will be amenable to being set aside, as later discussed. By way of contrast, in this particular case, the contract itself defined the qualities to be possessed by the appointed expert. The question at this point is whether the proper expert was appointed pursuant to the contractual criteria, rather than whether the report produced is amenable to being vitiated by the conduct of the appointed expert by application of the common law.

140 Further, I am not satisfied on the evidence that if any prior association with either AU or the Project resulted in disqualification of a proposed Quantity Surveyor under Special Condition 14.5, the Contract would become unworkable. I am not satisfied that the evidence went so far as to establish the unavailability of properly qualified quantity surveyors who could satisfy the criteria required by Special Condition 14.5 as I have found the criteria to be.

141 Thus in addition to the necessary technical competence and independence both from the parties, independence from the project itself was a most important factor in establishing the necessary credibility of the assessment.

142 This I find was what a reasonable person in the position of the parties would have understood by the term "independent" in Special Condition 14.5 after taking into account the text, the surrounding circumstances known to the parties, the purpose and object of the transaction and the particular function to be performed by the appointed Quantity Surveyor under the Contract.

143 The question then becomes, as a matter of fact, did Mr Hogg and DCWC satisfy the contractual requirement of "independence" in Special Condition 14.5 as I have found it to be.

Previous engagements of DCWC by the parties

144 For the reasons which follow, I find that, at the time of its appointment by AU in early November 2007, DCWC was not independent within the meaning of Special Condition 14.5 of the Contract. By reason of its prior work on the Development for both 500 Burwood and AU, DCWC was not, and could never have been, independent within the meaning of the special condition.

145 Prior to DCWC's engagement by AU in November 2007 to prepare the Assessment Report under the Contract, both APAC, a company related to 500 Burwood, and AU had engaged DCWC to provide professional quantity surveying services for this particular Development.

146 I find those engagements were as follows:

DCWC Work Undertaken for 500 Burwood

(a) In or about September 2001, APAC engaged DCWC in relation to to obtaining a town planning permit in respect of the development of the site as a whole. Mr Hogg explained that the project information sheet, the preparation of which had been supervised by him personally, reflected a review of all current town-planning documents and was probably directed towards an assessment of the feasibility of the Development. Mr Hogg gave evidence that he would not have prepared the report but he would have signed off on it as a Director of DCWC. The work done involved an examination of the town planning

documents that related to the whole Development. This was a significant body of work. The report produced assessed the cost of building the proposed Development, comprising in excess of some 200 pages of documentation, calculations and other supporting documentation.

(b) In December 2004, 500 Burwood engaged DCWC to complete an initial verification report for Stage 1 of the Development to be used by 500 Burwood to secure finance for the Project. Between late 2004 and early 2005, Rory Pincott and Ollie Kovaljev of DCWC prepared two progress reports for Hyaline Finance and for the ANZ, 500 Burwood's chosen financier of the Development at the time. Mr Hogg was not involved in preparation of these reports. Mr Hogg agreed that the report was a significant piece of work.

(c) In March 2005, again at the request of 500 Burwood, DCWC prepared a further progress report for work on Stage 1 of the Development for Hyaline Finance Pty Ltd. The progress report was required to enable the authorisation of draw-downs under the construction finance facility held by 500 Burwood.

However, in about March 2005, 500 Burwood changed financiers from ANZ to Suncorp-Metway and commenced using Napier & Blakeley as quantity surveyors in place of DCWC.

(d) APAC or a related entity engaged DCWC as the quantity surveyor to prepare draw down reports for the financier of its development at 630 Mitcham Road, Vermont. DCWC's engagement in respect of that job ceased in about August 2007.

DCWC Association with AU and Work Undertaken for AU

(a) Prior to DCWC providing quantity surveying services to AU in 2007, an employee quantity surveyor from DCWC, Mr Steve Johnson, was seconded to AU for a brief period to assist with setting up the cost estimating processes for various projects being considered by it.

(b) On 28 March 2007, Mr Philip David of AU sent an email to Mr Hogg requesting a high-level cost appraisal for the Development and infrastructure. The email is written in familiar, first-name terms: Mr Hogg was well known to both Mr Philip David and Mr Darren Morgan of AU by reason of a prior association involving the Tram Road, Doncaster residential development undertaken by the Gandel Group of companies. While he was employed as Senior Development Manager at the Gandel Group, Mr David had engaged Mr Hogg of DCWC to provide quantity-surveying services in relation to the Tram Road project. Mr Hogg described his professional relationship with Mr Hogg as a good and enduring one.

(c) A short time later, in about late March to early April 2007, AU engaged DCWC to perform a high level cost to complete appraisal in respect of stage 1 of the Development. Mr Rob Penna of DCWC provided the requested services. This engagement was commissioned by AU for the purposes of its due diligence in respect of the Development.

DCWC completed its report for AU on or about 26 April 2007 and provided it to AU under cover of a letter dated 4 May 2007. The report included a "Modifications Cost Summary" (Appendix D) setting out modifications which AU wished to make to the Development. The summary was contained in a table sorted according to reference, location, issue and recommendation. Mr Hogg gave evidence that it was possible that the table was provided to him by AU.

(d) On 7 May 2007, at a meeting took place between representatives of 500 Burwood and AU, attended by their respective legal advisors. Ccertain terms of the draft Contract were negotiated and Ms Low of Russell Kennedy recorded that "AU's QS" had estimated a completion cost of around $3,000,000. Although Ms Low gave evidence that she could not recall whether or not the reference to "AU's QS" was a reference to DCWC (acting as AU's quantity

surveyor), this is a likely interpretation of that reference in light of work done by DCWC for AU the previous month.

(e) In about late July or early August 2007, AU engaged Mr Hogg of DCWC to make an assessment of the cost to complete Stage 1 of the Development at that point in time. The report dated 3 August 2007 was prepared by DCWC and provided to AU. The report was based on the contents of DCWC's 26 April 2007 report: it updated the order of costs to complete the Development to the current design and added a sum of costs to achieve compliance with the 9C classification. DCWC derived its estimate of the costs of achieving compliance with the 9C classification from the report of the CH Group dated 29 June 2007. Mr Hogg did so as he was not then, and does not now purport to be, an expert in relation to the 9C classification.

(f) In late August 2007, Mr Hogg met with Mr David of AU to discuss the preparation of an estimate of costs for the construction of Stage 2 of the Development. Mr Hogg provided AU with a report dated 17 October 2007 in relation to DCWC's estimates. Two weeks later, Mr David telephoned Mr Hogg to request that he prepare a report on the cost to complete Stage 1 of the Development for the purposes of the Contract.

Engagement by AU of DCWC Under the Contract

147 Mr David of AU gave evidence that at the time he was considering which firm of quantity surveyors to appoint for the Update Report, he considered that DCWC had the advantage of familiarity with the Development, and that DCWC had been the only quantity surveyor discussed by representatives of AU for appointment under the Contract.

148 Mr David contacted Mr Hogg by telephone in early November 2007 to engage him to prepare the cost to complete report in accordance with Special Condition 14.5 of the Contract of Sale.

149 On 2 November 2007, Ms Low of Russell Kennedy wrote to Laurance Davis of Mills Oakley. Amongst other things, the letter stated that if the date for settlement of the Contract was not extended by agreement between the parties, then the defendants would exercise their rights under Special Conditions 14.5 and 14.6 of the Contract. It further stated that site visits would be required on 7, 8 and 9 November 2007 for the purposes described in Special Condition 14.5(a) and that DCWC had been appointed as the defendants' quantity surveyor.

150 On 8 November 2007, Mr Joel Freeman of 500 Burwood instructed Mr Laurence Davis of Mills Oakley to write to Russell Kennedy objecting to the engagement of DCWC as the independent quantity surveyor appointed under Special Condition 14.5(a) of the Contract. Acting on those instructions, Mr Davis sent a letter to Ms Low of Russell Kennedy on that date in which it was stated "*Our client does not believe DCWC has the required independence under special condition 14.5(a) and has a preference for your client to engage a different quantity surveyor*". No explanation was provided as to the basis of Mr Freeman's belief that DCWC did "*not have the required independence*".

151 On 12 November 2007 at 10:20am, Ms Low responded to the letter from Mills Oakley dated 8 November 2007 regarding DCWC. In substance, Ms Low's letter maintained that DCWC were independent quantity surveyors and that unless the plaintiff could provide evidence which would suggest otherwise, no aspersions should be cast, however indirect they may be, on a reputable firm of quantity surveyors. Ms Low received no response to that letter from Mills Oakley.

Conclusion as to the "Independence" of DCWC under the Contract

152 In my opinion DCWC was not capable of appointment as an "independent quantity surveyor" pursuant to Special Condition 14.5 of the Contract.

153 Prior to its engagement by AU in November 2007 to prepare the cost to complete report under the Contract, both APAC, a company related to 500 Burwood, and AU had engaged DCWC to provide professional quantity surveying services.

154 The prior engagements of DCWC and Mr Hogg, on the part of APAC, a company related to 500 Burwood; 500 Burwood itself; and AU, together compromised the independence of DCWC for the purposes of Special Condition 14.5 as I have described.

155 I find that DCWC and Mr Hogg were not "independent" as that term is to be understood in the context of this Contract. They were therefore not eligible for appointment pursuant to Special Condition 14.5, and their purported appointments were ultra vires the power conferred on AU under the Contract. For this reason, AU acted in breach of its contractual obligation in appointing them under Special Condition 14.5. Consequently, DCWC's appointment and the subsequent assessment of the Completion Cost is not binding on 500 Burwood under the Contract.

Loss of Independence of DCWC after Appointment

156 The concept of "independence" in Special Condition 14.5 carried with it the implication that the appointed Quantity Surveyor would maintain independence throughout the engagement. This was to give effect to the twin purposes of the Special Condition earlier described[5].

157 Even if DCWC could be regarded as having been "independent" for the purposes of Special Condition 14.5 of the Contract from the outset of its appointment as the contractual Quantity Surveyor, it soon lost that independence. It failed to be such because it acted as if AU was its client throughout the preparation of the DCWC Report. Although DCWC consulted with AU and its consultants, it failed to consult at any stage with 500 Burwood.

158 The way in which AU and Mr Chenoweth conducted the meeting of 12 November 2007, which was held at the offices of AU, two days prior to the deadline for the delivery of the DCWC assessment, pointed to this being the case. Mr Hogg gave evidence that during the meeting, he had a detailed discussion with Mr Chenoweth

5 See paragraph [120] above.

and representatives of AU regarding each item identified in Update Report. Mr Hogg said:

> … what I did in conjunction with the – with CH Group and in Australian Unity, in Australian Unity's office on 12 November, I think it was, we ran through all of the items that had been raised by – by Mr Chenoweth in his report, understood the relative issues that related to those particular items, and then accordingly I was able to ascertain what needed to be done from a works point of view, or what would need to be done from a reporting point of view in order to make the issue compliant.

159 Further, Mr Hogg also described the circumstance where he determined his risk-weighting based on discussions with Mr Chenoweth. In relation to the weighting for the capital works concerned with en suite configuration, Mr Hogg's evidence was as follows:

> ….what we did for this particular item was we actually worked through what the proposed remedy was going to be and in this particular instance we determined that the en suite walls needed to be moved if it were to be made compliant.

160 Mr Hogg went on to describe this as "a prime example" of the explanations given to him by Mr Chenoweth at the 12 November 2007 meeting.

161 The evidence of Mr Bailey and Mr Chenoweth in relation to the nature of their engagement, the evidence of Mr Hogg in relation to the conduct of the 12 November 2007 meeting, and the fact that at no time was 500 Burwood consulted, shows that DCWC did not discharge its role as an "independent" consultant, rather it acted but as a consultant engaged to provide a service to AU and to act in AU's interest.

162 Having made this finding, it is unnecessary to consider 500 Burwood's further submission to the effect that the CH Group also failed to act independently of AU.

Conclusion as to "Independence"

163 For these reasons detailed above, the DCWC Report and the purported Completion Cost assessment contained in the DCWC Report, must be set aside.

Bias Allegation

Legal Principles as to the Role of a Contractually Appointed Expert

164 An expert appointed under a contract is in a different position to an arbitrator and has a distinctly different range of duties. In *Beevers v Port Philip Sea Pilots Pty Ltd*[6] ("*Beevers*"), Dodds -Streeton J described the differences in the following terms:

> A valuer acting as an expert unlike an arbitrator is generally not obliged to receive submissions from the parties.
>
> An arbitration is characteristically quasi-judicial and the parties intend that they should have the right to be heard if they so desire.
>
> It is clear that, whereas a primary function of an arbitrator is to hear and resolve opposing contentions, in contrast, an expert is appointed to appraise value of loss or damage 'by use of some special knowledge or skill … without being required to hear the parties.
>
> It has been held that, due to the distinction between the arbitral and expert functions, a report by an expert will not be vitiated by the appearance alone of partiality.[7]

165 In *Beevers* Dodds-Streeton J referred to *Macro v Thompson (No. 3)*[8] ("*Macro*") with approval. *Macro* involved a valuation of shares in family companies was, under a pre-emption clause in the articles, committed to the companies' auditor acting as an expert, rather than an arbitrator. Robert Walker J stated that

> [a]n expert entrusted with the duty of issuing certificates under contractual arrangements between two other parties is under a duty to act fairly and impartially, and the other parties implicitly contract on that basis.
>
> Robert Walker J accepted that
>
> [o]n the authorities as a whole I accept the submission made by Mr Rhys that when the court is considering a decision reached by an expert valuer who is not an arbitrator performing a quasi-judicial function, it is actual partiality, rather than the appearance of partiality, that is the crucial test.
>
> His Honour adopted that view because –
>
> [t]o hold otherwise would mean that auditors who have had a longstanding professional relationship with an association with one party to the contract might be unduly inhibited in continuing to discharge their professional duty to their client, by too high an insistence on avoiding even an impression of partiality.

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6 *Beevers v Port Philip Sea Pilots Pty Ltd* [2007] VSC 556.
7 *Beevers v Port Philip Sea Pilots Pty Ltd* [2007] VSC 556 [263] –[266].
8 *Macro v Thompson (No. 3)* [1997] 2 BCLC 36.

> In *Macro*, as noted by Dodds -Streeton J in *Beevers*, [9] Robert Walker J found that the auditor (while not guilty of fraud or collusion or any conscious and positive cooperation in forwarding the interests of one party) was extremely imprudent in seeking advice and information from the purchaser's solicitor, with whom he discussed figures. The auditor allowed the solicitor 'to obtain a position of psychological ascendancy over him' which the solicitor seemed to exploit.[10]

166 Nevertheless, Robert Walker J, despite finding that "[the auditor] should have taken a much more independent line from the outset", on the balance of probabilities was:

> not persuaded that [the auditor] yielded sufficiently to [the solicitor's] influence as to invalidate his valuation on the ground of partiality.[11]

167 In the recent case of *McGrath v McGrath* ("*McGrath*") [12] Pembroke J cited with approval the observations of the English Court of Appeal in *Barclays Bank v Nylon Capital* [13] which are to similar effect:

> As I have said, there is no procedural code for expert determination, in contradistinction to arbitration. The activities of an expert are subject to little control by the court, save as to jurisdiction or departure from the mandate given. Unless the parties specify the procedure, the expert determines how he will proceed; it is rare for what might be perceived as procedural unfairness in an arbitration to give rise to a ground for challenge to the procedure adopted by an expert: see *Kendall, Freedman & Farrell, Expert Determination*, 4th ed (2008), ch 16.[14]

168 For these reasons, unless required by the contract in question, the parties have no entitlement to insist that the expert adopt any particular procedure; or that the appointed expert seek their approval to the proposed determination; or that they are given any hearing or facility to provide input into the process. An expert is not obliged to afford to the parties procedural fairness in the manner required of a court or arbitration in a curial context. [15] A certifying expert is not under an obligation to provide procedural fairness or natural justice in the absence of an express contractual provision, and there is none in the present case: *Hounslow London Borough Council v*

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9 *Beevers v Port Philip Sea Pilots Pty Ltd* [2007] VSC 556 [268 - 270].
10 *Macro v Thompson (No. 3)* [1997] 2 BCLC 36 [64].
11 *Macro v Thompson (No. 3)* [1997] 2 BCLC 36 [66].
12 *McGrath v McGrath* [2012] NSWSC 578.
13 *Barclays Bank v Nylon Capital* [2011] EWCA Vic 826; [2012] Bus LR 542.
14 *McGrath v McGrath* [2012] NSWSC 578 [7].
15 *Lahoud v Lahoud* [2010] NSWSC 1297 [59]; *Barclays Bank v Nylon Capital* [2011] EWCA Cic 826; [2012] Bus LR 542 [37].

Twickenham Garden Developments Ltd.[16] How the task is undertaken is in the hands of the expert, subject to anything to the contrary in the contract pursuant to which the appointment was made.

169 This result is in part the product of the contract and what is to be gleaned from it as to the intention of the parties. When the parties appoint an expert, they usually do so because they agree to place reliance on the expert's skill and judgment. They implicitly agree to accept and be bound by the determination. In the usual case, provided the decision is arrived at honestly and in good faith, the parties will not be able to re-open it and will be bound by the result.

170 It is also in part the product of a particular body of expert experience, learning, skill and judgment which the parties wish to apply to the problem to be dealt with. This is to be applied in a manner which is untrammelled by procedural considerations, so that the specialist skills and insights of the expert can be freely applied to the issue.

171 Finally, considerations of commercial utility are likely to be relevant factors. Efficiency, the production of a speedy and authoritative outcome and the elimination of the expense of a more elaborate procedure, undoubtedly play a part in parties selecting the contractual process of expert determination.

172 Mistake or error in the process of the determination of the appointed expert will not invalidate a decision.[17] However, if the expert asks the wrong question or misconceives the function of the appointment, the task required to be performed by the contract will not have been fulfilled.[18] In this event, the determination will be exposed to being set aside.

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16 *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, 258-60; *Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd* [1989] 1 Qd. R. 8; cf *Fletcher Construction Australia Pty Ltd v MPN Group Pty Ltd* (unreported) Supreme Court, NSW, 14 July 1997 p.20.

17 *Legal & General Life of Australia v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 334-336 (McHugh JA).

18 *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* [2012] NSWSC 4 [23] (Brereton J); *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173 [51].

173 Parties to a contract who, by the terms of that contract, agree to submit a question to an independent expert, are bound by the determination of that expert acting honestly and in good faith.[19]

174 Actual bias or partiality must be demonstrated in order to impugn the determination. Further, the party alleging actual bias by a decision-maker carries a heavy onus. So much was made clear in *Minister for Immigration v Jia* by Gleeson CJ and Gummow J.[20]

175 As observed by Pembroke J in a recent decision on point, *McGrath,* the appearance of partiality is not sufficient even if made out. *McGrath* concerned the appointment of an expert under a shareholders' agreement to determine the value of a corporate group following a dispute between shareholders.[21] The plaintiff shareholder sought to avoid the appointment of a particular expert to carry out the valuation on the basis of communications between that expert and one appointing shareholder prior to the expert's formal engagement. The plaintiff's application to avoid the expert's appointment failed for want of evidence of partiality.[22] Pembroke J held that, based as it was on an apprehension that, if appointed, the expert would fail to act impartially, the plaintiff's case was akin to one of apprehended bias, which would not entitle the Court to prevent the expert from taking appointment.[23] Pembroke J was thus not required to make findings as to whether or not the expert had breached his duty to act impartially (meaning without actual bias). His Honour made the following observations in *McGrath*:

> The obligation on an expert to act impartially is of course a foundational requirement. It finds its source in an implied term that subsists in agreements of this kind: *Ceneavenue Pty Ltd v Martin* (2008) 106 SASR 1 at [69]; *Legal & General v A Hudson Pty Ltd* at 335; Holt v Cox (1997) 23 ACSR 590 at 595. Within that constraint however, the expert may act as he likes and may give such opportunities to the parties to make submissions, and on what terms, as he

19 See *Campbell v Edwards* [1976] 1 WLR 403, 407 per Lord Denning MR; followed in *Baber v Kenwood Manufacturing Co Ltd and Whinney Murray & Co* [1978] 1 Lloyds Rep 175 (Court of Appeal); *Jones & Others v Sherwood Computer Services PLC* [1992] 1 WLR 277; applied in Australia in *Legal & General* by McHugh JA. The critical distinction is between a mistake in process of the valuation or assessment where in the absence of dishonesty or partiality, the courts will not interfere, in contrast to a valuation or assessment which actually departs from the contract, where the courts will intervene.

20 *Minister for Immigration and Multicultural Affairs v Jia* [2001] HCA 17.

21 *McGrath v McGrath* [2012] NSWSC 578.

22 *McGrath v McGrath* [2012] NSWSC 578 [16].

23 *McGrath v McGrath* [2012] NSWSC 578 [17].

alone considers necessary or appropriate. He may even choose not to do so - so long as he acts honestly and impartially.[24]

176 In *Beevers* Dodds-Streeton J held that "a report by an expert will not be vitiated by the appearance alone of partiality".[25] Having referred to the orthodox position,[26] her Honour then introduced the concept of "a credible appearance or soundly based apprehension of partiality".[27] However, her Honour did not finally rule on the question on the facts of the case before her, finding it unnecessary to do so.

177 To the extent that Dodds-Streeton J in *Beevers* opened the door to the prospect of the appearance of bias as being sufficient to call into question and bring down the determination of a contractually appointed expert, I do not follow the decision. Absent something in the contract which works against this outcome in a particular case, actual partiality and not the appearance of partiality is the critical test: *Macro v Thompson (No 3)*.[28] Such observations are consistent with the views expressed by the Court of Appeal concerning experts called upon to give independent opinion evidence, such experts not being disqualified from that role due to previous association with the parties; see *FGT Custodians Pty Ltd (formerly Feingold Partners Pty Ltd) v Fagenblat*.[29]

178 There is a substantial body of further authority on the point. In *Ceneavenue Pty Ltd v Martin,* Debelle J took the conventional approach in adopting the view that actual bias is required.[30] In *Candoora No 19 Pty Ltd v Freixenet Australasia Pty Ltd (No 2)*, Hargrave J referred to and approved the ruling in *Macro* that actual partiality, rather than the appearance of partiality, was necessary.[31] In *Kenros Nominees Pty Ltd v Tipperary Group Pty Ltd*, Hollingworth J gave further approval to this approach, observing: "All of the cases to which the parties referred deal with the setting aside of

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24 *McGrath v McGrath* [2012] NSWSC 578 [12].
25 *Beevers v Port Philip Sea Pilots Pty Ltd* [2007] VSC 556 [266] and [300].
26 *Beevers v Port Philip Sea Pilots Pty Ltd* [2007] VSC 556 [263] - [272].
27 *Beevers v Port Philip Sea Pilots Pty Ltd* [2007] VSC 556 [300].
28 *Macro v Thompson (No. 3)* [1997] 2 BCLC 36.
29 *FGT Custodians Pty Ltd (formerly Feingold Partners Pty Ltd) v Fagenblat* [2003] VSCA 33.
30 *Ceneavenue Pty Ltd v Martin* (2008) 106 SASR 1 [69] and [71].
31 *Candoora No 19 Pty Ltd v Freixenet Australasia Pty Ltd (No 2)* [2008] VSC 478 [25].

a valuation after it has been performed, on the basis of actual bias".[32] Other authorities are to similar effect in support of the orthodox approach.[33]

179 This view of the law accords with sound policy. Pembroke J in *McGrath* explained the policy considerations in the following terms:

> When it comes to the principle of apprehended bias in relation to independent experts, I prefer the orthodox approach. To my mind, that approach accords with sound principle and persuasive authority. Too high an insistence on independent experts being required to avoid even an impression of partiality would not be in the interests of justice. It might, as it has in this case, encourage unwarranted challenges and unnecessary litigation by those too readily prone to suspicion and paranoia. The better course would be to allow the independent expert to complete his determination. [34]

180 In the light of the weight of these authorities, 500 Burwood conceded that an apprehension of bias on the part of Mr Hogg is not a sufficient basis for setting aside the DCWC assessment.

181 500 Burwood also concedes that Mr Hogg owed no obligation to accord procedural fairness or natural justice to 500 Burwood or AU.

182 Accordingly, in order to have the DCWC assessment set aside, 500 Burwood must show, on the balance of probabilities, either actual bias or lack of impartiality on the part of Mr Hogg rather than mere apprehension of it.[35]

Bias Allegation – Findings of Fact

183 Set out below is a chronology of events which provides a summary of relevant findings of fact. The events described occurred in the first two weeks of November 2007 leading up to the production of the assessment of completion cost contained in the DCWC Assessment Report.

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32 *Kenros Nominees Pty Ltd v Tipperary Group Pty Ltd* [2009] VSC 524 [95].

33 See: *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 335; *Holt v Cox* (1997) 23 ACSR 590, 595; *Andrews v Queensland Racing Ltd* (No. 2) [2009] QSC 364 [24] - [25]; *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd* [2004] 2 Lloyd's Rep 352 372.

34 *McGrath v McGrath* [2012] NSWSC 578 [21].

35 *McGrath v McGrath* [2012] NSWSC 578 [16].

8 November Site Inspection

184 On 8 November 2007, shortly after he had been requested by Mr David to assess the completion cost under the Contract, Mr Hogg inspected the Development site.

185 Prior to leaving the site, Mr Hogg had a discussion with Mr Morgan, who visited the site at the same time, to discuss his site inspection and the progress of the DCWC assessment. While at the site, Mr Morgan also compiled his own list of defective work which was later provided that list to Mr Hogg for his consideration.

186 Other than 500 Burwood representatives who inducted visitors to the site, including Mr Hogg, there was no representative from 500 Burwood onsite to brief Mr Hogg as to the state of the works or to accompany him during his inspection. He made notes of his inspection and took photographs. The notes and the photographs depicted the state of the works at the site. Although Mr Morgan and some AU operational staff were also on site on 8 November 2007, Mr Hogg was left on his own to undertake his task. He spent approximately 4-5 hours onsite.

187 Mr Hogg had already accepted AU's explanation as to why no representatives of 500 Burwood were present to accompany him on his site inspection on 8 November 2007. Mr Hogg gave evidence that a representative of AU had told him that 500 Burwood representatives had been invited but were disinclined to attend and that, although he did not know whether or not this was true, he had accepted AU's explanation.

The 12 November 2007 meeting at AU's offices

188 Later on 12 November 2012, Mr Hogg attended a meeting at AU's office in South Melbourne. Also in attendance at the meeting were Mr Chenoweth and Mr Bailey of CH Group, Ms Low of Russell Kennedy, and Mr Philip David, Mr Darren Morgan, Mr Van Sanden and Mr Derek McMillan of AU.

189 One of the principal purposes of the meeting was the discussion of Mr Hogg's progress with the DCWC assessment, as AU was anxious to know when Mr Hogg's report would be ready, given that settlement was due to be completed by 15 November 2007.

190 Ms Low's evidence was that the main topic of conversation at the meeting was the work which Mr Hogg was to complete, for the DCWC assessment to be included in the DCWC Assessment Report.

191 Mr Hogg's evidence was that his discussions at the meeting provided much of the information from which he compiled the DCWC Assessment Report.

192 Mr Hogg gave evidence that the nature of his task as defined under the Contract, was made clear to him in the course of completing his work but not at the outset. Mr Hogg's evidence also shows that he was not made aware of the precise contractual requirements of his task until this meeting on 12 November 2007 at AU's offices, when he was provided with a copy of Special Condition 14 of the Contract by Ms Low of Russell Kennedy.

193 Ms Low gave evidence that she stressed to Mr Hogg the need for him to be independent. Ms Low's instruction was given to Mr Hogg at a time when he had already commenced work on the DCWC assessment. That instruction was also given by Ms Low to Mr Chenoweth, whether prior to or after representatives of AU and Mr Chenoweth discussed in detail all of the items which would have to be covered by Mr Hogg in the DCWC Assessment Report. Ms Low gave evidence that during the 12 November meeting:

> It occurred to me then that I needed to ensure that Tim Hogg who was the quantity surveyor knew exactly what he had to do when he made an assessment as to what works were required to be done to the residential aged care Facility.

194 However, Ms Low did not assist Mr Hogg to understand how he ought to comply with his obligation of independence or give any explanation as to what that entailed under the Contract. Ms Low regarded Mr Hogg's obligation of independence, as she said in cross-examination, as simply requiring of him that he "assess what it was going to cost in order to secure the certificates that the vendor should have given over settlement."

195 In any event, the warning provided by Ms Low, to the extent that it fulfilled that function, did not prevent Mr Hogg from attending the 12 November meeting or later adopting in the DCWC Assessment Report the cost estimates which were supplied by Mr Morgan of AU for that very purpose, as will be later described. Nor did Ms Low's caution incline Mr Hogg to consult representatives of 500 Burwood in relation to any of the items of supposed non-compliance with the 9C classification mentioned in the Update Report, or indeed on any matter; Mr Hogg's evidence was that he did not consider it to be important or appropriate to do so. That was because I find that Mr Hogg saw his role as being that of someone appointed by, and acting for, AU in assessing the completion cost.

196 At the meeting of 12 November, Mr Chenoweth discussed BCA 9C items identified in the 29 June Report which had been updated on 9 November 2007. Mr Hogg provided an update on how preparation of his report was progressing. Mr Hogg was informed that Mr Chenoweth had been engaged as the independent expert under the Contract between the parties to assess and certify BCA 9C compliance. Mr Hogg had earlier been provided with a copy of the 29 June Report. Mr Hogg gave evidence that at the meeting, he suggested that he would cost the BCA 9C non-compliance issues identified by Mr Chenoweth in the Update Report, by assessing for each item the risk that capital works would need to be carried out before 9C compliance would be certified.

Provision of CH Group Update Report to Mr Hogg on 12 November

197 By an email sent by Debra Murray, Mr Chenoweth's personal assistant, to Mr Hogg at 10:54am on 12 November, the CH Group sent an electronic copy of the Update Report to Mr Hogg. This was to assist Mr Hogg in preparing his costing of the information provided to him. Mr Chenoweth sent a copy of the Update Report to Mr Hogg in Word format. Mr Hogg used this word version of the updated report in his Appendix B to his cost to complete report for the purposes of costing 9C compliance by adding on three columns for the purposes of the estimated cost and the risk assessment.

13 November 2007

198 On 13 November 2007, the day after the 12 November 2007 meeting, there was a telephone conversation between Mr Darren Morgan of AU and Mr Hogg in which Mr Hogg advised that he was gathering information regarding the cost to complete specific items and asked if AU had obtained written reports from the contractors setting out the accurate figures of what it was going to cost to finish specific works. Mr Morgan said he would forward other contractor reports from the contractors of suppliers when he received them.

199 At 10.03 am, Mr Hogg received an email from Mr Morgan, further to previous discussions between them, enclosing a list entitled "QS Cost to Complete Summary", stating that reports of other contractors would be forwarded to DCWC on receipt. Mr Hogg gave evidence that he considered each of the items of defective work listed by Mr Morgan but did not think it important to seek comment on any of those items from any representative of 500 Burwood.

200 Mr Morgan sent another email to Mr Hogg on 13 November 2007, about one hour later, at 11.24 am. Mr Hogg gave evidence that he did not think it appropriate to forward the email or its contents to any representative of 500 Burwood in order to obtain their comments, although he acknowledged that Mr van Ravenstein would have been in a position to comment.

201 At 1.51 pm the same day, Mr Morgan sent a further email to Mr Hogg, copied to Mr David, purporting to contain information regarding defective and incomplete works, together with approximate costs. That email attached a report from the carpet manufacturers in which they provided an estimate of their costs for all labour and materials and included the text from an email from the plumber contractor with an estimate to finish the plumbing.

202 Despite the express indication in the manufacturer's email that no defect notification had as yet been received, and that in any event the builder could be expected to rectify any defects at its own cost, Mr Hogg included in the DCWC Assessment Report an

estimated cost of replacing the carpet, based on a quotation which he knew to have been procured from the manufacturer by Darren Morgan of AU.

203 Mr Morgan procured another contractor to provide a quotation on its letterhead directly to Mr Hogg for the purposes of the DCWC Assessment Report. Mr Morgan prefaced the quote by informing Mr Hogg that he had written "a short email to summarise the results of our review of the hydraulic services at Victoria Grange Retirement Village, 502 to 514 Burwood Highway". Mr Hogg considered the information contained in the email for the purposes of the DCWC Assessment Report but did not think it was material to forward that information to representatives of 500 Burwood.

204 At 4:33 pm, also on 13 November 2007, Mr Morgan sent an email to Mr Hogg forwarding the email sent from PBN Connect to Darren Morgan providing a cost to complete summary in relation to the communication system.

205 At 7.38 pm Mr Chenoweth sent an email to Ms Low, which was copied to Mr Morgan and Mr Hogg. Attached was a copy of Mr Chenoweth's letter in relation to occupancy numbers.

206 At 10:55 pm on 13 November 2007, Mr David sent an email to Mr Chenoweth and Ms Low and copied to Mr Morgan and Mr Hogg regarding occupancy numbers for the Facility and offering to provide a "signed operational memo regarding peak numbers signed by our site and national manager".

14 November 2007

207 On 14 November 2007 at 9:02am, Mr David of AU sent an email to Ms Low and copied to Mr Chenoweth, Mr Morgan, Mr Hogg and Mr McMillan regarding peak load numbers and attaching a memorandum from the residential services manager and national aged care manager of AU estimating the peak load of the Facility to be 435 persons.

208 On 14 November 2007 at 12:26pm Mr Hogg sent an email to Mr Morgan of AU attaching a draft of his cost to complete report, comprised in a draft spreadsheet for Mr Morgan's review. The spreadsheet set out Mr Hogg's estimate of the costs to complete Stage 1 of the Development. Mr Hogg did not, however, send a copy of the same spreadsheet to 500 Burwood for review.

209 On 14 November 2007 at 12:51pm, Mr Chenoweth sent an email to Ms Low advising that despite numerous requests made to 500 Burwood, 500 Burwood's architect and building surveyor, a complete set of building permit or town planning documentation had never been provided at any stage of the review and attaching a list of documents he had received and a list of documents he had yet to receive.

210 On 14 November 2007 at 12:56pm, Ms Low sent an email to Cameron Allen forwarding the email from Mr Chenoweth at 12:51pm confirming that Mr Hogg would have no alternative but to work out his completion cost report only on the documentation he had.

211 On 14 November 2007 at 1:35pm, Mr Morgan sent an email to Mr Hogg in response to his 12:26pm email, providing Mr Hogg with more up to date figures for some of the works that needed to be completed. Mr Morgan replied to Mr Hogg's email saying:

> Tim, please find attached numbers for your perusal. Changes highlighted. Please call to discuss. Regards, Darren.

212 Mr David gave evidence that he had authorised Mr Morgan to provide feedback and information to Mr Hogg for the purposes of the DCWC Assessment Report.

213 At around 2.20 pm Ms Low sent an email to Mr Hogg, Mr David and Mr Morgan asking what was happening with the report. Shortly afterwards, following a discussion with Mr Hogg, Mr Morgan responded on Mr Hogg's behalf to the effect that the report would be ready within an hour or so.

214 At 3:30pm, Mr Morgan sent an email to Ms Low, Mr David, Mr Hogg and copied to Mr McMillan and Mr van Sanden advising to this effect.

215 On 14 November 2007 at 4:46pm, Ms Katherine Yacoub sent an email on behalf of Mr Hogg to Ms Low, Mr Morgan, Mr David, Mr Chenoweth and Mr Hogg attaching a cost to complete report.;

216 Eight minutes after that email was sent, at 4:54pm, Mrs Low sent an email to Mr Hogg asking, "Tim, how does this deal with the issue of maximum number of people on site?" Ms Low then telephoned Mr Hogg and left a message for him to return her call urgently. Mr Hogg returned Ms Low's call and they discussed the allowance of $600,000 for capital works in respect of the central stair case for which Mr Hogg had made provision in the DCWC assessment and how the cost to complete report dealt with the maximum number of people on site and the height of the upper floor.

217 On 14 November 2007 after 5:34pm, Mills Oakley, then lawyers for 500 Burwood, hand-delivered documentation from Axiom Architects. Ms Low then sent an email to Mr Chenoweth and Mr Hogg attaching the documents provided by Mills Oakley.

218 On 14 November 2007 at 5:48pm, Mr Hogg sent an email to Ms Low, Mr David, Mr Morgan, Mr van Sanden and Mr Chenoweth in relation to the documents provided by Mills Oakley.

219 On 14 November 2007 at 5:55pm, Mr Morgan sent an email to Mr Chenoweth, Mr Hogg, Ms Low, Mr David and Mr van Sanden in relation to the documents provided by Mills Oakley and noting that the town planning permit was not amongst the documents.

220 Later that afternoon, there was a telephone discussion between Mr Hogg and Mr Morgan in which Mr Hogg informed Mr Morgan that he was making some minor amendments to some of the figures and he would send through an updated assessment report.

221 On 14 November 2007 at 6:27pm, Mr Hogg sent an email to Mr Morgan and Mr David, which he copied to Ms Low and Mr Chenoweth, attaching an updated version of the cost to complete report (the DCWC Assessment Report). This was sent

following discussions between Mr Morgan and Mr Hogg. The email attached a file described as "Updated Report with minor amendments to figures as discussed with Darren Morgan". Again, Mr Hogg did not send this version of the DCWC assessment to representatives of 500 Burwood for comment.

15 November 2007

222 On 15 November 2007 at 8:14am, Ms Low sent an email to Mills Oakley attaching the DCWC Assessment Report, offering more time for 500 Burwood to carry out as much of the works as possible.

The Occupancy Issue and Fire Rating of the Central Stairs

223 A further topic of importance discussed at the 12 November meeting was the issue of the total occupancy of the completed Development and the impact this may have on the treatment of the central stairway for fire rating purposes under the BCA.

224 The issue of fire ratings generally is an important element of the BCA for aged care and residential facilities.

225 More specifically, the question was whether the central stairs were required to be constructed so as to be "fire isolated". If they were required to be fire isolated, considerable capital expenditure would be required to have this done. The answer to this question turned upon the provisions of the BCA and the maximum occupancy level permitted for the Development being the maximum number of persons, whether residents, visitors, entertainers, staff, doctors, nurses and the like, who would attend on the premises on any day, including peak visiting days such as Mother's Day, Father's Day, and Christmas Day.

226 This was an important issue for the Development and Mr Hogg's assessment of completion cost under the Contract. The amount allowed by Mr Hogg for capital works relating to the central stairway was $600,000, which was by far the largest allowance in his assessment of the total cost the complete. Under Table 4.2 of the DCWC Report, Mr Hogg dealt with the issue in the following way, as shown in the last three columns "DCWC Assessment" beside the four columns to the left of the

table which had been earlier prepared by the CG Group and supplied to him in "Word" format on 12 November in the form of the Update Report:

				DCWC Assessment		
BCA Clause	**BCA Modification Application**	**Issue Addressed Y/N**	**Comments and suggestion for resolution of matter**	**Compliance Reports Cost Estimate**	**Capital Works Estimate**	**Risk**
D1.3	(a) Obtain a modification from the Building Appeals Board to allow the Central Stairs (Stair 1) to remain non-fire isolated.	Y	Approved Alternative Solution has been issued by Hank Van Ravenstein to permit the central stair not to be fire isolated.	$10,000	$600,000	H

227 In the first four columns of Table 4.2, which comprised the Update Report component, the issue of the central stairs was noted to have been resolved by an "Approved Alternative Solution" issued by the authorised building surveyor, Mr Van Ravenstein, to permit the central stairs not to be fire isolated. However, Mr Hogg assessed this to be a high risk and included a capital works estimate of cost at $600,000.

228 Mr David of AU attended the meeting on 12 November 2007. He said that the issue of occupancy numbers was a subject of discussion. In this regard, he related the following in his cross-examination:

> You recall that there was an issue raised by Australian Unity, I suggest, at the meeting on 12 November 2007 about the maximum occupancy number of the residential aged care facility?---Yes.
>
> Do you recall that?---Yes.
>
> Your concern was and Australian Unity's concern was to ensure that the compliance was based on the maximum number for the building, maximum number of occupants for the building, is that right?---Yes.
>
> So you wanted to make sure that the CH Group when they signed off on their 9C report it was done on the maximum number of occupants for that particular building, correct? ---Correct.

229 On 13 November 2007, Mr Chenoweth wrote a letter of that date to AU which was emailed to Mr Morgan, Mr David, Ms Low representing AU and to Mr Hogg of DCWC at 7.38 pm. The letter was the product of the meeting held on 12 November. It related to occupancy numbers for the Development. In cross-examination, Mr Chenoweth made the following concessions about the provenance of his letter of 13 November:

I suggest to you, after you had met on 12 November 2007 the reason you wrote your letter on 13 November 2007, copy to Darren Morgan, Philip David and Tim Hogg and sent to Ms Low was because you were following up from discussions that had taken place about maximum occupancy on 12 November 2007?---Following up discussions, yes, Your Honour.

So you were requested, I suggest, at the meeting of 12 November 2007 to write to Ms Low and to tell her what your concerns were about the maximum occupancy?---Yes.

And that's what you did on 13 November 2007, isn't it?---Yes.

230 In his letter of 13 November Mr Chenoweth relevantly advised as follows:

> Further to our telephone conversation in relation to the Aged Care Home currently under construction at the above addressed I have received the Alternative Solution report dated 11 October 2007 prepared by Integrated fire Services PTY LTD and the Building Code of Australia (BCA) Deemed to Satisfy provisions relating to clause D1.13 and offer the following opinion.
>
> The Relevant Building Surveyor (RBS) for the above project Mr. Van Ravenstein has approved an Alternative Design Solution using the relevant BCA Performance Clauses that relates to several fire safety matters which has been based on the findings of Integrated Fire Services Alternative Solutions report.
>
> …
>
> In the absence of "any other suitable means of assessing its capacity" and by making an assessment of the floor area of the building, the maximum number of persons deemed to be accommodated within the building in accordance with BCA Table D1.13 is 480. This is made up of 113 residents and 367 other occupants (staff, visitors, carers etc).
>
> Although its not expected that 480 persons will occupy the building at any one time but we find it difficult to accept Integrated Fire Services nomination of a maximum 197 persons with the note saying that "this represents an overly conservative situation as the building resource would not cope".
>
> …
>
> It our recommendation that in consultation with Australian Unity, Integrated Fire Services and the RBS be engaged to undertake a review of the total number of occupants as nominated in Section 4.1.1 of the Alternative Solutions Report dated 11 October 2007. The purpose of this review is to agree on the occupant numbers that will better suit the onsite needs of the Home and assist in providing a safe and well managed Home.

231 Mr Chenoweth described his letter of 13 November as an "advisory note" and that none of the alternative solutions adopted by the Building Surveyor were rejected on the basis of this letter. He said in cross-examination:

> This is an advisory note. None of the alternative solutions were refused based on this note. I don't understand the - the course of questioning implying that we are saying that we have disregarded his fire engineer's report. All we've said is that, "Hey guys, we've got a problem here. Maybe once you issue the occupancy permit the numbers may be a problem if you exceed that, and the risk to - to whoever the owner will be of that building".

232 Mr Chenoweth reiterated that the letter was "purely advisory" and that "we may have an issue" which warranted entering into discussions with the relevant parties concerning maximum occupancy numbers. He said further that, "all alternate solutions was [sic. *were*] approved and accepted. Nothing was challenged". Indeed, Mr Chenoweth was at pains to point out that he was not in a position to go behind the alternate solutions adopted by the Building Surveyor, and he did not do so. The Update Report which noted the Approved Alternative Solution issued by the Building Surveyor, Mr Van Ravenstein to permit the central stairs not to be fire isolated, supports this approach adopted by Mr Chenoweth.

233 Mr Chenoweth's approach was correct. His letter of 13 November 2007 did not and could not have provided any basis for going behind the expert judgment of the fire engineer Mr Verheijden or the Approved Alternative Solution issued by the Building Surveyor, Mr Van Ravenstein, insofar as Mr Chenoweth's letter indicated that the 9C classification requirements applicable to clause D1.3 of the BCA had not been complied with.

234 At 10:55pm on 13 November 2007, Mr David sent an email to Mr Chenoweth and Ms Low replying to Mr Chenoweth's letter sent by email at 7.38 pm regarding occupancy numbers for the Facility. The 10:55pm email was also copied to Mr Morgan and Mr Hogg. Mr David said that he would "forward the signed operational memo regarding peak numbers signed by our site and national manager."

235 On 14 November 2007 at 9:02am, Mr David sent an email to Ms Low, which was copied to Mr Chenoweth, Mr Morgan, Mr Hogg and Mr McMillan, regarding peak load numbers and attaching a memorandum from the residential services manager and national aged care manager of AU estimating the peak occupancy load of the Facility which had been promised the day before by the email of 10:55pm. The

memorandum was dated 15 August 2007 and estimated the peak occupancy load to be 435 persons, based on estimates of 110 residents, 220 relatives, 10 entertainers, 75 staff and 20 volunteers. The memorandum noted that several large functions were planned annually, including Christmas dinner, Easter celebrations, a mid year dinner, Mother's Day, Father's Day and a grand opening.

236 Mr Hogg's understanding of the issue at the time was evidenced in the following passages of his cross-examination:

> I understood that Australian Unity were concerned with the numbers, the allowable numbers in the building permit.
>
> Did you understand that they wanted a maximum occupancy of 480 occupants?---I understood that it was something of that order, yes.
>
> .....
>
> You had a discussion with Australian Unity, did you not, about the effects of having the occupancy increased up to 480 maximum?---With Australian Unity and Peter Chenoweth.
>
> That discussion was about how it affected the fire ratings that the building had achieved, would you agree with that?---More particularly the last safety issues and fire egress and access.
>
> So stairwells, exits, things of that nature?---Yes.
>
> You were aware - pardon me. You were aware that as you increase the number of occupants in a facility such as this then understandably the fire safety measures are also similarly increased?---Yes.
>
> Australian Unity wanted to ensure that you had made allowance for increased fire measures in your 14 November report? ---No, that wasn't the issue.
>
> The issue was making sure that the building was fit for purpose.
>
> Yes?---And that the number of persons that would occupy the building would cater for the peak load times, in particular Mother's Day, Father's Day and Christmas.
>
> It follows, does it not, that if you increase the number of maximum occupants in the building then that has an impact, does it not, on the fire standards that need to be employed in the building?---Yes.
>
> And that obviously has a cost associated with it?---Yes.

237 However, at the time there were three possible positions with regard to occupancy numbers. They were as follows: the fire engineer's estimate provided by Integrated

Fire Services which nominated a maximum of 197 persons which in turn was adopted by the building surveyor Mr Van Ravenstein for the purposes of his Approved Alternative Solution permitted under the BCA allowing the central stairs not to be fire isolated; the signed operational memo regarding peak numbers signed by the AU Residential Services Manager and the AU National Aged Care Manager forecasting 435 persons; and the tentative view of Mr Chenoweth that

> in the absence of 'any other suitable means of assessing its capacity' and by making an assessment of the floor area of the building, the maximum number of persons deemed to be accommodated within the building in accordance with BCA Table D1.13 is 480. This was made up of 113 residents and 367 other occupants (staff, visitors, carers etc).

238 The opinion of Mr Chenoweth was only tentative, because what he in fact recommended as a course of action to resolve the issue in his 13 November letter was that

> …in consultation with Australian Unity, Integrated Fire Services and the RBS [the Registered Building Surveyor, Mr Van Ravenstein] be engaged to undertake a review of the total number of occupants as nominated in Section 4.1.1 of the Alternative Solutions Report dated 11 October 2007. The purpose of this review is to agree on the occupant numbers that will better suit the onsite needs of the Home and assist in providing a safe and well managed Home.

239 Indeed, Mr Chenoweth at the time had no issue with the isolation of the stairwell on the material before him at the time. This was reflected in his observation in the Update Report which was incorporated into the DCWC Assessment Report as Table 4.2 which relevantly stated under the heading "Comments and suggestion for resolution of matter", "Approved Alternative Solution has been issued by Hank Van Ravenstein to permit the central stair *not* to be fire isolated." [Emphasis added]

240 However no such consultation as recommended by Mr Chenoweth in his advice of 13 November 2007 ever in fact occurred, not at least prior to 14 November 2007.

241 Nevertheless, and in spite of the fact that Mr Chenoweth had no issue with the isolation of the stairwell, as reflected in the Update Report, Mr Hogg proceeded to accept Mr Chenoweth's tentative view as indicated in his advice to AU of 13 November, that the appropriate number of occupants should be 480. This figure

happened to align with the figure that I find AU wanted as a maximum occupancy following the advice it had received from Mr Chenoweth in his letter.

242 So much was clearly demonstrated on 14 November 2007 by the email from Ms Low to Mr Hogg of 4.54 pm which was sent within 8 minutes of the receipt of Mr Hogg's "Final Report" at 4.46 pm. The email from Ms Low said, "Tim, how does this deal with the issue of maximum number of people on site?" This email clearly reflected the anxiety of AU that the DCWC Assessment Report reflect its proposed occupancy figure of 480 persons, which I find was a central focus of concern for it at that time.

243 Ms Low subsequently telephoned Mr Hogg. Although Ms Low recalled in her evidence that the number of people on site was an issue with her client AU, she had no recollection of the actual numbers of people that were under consideration.

244 However, I accept the evidence of Mr Hogg on the question when he said that Ms Low asked him how his report dealt with the maximum number of people on site being 480 occupants. I also accept his evidence that he replied by saying that he had dealt with it because he had allowed $600,000 for the isolation of the main stairwell and that Ms Low appeared to be content with that response.

245 The substance of the conversation between Ms Low and Mr Hogg is reflected in Ms Low's file note of the conversation which notes: "No of people on site? How is this dealt with? From P Chenoweth's letter report, need new central fire if more people (P 1.3 of Peter Chenoweth's Report). He has allowed for $600 K – included in the high risk items". Ms Low confirmed in cross-examination the "he" referred to in her note was a reference to Mr Hogg. Ms Low also confirmed that she appreciated by the time she had this telephone conversation on 14 November 2007, that Mr Hogg had allowed $600,000 to reconstruct the main staircase to fire insulate it. I infer from Ms Low's file note that Mr Hogg told her in the telephone conversation in response to her question that, based on Mr Chenoweth's letter of advice of 13 November 2007, work needed to be done to build a new central stair to fire insulate it, and this had become necessary

because more people were to be on site, compared with the 197 allowed for by the fire engineers as set out in paragraph 3 on the first page of his letter.

246 I find that Ms Low, in asking Mr Hogg as to how his report dealt with the maximum number of people on site being 480 occupants, was acting within her instructions from her client AU at the time to the effect that, adopting the tentative advice of Mr Chenoweth, it wanted the maximum number of occupants to be regarded as 480 in number, and that this was to be reflected in the DCWC Report.

247 I further find that Mr Chenoweth, in sending his email at 7.38 pm on 13 November 2007 to Ms Low, copying Mr Morgan and Mr Hogg, containing his letter of advice of the same date concerning occupancy numbers, was acting within the instructions of AU to provide such information to Mr Hogg on the eve of him finalising the DCWC Assessment Report.

248 I further find that Mr David, in sending his email at 10:55pm on 13 November 2007 to Mr Chenoweth and Ms Low copying Mr Morgan and Mr Hogg regarding occupancy numbers for the Facility and offering to provide a "signed operational memo regarding peak numbers signed by our site and national manager", was acting on behalf of AU. Mr David was also so acting when he sent his email on 14 November 2007 at 9:02am to Ms Low and copied to Mr Chenoweth, Mr Morgan, Mr Hogg and Mr McMillan regarding peak load numbers and attaching a memorandum from the residential services manager and national aged care manager of AU estimating the peak load of the Facility to be 435 persons.

249 These communications with Mr Hogg in the final days of the preparation of the DCWC Assessment Report were orchestrated by AU and calculated to influence him in the manner in which he undertook his assessment. The purpose behind the communications was clear. It was information which was intended by AU to be taken into account by Mr Hogg and was considered by it to be highly relevant to his assessment. There was no other purpose in providing Mr Hogg with the information regarding peak occupancy numbers at this time.

250 In contrast, there was no communication with 500 Burwood in relation to these matters, and it was denied any input into the process for Mr Hogg to consider. The information provided to Mr Hogg, which it was expected he would act upon in formulating his assessment, was therefore all one way

251 Mr Hogg succumbed to AU's influence. He declined to accept the finding of Mr Chenoweth that there was no issue with the isolation of the stairwell based on the Approved Alternative Solution issued by the person authorised to make such a determination, the building surveyor Mr Van Ravenstein, which in turn was based on the assessment of the fire engineer.

252 The Approved Alternative Solution issued by the Building Surveyor, Mr Van Ravenstein permitting the central stairs not to be fire isolated, was the product of the "deemed to satisfy" requirements of the BCA prepared by Integrated Fire Services Pty Ltd and signed by the fire safety engineer, Mr Paul Verheijden dated 11 October 2007. This in turn was certified by the registered fire safety engineer Mr Steven Kip. A certificate of compliance was issued dated 12 October 2007. A schedule included a reference to fire safety issues relating to the central stairs.

253 Instead, Mr Hogg chose to ignore the Approved Alternative Solution issued by the Building Surveyor, Mr Van Ravenstein, supported by the certification of the fire safety engineer, and indeed the Update Report on the issue, in favour of the tentative view of Mr Chenoweth reflected in his advice of 13 November, which was adopted by AU.

254 Mr Hogg rejected the Approved Alternative Solution of the Building Surveyor, Mr Van Ravenstein, in favour of costing the fire insulation of the central stairs as a high risk item, resulting in his assessment of $600,000 in capital expenditure.

255 It is to be noted that, as things ultimately turned out, the central stairs in the Facility remains unaltered in its final design and has never been fire-isolated, confirming that capital works for this purpose were not necessary.

Conclusion as to Actual Bias Allegation

256 The complaint made by 500 Burwood in relation to the exchanges described above is not that they reveal a want of procedural fairness or natural justice. The complaint is that the evidence reveals that the DCWC assessment was not carried out impartially: the DCWC assessment was treated by Mr Hogg as work performed for AU as DCWC's client.

257 Three principle matters work to establish that actual bias infected the DCWC Assessment Report:

(a) Mr Hogg invited and accepted modifications to the DCWC assessment proposed by Mr Morgan of AU;

(b) Critically, Mr Hogg also ensured that the assessment would make provision for an amount of $600,000 to cover capital works which CH Group had previously judged to be unnecessary, and in circumstances where, in the words of Mr Chenoweth, "the matter was finished as far as we were concerned"; and

(c) Mr Hogg did not consider it important or appropriate at any stage to consult with 500 Burwood in relation to the contents of the successive drafts which he discussed with Mr Morgan of AU. For example, Mr Hogg did not provide 500 Burwood with a copy of his assessment on 14 November 2007.

258 I make this finding after taking into account, as AU pointed out in its submissions, the fact that Special Condition 14.5(a)(ii) of the Contract provided that "the Purchaser *may* provide the Vendor with a copy of the Quantity Surveyor's assessment of the Completion Cost". There was therefore no obligation on the part of the appointed Independent Quantity surveyor to provide a copy of the report to 500 Burwood. In any event, 500 Burwood's then solicitors received a copy of the DCWC Assessment report by email the day after it was produced on 15 November 2007.

259 I have also taken into account the facts relating to Mr Hogg receiving from Mr Morgan of AU specialist contractor quotations (including carpet, plumbing and communications systems) on 13 November 2007, and suggested changes to some

items in the report on 14 November 2007, again from Mr Morgan. This included scope clarifications and assessment of some 12 items. However, as observed by AU, this had an effect which ultimately reduced Mr Hogg's assessment by $220,167. The acceptance by Mr Hogg of Mr Morgan's input was not, in the circumstances, proof of actual bias. Rather the conduct was equally consistent with Mr Hogg attempting to produce a report which was as accurate as possible within the limited time frame open to him.

260 I also take into account the accepted legal position that onus on the party alleging bias is a heavy one. Actual bias or partiality must be demonstrated in order to impugn the determination, the appearance of partiality is not sufficient even if made out. The requirement for 500 Burwood to prove actual bias and satisfy this standard of proof was common ground between the parties.

261 Nevertheless, and after taking into account each of these factors, both individually and cumulatively, I am satisfied that, in addition to the appearance of partiality, which has been clearly established by the evidence, the allegation of actual bias has been sustained. The evidence marshalled by 500 Burwood is sufficient to discharge the heavy onus placed upon it to the requisite degree.

262 A finding of actual bias involves proof that the decision-maker is so disposed towards one party that he does not, or is not able to, bring an impartial mind to the resolution of the question that he is required to decide. [36] As observed by Pembroke J in *McGrath v McGrath*

> [c]ases of actual bias are understandably rare. Even rarer must be a finding of actual bias against a person who is either not a party to the proceedings, or is not given the opportunity to be heard and defend himself. [37]

263 I am positively satisfied that Mr Hogg was diverted from carrying out his duty to produce an assessment on its merits under Special Condition 14.5 of the Contract by

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36 *Bahonko v Moorfields Community* [2012] VSCA 89 [25], citing *SCAA v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 688 [36]; McGrath v McGrath [2012] NSWSC 578 per Pembroke J [16].

37 *McGrath v McGrath* [2012] NSWSC 578 [16].

favouring AU over 500 Burwood. There is evidence, which I accept, that he yielded to the influence of AU in a manner that demonstrated actual bias and that he produced an assessment which was in AU's favour, in significant part, as a direct result of that influence.

264 In particular, I am satisfied, from the conduct illustrated by the preparation of the DCWC Assessment Report relating to the fire isolation of the central stairs, which was a major component of the overall cost assessment, that Mr Hogg was so disposed towards AU that he did not, or was not able to, bring an impartial mind to the resolution of the question that he was required to decide. Acting under the influence of AU and its advisers, he rejected the approved Alternative Solution of the Building Surveyor, Mr Van Ravenstein, in favour of costing the fire insulation of the central stairs as a high risk item, resulting in his assessment of $600,000 in capital expenditure. This occurred as a direct result of the meeting of 12 November 2007 with representatives of AU and its advisers, and the letter dated 13 November from Mr Chenoweth as to occupancy numbers which was produced as a result of that meeting and forwarded to Mr Hogg. Had it not been for this conduct, Mr Hogg would have been in a position to accept the recommendation of the CH Group in the Update Report on the issue, and regard the question of fire insulation of the central stairs as having been resolved. Instead, he rejected the Update Report on the matter and allowed a capital cost of $600,000 to be added to his total cost to complete, with a consequent purported reduction in the purchase price payable to 500 Burwood by that sum.

265 It follows that the allegation of invalidity on the grounds of bias or lack of impartiality has been made out.

266 However, in making this finding, nothing adverse is to be taken to have been said about the conduct of Mr Hogg or DCWC. The competence of these persons as expert quantity surveyors is not in question. They are highly experienced and skilled in carrying out their professional duties and assignments. Rather, the error exposed in this case was brought about by a failure to fully and adequately bring to their

attention and explain the full content of their duties under the Contact and at common law in carrying out the contractual assessment and how they should go about carrying out their assignment in compliance with those standards in the circumstances of this case.

Assessment in Accordance with the Contract

Legal Principles

267 The circumstances in which a court will intervene to overturn an expert determination, where the assessment is undertaken pursuant to a contractual mechanism, are very limited.

268 In *Beevers* Dodds -Streeton J outlined the applicable principles in the following terms:

> Historically, there has been a considerable degree of diversity in judicial identification of the deficiencies or flaws sufficient to vitiate an expert valuation. The fundamental principle endorsed in modern Australian authority is that an expert valuation will be binding if it is within the terms of the contract. Conversely, if an expert valuation can be said to depart from the terms of the contract, it will invite curial review and intervention. The fundamental principle is very general, and its application will, in each case, depend on the terms of the particular contract. The decided cases provide guidance on the construction of a contract under which an expert is appointed to determine a value or price. An expert's determination on discretionary matters is not ipso facto immune from review, but where, by the contract, such matters are entrusted to the expert without the prescription of criteria or restrictions, whether express or implied, it has frequently been inferred that the parties intended to be bound by the expert's bona fide judgment, even if it is in some way erroneous. On the other hand, it has been inferred that the parties would not intend to be bound by gross errors of objective fact or mechanical calculation. Further, the expert's determination may fail to satisfy a term of the contract because, when construed in context, the term is held to bear a special meaning which was not addressed. [38]

269 Recently, in *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* ("*TX Australia*") Brereton J described the potential scope of the enquiry, in a case such as the present, in the following terms:

> In *Legal & General Life of Aust Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, McHugh JA recognised, and it has repeatedly been accepted, that the fundamental question is whether the exercise performed in fact satisfies the terms of the contract so as to make the determination binding. Absent fraud or collusion, a valuation is binding if it was made in accordance with the contract,

38 *Beevers v Port Philip Sea Pilots Pty Ltd* [2007] VSC 556 [295].

> and if so it is beside the point that it proceeded on the basis of error, or was a gross over or under value, or took into account irrelevant considerations [*Legal & General Life of Aust Ltd v A Hudson Pty Ltd*, 335-336 (McHugh JA); *Holt v Cox* (1997) 23 ACSR 590, 596 (Mason P)]. This does not mean that a valuation will stand regardless of error; it depends on the terms of the contract [*Holt v Cox*, 597 (Mason P)]. Accordingly, the question is whether the Expert's determination binds the parties in accordance with their contract, and that depends on whether the Expert has performed the task allocated him by the contract, in a way that the contract makes binding on the parties. [39]

270 In *Legal & General Life of Aust Ltd v A Hudson Pty Ltd ("Legal & General")* McHugh JA held[40]:

> While mistake or error on the part of the valuer is not by itself sufficient to invalidate the decision or the certificate of the valuation, *nevertheless the mistake may be of a kind which shows that the valuation is not in accordance with the contract*. A mistake concerning the identity of the premises to be valued could seldom, if ever, comply with the terms of the agreement between the parties. But a valuation which is the result of the mistaken application of the principles of valuation may still be made in accordance with the terms of the agreement. In each case, *the critical question must always be: Was the valuation made in accordance with the terms of a contract?* If it is, it is nothing to the point that the valuer may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into account or has failed to take into account matter which he should have taken into account. The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract. [41]
>
> [Emphasis added]

271 Accordingly, the DCWC assessment contained in the DCWC Report may not be set aside by reason of error, such as a factual or arithmetic error, even if, in some cases, that error resulted in a "gross over or under value" where it was otherwise made under the terms of and within the scope of the governing contractual terms.[42]

272 However, and conversely, an expert determination may be set aside where it has not been undertaken in accordance with the prescription contained in the contract under which the appointment of the expert was made.

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39 *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* [2012] NSWSC 4 [18].

40 *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* [1985] 1 NSWLR 314; applied in *Beevers v Port Philip Sea Pilots Pty Ltd* [2007] VSC 556, *Candoora No 19 Pty Ltd v Freixenet Australasia Pty Ltd* (No. 2) [2008] VSC 478, *Kenros Nominees Pty Ltd v Tipperary Group Pty Ltd* [2009] VSC 524 and *McGrath v McGrath* [2012] NSWSC 578.

41 *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* [1985] 1 NSWLR 314, 335-6.

42 *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* [1985] 1 NSWLR 314, 336.

273 The distinction between those circumstances which may justify setting aside an expert determination and those which will not, was considered in *Khayat Investments Pty Ltd v Winston Holdings Pty Ltd (No.2)*.[43] Martin CJ, with whom Newnes and Murphy JJ agreed, explained the test, in the context of a contractual appointment of an expert valuer under a lease, as follows:

> If the determination accords with the terms of the lease, it binds the parties even though it might be the product of mistake or error. As McHugh JA observed in *Legal and General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314:
>
> 'By referring the decision to a valuer, the parties agree to accept his honest and impartial decision as to the appropriate amount of the valuation. They rely on his skill and judgment and agree to be bound by his decision (335).'
>
> However, if the determination of the rental payable does not accord with the lease agreement because, for example, it is not honest or is vitiated by collusion, or falls outside the scope of the provision in the lease because, for example, the valuer has assessed the wrong premises, the parties will not be bound, and one or other could seek a remedy setting aside the purported determination of the valuer, on the basis that it was not a valid determination under the lease. However, an error in the discretionary judgment of the valuer, or a mistake in the reasoning process, will not result in the invalidity of the determination unless it is of the limited kind to which I have referred, and which takes the purported determination beyond the scope of the powers conferred upon the valuer by the lease agreement (see also *Campbell v Edwards* [1976] 1 WLR 403, 407; *Jones v Sherwood Computer Services plc* [1992] 1 WLR 277, 287; *TXU Electricity Ltd v Commonwealth Custodial Services Ltd* [2003] VSC 88).[44]

274 In *TX Australia*, Brereton J formulated an appropriate test and identified the task required of the Court where an expert determination delivered under a contract is challenged, in these terms:

> [23] It is not in doubt that there will be an error of law, and that the determination will not be *binding, if the Expert misconceived his function, asked himself the wrong question or applied the wrong test* [*Ex parte Hebburn Limited; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416, 420 (Jordan CJ); *Avon Downs Pty Limited v Federal Commissioner of Taxation* [1949] HCA 26; (1949) 78 CLR 353, 360 (Dixon J); *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194, 208-209, [31] (Gleeson CJ, Gaudron and Hayne JJ)], as in that event, he would not have addressed himself to, nor performed, the task required of him by the contract.

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43 *Khayat Investments Pty Ltd v Winston Holdings Pty Ltd (No.2)* [2011] WASCA 196.

44 *Khayat Investments Pty Ltd v Winston Holdings Pty Ltd (No.2)* [2011] WASCA 196 [10] – [11].

> [24] Consideration of this ground requires analysis of two issues: first, what was the Expert's task; and secondly, what did the Expert actually do. [45]
>
> [Emphasis added]

275 Accordingly, and by way of a summary of the legal position, the DCWC assessment may be set aside if the Court determines that it did not comply with the exercise required by the Contract to be undertaken.

The DCWC Tasks Under the Contract

276 In order to determine whether or not the DCWC assessment contains an error of the kind which justifies an order that it be set aside, the precise task required of the expert required by Special Condition 14.5 of the Contract must first be construed.

277 In this case, the DCWC assessment was required satisfy the requirements of clause 14.5 which required the Quantity Surveyor (as defined) to assess

> the cost of carrying out the works necessary to cause the Certificates to be issued and provided to the Purchaser ('Completion Cost').

278 The expert task is that provided for in Special Condition 14.5, which in turn is informed by Special Condition 14.1. The requirement to undertake the Special Condition 14.5 costing assessment was by reference to what needed to be done to obtain the "Certificates" described in Special Condition 14.1. This exercise required an assessment of the costs involved:

(a) to obtain from the Licensed Building Surveyor, the Occupancy Permits in respect of the Facility and the Living Units;

(b) in carrying out the work needed to obtain certificates of practical completion for the 112 bed Facility and the eight Living Units;

(c) in carrying out the work needed to obtain a certificate verifying that the 112 bed Facility and the eight Living Units complied with the relevant provisions of the BCA;

---

45 *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* [2012] NSWSC 4 [23] - [24].

(d) to obtain a certificate of final inspection issued by the Licensed Building Surveyor; and

(e) to obtain a certificate by the Independent Consultant, being CH Group, that the Facility is a building which complies with the Class 9C classification requirements of the BCA.

279 Confining the task to the Certificate to be issued by CH Group in respect of the 9C requirements of the BCA, Special Condition 14.1(A)(e) of the Contract provided that settlement was to occur, if this was the latest event in the list provided under 14.1(A):

(e) 14 days after the Vendor has provided the Purchaser with a certificate by the Independent Consultant that the Residential Aged Care Facility is a building which complies with the Class 9C classification requirements of the Building Code of Australia;

280 Special Condition 14.5 then provided that the independent Quantity Surveyor was to assess the cost of carrying out the works necessary to cause the Certificates (including the certificate by the CH Group in respect of 9C BCA compliance) to be issued and provided to the Purchaser, AU. In other words, what total cost would need to be incurred for the CH Group to issue its certificate. This opens up the further question as to what was required to be done in order for the CH Group to issue its certificate, including what documentation was necessary for this purpose, and if it was not in existence, the costs of preparation of the necessary documentation.

The CH Group Reports

281 In order to appreciate the context in which the DCWC Assessment Report was produced, it is first necessary to consider the circumstances in which that work was undertaken. An important element was the work undertaken for AU by the CH Group.

282 During 2007 at the request of the first defendant, CH Group prepared four reports regarding the extent to which the Facility within the Development complied with

building classification 9C of BCA. The reports were prepared based on a desktop assessment carried out by Mr Bailey and reviewed by Mr Chenoweth. To assist with preparation of these reports, Mr Chenoweth visited the site to conduct visual inspections of the works. These reports by CH Group were in addition to an earlier report prepared by CH Group in April 2007 at the request of Savills, the purpose of which report was to assess the architectural plans and documentation for the Facility against the 1999 Aged Care Certification Assessment Instrument (ACCAI).

283 The first report prepared by CH Group for AU, was dated 6 June 2007. This report discussed the extent to which the Facility did not comply with the applicable town planning permit for the development (the "CH Group town planning report"). Mr Chenoweth gave evidence that compliance with the town planning permit is a class 9C issue as any building which does not comply with the relevant town planning permit, cannot comply with the BCA and therefore cannot comply with class 9C.

284 The CH Group town planning report was provided to all parties. The Vermont External Team meeting Minutes dated 7 June 2007 record that the CH Group town planning report was tabled at the meeting and a copy distributed to all those in attendance. The Vermont External Team meeting Minutes dated 29 June 2007 also record that Mr Chenoweth provided a copy of the CH Group town planning report to 500 Burwood.

285 The second report prepared by CH Group was dated 29 June 2007. This provided a desk top assessment of whether the design of the Facility within the Development complied with class 9C of the BCA.

286 The report dated 29 June 2007 was provided to AU. Mr Philip David of AU provided a copy of the report and other documents to Mr Joel Freeman of 500 Burwood under cover of a letter dated 8 August 2007. The content of the report was also the subject of discussions between Mr Chenoweth, Mr Van Ravenstein and a representative of Napier & Blakeley during a site inspection attended by all three on 15 October 2007.

287 The third report prepared by CH Group was dated 17 October 2007 (the "17 October report"). This report was prepared as an update to the 29 June 2007 report and was based on discussions between Mr Chenoweth of CH Group, Mr Van Ravenstein and the representative of Napier & Blakeley during the site inspection on 15 October 2007.

288 The fourth and final report prepared by CH Group was dated 9 November 2007 and was an update to the 29 June 2007 report with reference to Stage 6 Building Permit documentation provided to CH Group by Axiom Architects on 26 October 2007 (this was the "Update Report").

Content of the DCWC Report and Assessment Dated 14 November 2007 (the "DCWC Report")

289 Mr Hogg completed his assessment of completion cost by his report dated 14 November 2007.

290 The Executive Summary of Mr Hogg's DCWC Assessment Report stated as follows:

> EXECUTIVE SUMMARY
>
> The independent assessment of the Cost to Complete is as follows:

Completion Item		Cost to Complete	Total Cost to Complete
1.0	Stage 1 Works		
1.1	Aged Care Lease	$995,923	
1.2	Single Storey Unit – Double Garage	$36,800	
1.3	Single Storey Unit – Single Garage	$36,800	
1.4	Landscaping/paving	$37,950	
1.5	Infrastructure/Land development costs	$147,200	
1.6	Stage 1 Project Costs	$121,783	$1,376,456
2.0	Independent Contractor & Consultants to complete		$206,468
3.0	9C Compliance Reporting		$93,000

4.0	Risk Adjusted Estimate for 9C Compliance		
4.1	High risk items	$661,280	
4.2	Medium risk items	395,000	
4.3	Low risk items	$130,000	$1,186,780
	Total Stage 1 Works Cost to Complete		$2,862,704/
5.0	Additional Items		
5.1	Provision for retention on completed works (5% of $13M)		$650,000
5.2	Cost to Complete Report preparation costs		$6,000

291 The total cost to complete Stage 1 of the Development was therefore calculated by Mr Hogg to be $2,862,704.

292 In that figure, Mr Hogg allowed for costs to finish incomplete works, rectify defective works, costs payable to a new builder and contractors taking on the works, and obtaining documentation and certification from CH Group that the building complied with classification 9C under the BCA.

293 Mr Hogg's Executive Summary shows that the two largest costs incorporated in the final "cost to complete", were the costs to finish the works for Stage 1, and the "Risk adjusted Estimate for 9C Compliance".

294 In the Project overview section of his report, Mr Hogg stated as follows:

> "Project Overview
>
> Australian Unity is proposing to purchase Vermont Aged Care development at 502-514 Burwood Highway, Vermont South. Donald Cant Watts Corke (DCWC) has been requested to prepare a Cost to complete report for the Stage 1 works.
>
> The proposed project comprises four separate stages. The initial stage (Stage 1) is approximately 92% complete.

We understand that there has been some preliminary infrastructure works undertaken for Stages 2-4 however, all other works in these stages remain incomplete.

On completion, the project as currently proposed will comprise:

- 110 No Aged Care Beds
- 72 No Domestic Units
- 72 No Apartments
- 1,403m2 Community Facility

on a site of 37,696m2.

Australian Unity has requested an independent report detailing:

- The Cost to Complete for Stage 1 works
- The cost for an independent builder and consultant team to complete Stage 1 works.
- The cost of independent consultant reporting to achieve 9C compliance
- A risk adjusted assessment of cost to achieve 9C compliance
- A value of retention applicable to Stage 1 works completed to date
- A cost to prepare this report"

295 Mr Hogg's report went on to explain the methodology employed in preparing the report in the following terms:

"METHODOLOGY

DCWC visited the site on 8 November 2007 and undertook a detailed audit of all works required to complete Stage 1.

It was clear from the site inspection that considerable works remained outstanding in order to achieve practical completion.

The assessment of the Cost to Complete incorporates a number of key components:

1. The estimated Cost to Complete Stage 1 Works based on the incumbent D & C Contractor taking the project through to completion.

2. The cost associated with employing an independent contractor and consultant team to complete the Stage 1 works.

3. The cost of independent consultant reporting to achieve 9C compliance. This information should be available from the incumbent D & C Contractor, however to date considerable compliance documentation remains outstanding. Refer to CH Group report in Appendix B.

4. A risk assessment of the cost to achieve 9C compliance. This has been done by costing each individual items raised in the CH Group report (Appendix B) providing a risk rating (H, M, L) and applying a likelihood factor according to the risk rating.

For example:

H = 80% likelihood of occurrence

M = 50% likelihood of occurrence

L = 20% likelihood of occurrence

1. The application of the likelihood factor to the capital cost have resulted in a financial risk assessment."

296 In Appendix B of his report, Mr Hogg utilised Update Report which had been provided to him in electronic "Word" format by the CH Group on 12 November 2007. Mr Hogg added a further three columns titled "DCWC Assessment" on the right hand side of the CH Group's table. Those three columns were titled "Compliance Reports Cost Estimate", "Capital Works Estimate" and "Risk". The first two longitudinal rows of the table in Appendix B to the DCWC Assessment Report therefore presented as follows:

					DCWC Assessment		
BCA Clause	Further Documentation /Information	Issue addressed Y/N	Findings of Stage 6 Building Permit Documentation review	Suggestion for resolution of matter	Compliance Reports Cost Estimate	Capital Works Estimate	Risk

297 In the "Compliance Reports Cost Estimate" column, Mr Hogg set out his cost estimate for AU to obtain documents which evidenced that the relevant works for the BCA item identified by CH Group, could be certified as being BCA class 9C compliant. Throughout Appendix B, these costs were estimated by Mr Hogg to be between approximately $500 and $5,000 per item. The total of this column in Appendix B was $93,000. This amount was allowed in full by Mr Hogg in his calculation of the total Cost to Complete on the basis that compliance reporting would need to be completed

in every instance before it was known whether it was necessary to carry out the capital works.

298 Mr Du Chateau gave evidence, which I accept, that it was reasonable to understand that the allowance for each item in this column would cover the costs associated with:

(a) Obtaining documentation from the relevant specialist (eg: a fire engineer evidencing compliance with BCA class 9C requirements;

(b) Obtaining certification from CH Group that the work complies with class 9C; and

(c) Project management of the process of obtaining such documents and certification.

299 Under the heading "Capital Works Estimate" Mr Hogg provided a cost estimate to complete the capital works identified by CH Group as one or more of the options of works required to achieve what was necessary in terms of 9C compliance. When assessing the cost of works, capital works being one approach to the "works" required to satisfy the BCA, the satisfaction of which was "necessary", under the "Risk" heading, he assessed the likelihood that such works would need to be carried out by reference to "H" for high risk, "M" for medium risk, and "L" for low risk.

300 Mr Hogg gave evidence that he made this assessment based on his own observations of the work completed on site, and based the information in the Update Report and Mr Chenoweth's discussion with him at the meeting on 12 November 2007 of various items in that report.

301 The risk adjusted total cost for each of the High, Medium and Low items were then added together by Mr Hogg and noted at the end of Appendix B and in Mr Hogg's Executive summary earlier in his report.

Mr Hogg's Preparation of the DCWC Report and Assessment dated 14 November 2007

302 There were particular difficulties with the Project for the appointed quantity surveyor undertaking the brief. In part this was caused by the fact that the building contract in place was a design and construct contract, and the design documentation was not complete at the time when the appointed quantity surveyor set about the appointed contractual task. Further, there were a number of unresolved construction issues which remained outstanding. These called for alternative solutions to be considered. The exercise for the quantity surveyor was therefore far from straight forward.

Whether DCWC Carried out the Contractual Task

303 The second question involves a determination as to whether DCWC did in fact "assess the cost of carrying out the works necessary to cause the Certificates to be issued and provided to the Purchaser ('Completion Cost')" as it was required to do pursuant to the Special Condition.

304 A question raised by the facts, central to the resolution of the dispute on this issue, is this: given the state of the documentation and the level of unresolved building issues on the Project as they were in mid-November 2007, as reported in the CH Group report of 9 November 2007, and given the contractual requirement for the appointed quantity surveyor to assess the cost of carrying out the works necessary to cause a 9C compliance certificate to be issued by the CH Group and provided to AU, and for it to do so in the limited time allowed under the Contract, was the appointed Quantity Surveyor obliged to do the best he could with the information available to him, and was the 14 November DCWC assessment such that, in the circumstances, it should be accepted as complying with the Contract? Or was the state of the information such that it was not possible to perform the assessment task as directed by the Contract, in which event the DCWC assessment did not comply with the Contract and the contractual mechanism failed? If the second scenario is accepted, the consequence would be that the DCWC assessment must be set aside.

305 The total cost to complete the works in accordance with Special Condition 14.5 of the Contract was assessed by Mr Hogg at $2,862,704. This total cost incorporated a number of key components:

(a) the estimated cost to complete Stage 1 Works based on the incumbent D&C Contractor taking the project to practical completion - $1,376,456;

(b) the costs associated with employing an independent contractor and consultant team to complete the Stage 1 Works - $206,468.00;

(c) the cost of an independent consultant reporting to achieve BCA 9C compliance - $93,000.00; and

(d) the cost to achieve 9C compliance, calculated not as an absolute cost based on strict compliance with 9C of the BCA, but building into the assessment the prospect that lesser works and actions than itemised may be sufficient to achieve 9C compliance certification - $1,186,780.

DCWC's Adoption of the CH Group's Update Report

306 The Update Report comprised a significant component of the DCWC Assessment Report. The total "Cost to Complete" in the DCWC Assessment Report amounted to $2,862,704. The risk adjusted assessment undertaken by Mr Hogg based on the CH Report, which was included in the total figure, amounted to $1,186,780, comprising $661,280 in respect of assessed "High risk items"; $395,000 in respect of assessed "Medium risk items"; and $130,500 in respect of assessed "Low risk items". The DCWC Assessment Report, to the extent that it was founded upon the CH Report, in total amounted to more that 41 percent of the total "Cost to Complete" assessment.

307 As earlier described, in April 2007, AU retained CH Group to prepare a report assessing whether the drawings and the plans for the Development complied with Department of Health and Ageing Certification Assessment Instrument.

308 Subsequently, in around mid-June 2007, AU retained CH Group to undertake a desktop review to assess whether or not the drawings and the plans for the

Development complied with the 9C classification. CH Group completed that report using the same documents as it had used to compile its earlier report in April 2007.

309 In 29 June Report, the CH Group identified documents which were not available to enable them to assess whether or not there was compliance with the 9C classification in respect of a particular item. Mr Bailey explained in cross-examination:

> Insofar as you made a request for documents and they were not made available to you by Australian Unity your report just notes that the documents were not available, is that right?---Yes.
>
> Yes?---Yes.
>
> And because the documents were not made available to you that was the end of your inquiry so far as your compliance report was concerned, is that right?—Yes, because it was - exactly right, as we said, it was a document assessment task based on the permit documents that we've been provided.
>
> Thank you. Do you recall that the original report that you provided for 9C compliance as you were instructed by Australian Unity was dated 29 June 2007, is that right? ---Yes."
>
> In June 2007, Mr Chenoweth and Mr Bailey completed the documentation assessment culminating in CH Group's report dated 29 June 2007. Mr Bailey described the documentation assessment task as that of identifying documents which were not available to the CH Group but which were required in order to assess whether the 9C classification compliance had been achieved or not. CH Group updated that assessment in November 2007 and produced the CH Group Update Report dated 9 November 2007 as a summary of its findings.

310 The Update Report recorded the extent to which the documentation which had been identified as wanting in the 29 June Report was available or not available. Both Mr Chenoweth and Mr Bailey described this task as a "progress report". Mr Bailey gave evidence about the progression from the 29 June Report to the Update Report where he said:

> Then subsequently was that report updated by you?---It was - there was a status report provided which was similar but different and that was in - I think the first one we did was in October 2007.
>
> When you're referring to a status report that is really just providing an update about whether you had received the documents you'd ask for or not, is that right?---Or whether issues had been addressed, yes.
>
> Or whether issues had been addressed?---Yeah.

When you say whether issues had been addressed, could they be addressed in this fashion, that a document had been provided, a drawing say for example? Let's pick something, what about the width of doorways, for example?---Yeah, exactly. They were addressed by documentation that was provided to us, whether that was additional drawings or documents that hadn't been, yeah, seen before, whether it was - yeah, it was a continuous document assessment task so that it was only ever updated based on additional documentation that was provided.

So that was an update you did in October and then there was a further update you did to that report in November?---Yes.

Is that correct?---Yes.

You prepared a report dated 9 November 2007, is that correct? ---Yes.

And that 9th report update of 2007, that updated the previous report which you provided which was the October 2007 report?---Yes.

And again what you were doing is updating the report based on the documentation that had been provided to you, is that right?---That is correct."

311 Both Mr Chenoweth and Mr Bailey explained that the CH Group's 29 June Report and its Update Report were in the nature of an audit of compliant documentation.

312 There were three designated categories contained in the Update Report which mirrored and updated similar categories in the tables in the 29 June Report:

(a) Table 4.1 "additional areas not assessed and seeking further documentation". This category referred to 9C Compliance not achieved and not assessed because documentation identified as required in the 29 June Report in order to enable that assessment had not been provided in the intervening 5 month period. The first column of the table relates to the clause of the BCA in question and the second column records the status of the Stage 6 building permit documentation as assessed by the CH Group. In the third column, headed "Suggestion for resolution of matter", CH Group describes the documentation required to make good the deficiency (if any) identified from its assessment of the permit documentation and suggests, apparently in the alternative, "If AU is unsuccessful in obtaining complying documentation", that AU undertake certain capital works to ensure compliance with the 9C classification.

(b) An example of table 4.1 is set out below (the first five columns comprise the content prepared by CH Group, while the last three columns consist of the DCWC assessment which was later added):

					DCWC Assessment		
BCA Clause	**Further Documentation / Information**	**Issue Addressed Y/N**	**Findings of Stage 6 Building Permit Documentation Review**	**Suggestion of Resolution of Matter**	**Compliance Reports Cost Estimate**	**Capital Works Estimate**	**Risk**
Part B1	(a) Obtain structural certification of the design of the balustrading system employed.	N	Structural Engineers Certification not provided. It is reasonable to expect that this documentation should have been provided prior to the issuing of the Stage 6 Building Permit.	1. Obtain Structural Engineer's Certification of balustrade system employed, or 2. If AU is unsuccessful in obtaining complying documentation then to verify compliance the following will apply. Remove balustrading and replace with known structurally compliant balustrading.	$5,000	$150,000	M
Cl. 10	(a) Provide the fire hazard properties of the materials and surface finishes that indicate they achieve the BCA requirements.	N	Manufacturer's Specification for floor and wall finish not provided. It is reasonable to expect that this documentation should have been provided prior to the issuing of the Stage 6 Building Permit.	1. Obtain fire hazard test certificates for floor and wall surface finishes, or 2. If AU is unsuccessful in obtaining complying documentation then to verify compliance the following will apply. Remove installed floor and wall finishes and replace with known compliant floor and wall finishes.	$1,000	$300,000	L

(c) Table 4.2 items being "suggested Modifications for Consideration." The stated subject of table 4.2 was suggested modifications to the Building Appeals Board of Victoria ("BAB") for the consideration of AU. The purpose of this table is explained in the introductory section of the 29 June Report as follows:

> The suggested application to the Building Appeals Board and 'possible solutions for consideration' detailed in Tables 4.2 and 4.3 of Section 4 of this report are *for consideration by the Relevant Building Surveyor and the Vendors [sic] design team*.
>
> [Emphasis added].

(d) In relation to each issue in the table 4.2 which is said to be unresolved (signified by the "N" in the third column), CH Group includes the following comment in the fourth column: "It is reasonable to assume that this issue should have been resolved prior to the issuing of the Stage 6 Building Permit

approval." In addition, in relation to every unresolved item which has not been the subject of a documented approved alternative solution, CH Group sets out two alternatives in the fourth column. The first alternative is to obtain a modification from the Building Appeals Board, and the second alternative is to undertake certain capital works.

(e) An example of one such issue is the distance of travel to a point of choice for fire exit. In some cases, as the Update Report stated, these items had been dealt with in the meantime by Mr Van Ravenstein , 500 Burwood's building surveyor, approving an Alternative Solution in lieu of an application for a modification. In other cases neither a modification nor an Alternative Solution approval had been obtained as at 9 November 2007. In the case of the non-fire isolated central stair an application to BAB had been made for a modification, as recommended in the 29 June Report, but no decision had yet been made. In the meantime Mr Van Ravenstein had approved an Alternative Solution, not based on the Contract plans, but based on the Level 4 plan version 1-06 (rev K) and based on an assumed maximum occupancy of 197 persons.

(f) Table 4.2 is, like table 4.1, a documentation assessment, albeit one which is expressed to relate to documented alternative solutions. The significance of the Building Appeals Board modification in each case is that such a modification would overcome the reported lack of documentation (and thus constitute the documentation required by CH Group to indicate compliance with the clause of the BCA in question).

(g) An example of table 4.2 is set out below (the first five columns comprise the content prepared by CH Group, while the last three columns consist of the DCWC assessment which was later added):

				DCWC Assessment		
BCA Clause	**Further Documentation / Information**	**Issue Addressed Y/N**	**Suggestion of Resolution of Matter**	**Compliance Reports Cost Estimate**	**Capital Works Estimate**	**Risk**
F2.8	(d) Seek a	N	The Stage 6 Building Permit has a condition that the	$2,500	$5,000	L

	modification from the Building Appeals Board to permit the use of flushing rim sinks in lieu of slop hoppers with a flushing apparatus and grating.		successful granting of a modification from the Building Appeals Board or Alternative Solution for the deletion of slop hopper or other device for the safe handling of and disposal of liquid and solid waste and an appliance for the disinfection of pans for each level when an alternative system is used, is to be obtained. No Alternative Solution has been documented as being approved by Hank Van Ravenstein and no determination from the Building Appeals Board has been provided. It is reasonable to assume that this issue should have been resolved prior to the issuing of the Stage 6 Building Permit. 1. Obtain a successful modification from the Building Appeals Board to allow the use of flush rim sinks in lieu of slop hoppers with a flushing apparatus and grating, or 2. Install a slop hopper and an appliance for the disinfection of pans on each level as required by the BCA.			

(h) Item 4.3 "possible solutions for consideration" is the third category in the Update Report. The stated subject of table 4.3 is "possible solutions for consideration". In broad terms this category comprised further items where there was a lack of documentation evidencing 9C compliance identified by CH Group in the 29 June Report which remained unaddressed in or following the issue of the Stage 6 permit.

(i) However, a close examination of table 4.3 reveals the following: table 4.3 contains 4 columns: the first column relates to the BCA clause in question; the second specifies the possible solution (in the nature of a design amendment requiring capital works); the third indicates whether or not the issue has been addressed; and the fourth column sets out "comments and suggestion for resolution of matter". The fourth column is primarily concerned with available documentation:

(i) in relation to BCA clauses C2.5(b)(iv), C2.5 clause 3, D2.15, D3,2(b) and F2.4, each of the design solutions suggested in the fourth column are nominated as alternatives to documenting compliance;

(ii) in relation to BCA clauses D2.21, E1.4(a), E4.8 and VICH101.3, the fact that CH Group's report assesses the available documentation, and not compliance with the 9C classification, is apparent from CH Group's

recommendation that a site visit be undertaken as a means of determining compliance with the 9C classification in each case; and

(iii) in relation to BCA clauses C3.4 clause 3.2, D1.7(b) and (c), D1.10, D2.16, VicH101.4, E1.4(a), E2.2(a), E4.6, F4.4 and F4.5, CH Group has specified the nature of the documentation required in order to demonstrate compliance with the 9C classification but has not purported to assess the extent to which those clauses are satisfied or the work remaining to be done to achieve compliance.

(j) An example of table 4.3 is set out below (the first five columns comprise the content prepared by CH Group, while the last three columns consist of the DCWC assessment which was later added):

				DCWC Assessment		
BCA Clause	**Further Documentation / Information**	**Issue Addressed Y/N**	**Suggestion of Resolution of Matter**	**Compliance Reports Cost Estimate**	**Capital Works Estimate**	**Risk**
Vic.H101.1.4	(a) Install additional corridor rails leading to Rooms 1-94, 1-72, 1-111, 1-112, 2-43, 2-71, 2-131, 3-1, 3-41, 3-42, 3-22, 3-23 and 3-24. The handrails should also be located on the stair walls and along the east side of Hall 2-150. Additional lengths of hand rail should also be provided to sections of wall near cupboards.	N	It is reasonable to assume that this issue should have been resolved prior to the issuing of the Stage 6 Building Permit approval. 1. Document the installation of additional hand rails as suggested previously in our 9C Compliance Report of June 2007.	$1,500	$25,000	M

DCWC Report on 9C Compliance

313 Appendix B to the DCWC Assessment Report is the CH Group Update Report with additional columns added by Mr Hogg and populated as to cost and risk rating by him. The Update Report was prepared by Paul Bailey and reviewed by Peter Chenoweth of CH Group, the nominated "Independent Consultant" under the Contract. It updated an earlier detailed report prepared by CH Group on 29 June 2007, a copy of which had previously been provided to Mr Hogg. The CH Group Report as at 9 November 2007 set out the matters with which necessary compliance was required in respect of classification 9C of the BCA. It proposed alternatives to achieve the necessary certificates. Together with information provided by Mr Chenoweth at the 12 November 2007 meeting, the 9 November 2007 CH Report was relied upon by Mr Hogg in preparing his assessment as to what was necessary to satisfy CH Group, as the Independent Consultant, that 9C compliance had been achieved.

314 CH Group had not certified prior to 1 November 2007 that the Facility complied with 9C of the BCA.

315 There were two ways in which CH Group could have certified that the Facility complied with 9C of the BCA.

316 The first method would be based on detailed drawings and specifications which showed matters such as detailed dimensions and specified the detail of items, such as door handles and exit signs. In the case of the present Project, the first method could not be applied to all aspects of the building by reason that it was being constructed pursuant to a design and construct and not all the documentation was available at the time when the appointed Quantity Surveyor commenced his task.

317 The second method could only be implemented once the building was practically complete. That is, once the building had been completed, it could be assessed for 9C compliance. The second method could not be implemented because in November

2007, practical completion had not been achieved. Accordingly, there was no occasion or basis to assess the completed building for 9C compliance.

318 "Works" were defined in the Contract to mean the design and construction works required for the completion of the building. In circumstances such as the present where a Design and Construct Contract was being administered, costing of the works which were required to satisfy the Independent Consultant of what was "necessary" to be done to achieve 9C compliance involved at least two elements: first, costing of the physical construction works required; and second, costing of the provision of the necessary design and documentation required for construction.

319 This was overlayed by another element of importance. As at November 2007, a number issues remained unresolved. There were a number of ways to the parties to resolve these issues and it was not yet settled which course/s would be adopted. There was, therefore, uncertainty not only as to the manner in which the outstanding matters were to be resolved, but also the costs to be incurred in doing so, depending on the solution, or solutions if more than one, ultimately adopted.

320 Assessing the costs of achieving 9C compliance so as to cause CH Group to issue a 9C certificate, therefore called for a special approach to accommodate these uncertainties.

321 Not unlike undertaking a valuation, there may have been more than one method to carry out the assessment required by the Contract. As said by Dodds -Streeton J in *Beevers* in the context of considering a valuation of shares undertaken by an appointed expert:

> The methodology and the identification and treatment of relevant factors are left to the expert. The nature of the valuation indicates that it involves a discretionary judgment. There may be more than one valid method of assessing the fair selling value of the income shares, 'each giving widely different results, but each being reasonable.'[46] There are many uncertain subsidiary factors and contingencies, the determination of which also involves judgment, which may produce a wide range of different but legitimate opinions and decisions. [47]

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46 *WMC Resources v Leighton Contractors* (1999) 20 WAR 489, 496.

47 *Beevers v Port Philip Sea Pilots Pty Ltd* [2007] VSC 556 [296].

322 The method of assessment undertaken by Mr Hogg involved the following steps:

(a) assessing the cost of 9C compliance beyond the works required to achieve practical completion. This was assessed based on the identification of what was needed to satisfy 9C as set out in the CH Group report.

(b) this was followed by an itemised costing and then the application of a risk assessment by Mr Hogg to the capital works proposed as a method of satisfying what was needed for 9C compliance. This exercise in turn involved the following steps:

(i) taking as the starting point the Update Report so as to achieve 9C compliance, a copy of which (with added columns) is Annexure B to the DCWC Assessment Report;

(ii) Mr Hogg costed a number of the individual items required to achieve 9C compliance in accordance with the CH "suggestion for resolution of the matter" column in the Update Report;

(iii) Mr Hogg applied a risk rating (H, M, L)["High, Medium and Low"] to the cost estimated by him of carrying out the works and actions which would achieve the necessary 9C compliance. The H, M, L risk rating or "likelihood" factor applied by Mr Hogg to reflect his assessment of risk was stated in his Report to be as follows:

H = 80% likelihood of occurrence

M = 50% likelihood of occurrence

L = 20% likelihood of occurrence

(iv) he then discounted the full cost of the works and actions so as to reflect the risk that those works or actions may or may not all be required to achieve the necessary 9C compliance.

323 The application of the likelihood factor to the 9C suggested capital works had the consequence that if the full cost of implementing what CH had identified as the "suggestion for resolution" was $1,000, if Mr Hogg assessed the likelihood was "high" that $1,000 would need to be spent to achieve 9C compliance, he allowed $800. If he assessed a "medium" likelihood that $1,000 would need to be spent to achieve compliance he allowed $500, if his assessment of likelihood was "low", he allowed $200.

324 The work that CH Group actually did, as reflected in the Update Report was to identify what was necessary in order to comply with 9C requirements and then to suggest works which may be required in order to achieve compliance. The left hand column of the Update Report listed the relevant BCA clauses in which compliance was necessary. The Update Report was to be read together with the 29 June Report, as explicitly stated in the introduction to the Update Report. When the two reports are read in conjunction, it becomes apparent that what CH Group did was to detail what was necessary for 9C compliance and how it was anticipated that compliance could be achieved for each clause identified.

325 The following example serves to illustrate the CH Group approach:

(a) BCA clause D2.23 specifies that signs on doors is one item of 9C with which compliance is necessary.

(b) In the 29 June Report, CH Group describes the "deemed to satisfy" provision as follows:

> Signs on Doors
>
> Requires signs on smoke doors, and fire doors providing direct access to a fire-isolated exit, on horizontal exits, double-swing smoke doors and doors leading from fire isolated exits to a road or open space.

(c) CH Group found in its 29 June Report that:

> [t]he documentation provided does not indicate signage to be provided on smokedoors, fire doors or exit doors.

(d) Nevertheless, in order for 9C compliance to be achieved, CH Group identified a possible solution, (that is, works which may result in the necessary compliance being achieved) being to:

> [p]rovide details of signage to be provided on smoke doors, fire doors and exit doors for review.

(e) The Update Report reported that, five months later, the documentation suggested in the 29 June Report had not been provided. The Update Report repeated as a possible solution the provision of an approved Architectural Specification that included signage for smoke doors, fire doors and exit doors and noted that if unsuccessful in obtaining complying documentation, the further works to achieve necessary 9C compliance would be to install compliant signage.

(f) CH Group therefore identified both what 9C compliance required for signage and how 9C compliance could be achieved to satisfy clause D2.23 of the BCA. Mr Hogg of DCWC costed the works that needed to be done in order to achieve that compliance. He allowed $1,000 for compliance reports and assessed $20,000 as the allowance for capital works (if required). He rated the risk of those works being required to achieve necessary compliance as "medium".

Risk Based Assessments by Quantity Surveyors

326 I accept that risk based assessment is accepted practice in the area of quantity surveying, both in Australia and overseas. In June 2003, the Australian Institute of Quantity Surveyors published a paper titled "Project Risk Management in the Construction Industry: A Review". Under the heading "Risk Assessment", the paper states that

> [o]nce risks are identified they are assessed as to their likelihood of occurrence and impact. ... Risk assessment considers both the likelihood of occurrence and the consequence of occurrence of risks identified. By combining estimates of consequence and likelihood of occurrence risks can be ranked or prioritised.

327 The paper then references AS4360 and notes that

> [i]ntuition, judgment, experience and rules of thumb (heuristics) are important elements in risk assessment. Often it is very difficult to quantify risks in the time available and it is natural to rely on these elements in order to shorten the risk assessment timeframe.

328 The Competency Standards for Quantity Surveyors Construction Economists and Cost Engineers published by the Australian Institute of Quantity Surveyors states that the competencies "cover the broad range of expertise provided by the modern Quantity Surveyor and extends beyond some of the more traditional Quantity Surveying services".

329 The Competency Standards prescribe a special competency unit on "project risk management" which "involves a structured approach the identification, analysis and treatment of events that might have an adverse impact on achieving a project's objectives" and the:

> determination of a structure by which project risk can be analysed; identification of events (risks) that might adversely affect the project; quantification of risks using appropriate methods to enable the prioritisation of those risks; identification and implementation of strategies to effectively manage those risks and ongoing monitoring of changing risk situations ... .

330 The Competency Standards also provide that a core unit of study is the acquisition of "knowledge of appropriate Government legislation, standards and codes relating to a business practice". The performance criteria include an understanding of the relevant Australian Standards.

331 An expert witness called by 500 Burwood, Craig Smith, a Quantity Surveyor from Napier & Blakeley, agreed that the Competency Standards set out the sorts of techniques commonly used by Quantity Surveyors and that there were different methodologies that could be used to analyse risk. He also said that Quantity Surveyors were familiar with determining consequences and likelihood in analysing risks consistent with the AS4360. The Standard describes the types of analysis which may be undertaken with varying degrees of detail, depending on the risk, the purpose and the information and resources available. The analysis may be qualitative, semi-quantitative or quantitative or a combination. Craig Smith agreed that one way of

dealing with uncertainty in a project in terms of providing for risk is to assess whether there is a high, medium or low probability of an outcome occurring.

332 In "Developing a Risk Management Matrix for Effective Project Planning – An Empirical Study", the learned authors state that "[i]n order to have a holistic view of the project in the context of various risks arising out of the environment ... a two-dimensional risk management matrix is proposed." The ranking is given as low, medium and high.

333 In Michael F Dallas' text "Value and Risk Management: A Guide to Best Practice", the learned authors describe contingency management as follows:

> Risk allowances that are based upon a risk register contain direct links to actual events. This means that if an event that contributes to the risk allowances passes without incurring costs or incurs a lower cost than has been estimated the project manager can reallocated the amount say to other projects or other cost centres within the same project. This process is known as contingency management. If the project forms part of a large program of other projects this provides a significant source of additional funding.

334 In monetary terms, the total cost to complete capital work required for 9C compliance, comprising both compliance report costs and Capital Works Costs as assessed by Mr Hogg, if allowed at 100% of the estimated itemised cost, would have amounted to $2,269.100. The actual cost to complete assessed by Mr Hogg after applying the various H, M and L risk weightings which represented Mr Hogg's pinpointed assessment in accordance with the contract amounted to $1,186,780 made up of $661,280 "high" risk items, $395,000 "medium" risk items and $130,500 "low" risk items.

335 Mr Hogg said that the risk assessment was meant to achieve a fair outcome and a fair representation of the cost to complete. He said that it is a process which is undertaken relatively frequently in the area of Quantity Surveying and which is guided by the Australian and New Zealand Standard 4360. The process, he said, involved the likelihood and consequence of an event occurring and then applying the relevant weightings.

336 The Contract did not specify how CH Group was to go about the task of assessing and certifying as to whether the 9C requirements of the BCA had been complied with.

337 However, in this case I am not satisfied that the exercise undertaken by Mr Hogg did amount to an assessment of risk that fell within the scope of the task provided for in Special Condition 14.5. Because of the level of absent documentation and unresolved construction issues, which will later be described, Mr Hogg was compelled to undertake an exercise in determining the likelihood of how the design was to be completed in a particular way and how the issues would be likely to be resolved, before he could cost the remaining work and apply his weightings. I am satisfied that this is not what the Contract contemplated, as analysed below.

Lack of Documentation and Unresolved Construction Issues

Lack of Documentation

338 Mr Bailey of the CH Group gave evidence that standard practice in drafting a 9C compliance report involves a desk top assessment of the development's design based on the plans and documents approved by the Building Surveyor as part of the Building Permit issued for the construction of the subject building. Mr Bailey also gave evidence that in order to prepare a full BCA 9C compliance report, he would have required a package of documentation which included:

(i) All architectural design drawings;

(ii) Services design drawings including fire detection and alarm services; air conditioning and mechanical services; sprinklers and exit signs and emergency lighting;

(iii) Electrical design drawings;

(iv) Lift design drawings;

(v) Structural design drawings; and

(vi) Specifications for drawings, such as technical specifications.

339 I accept the evidence that in this instance CH Group continually asked for complete documentation relating to each staged building permit. However, by November 2007, a complete set of documentation for the entire project was not available.

340 In preparing its reports from time to time, the CH Group made various requests of 500 Burwood and its representatives for the provision of further documentation. Such requests were made either directly to representatives of 500 Burwood, or through representatives of AU, as follows:

(a) Email dated 10 April 2007 from Robert Putamorsi, to James Briant, and then to Mark Allison of Axiom Architects requesting documents to be used in AU's due diligence checks, *inter alia*, copies of approved plans, engineering drawings, construction certificate, all fire engineering reports, all approvals or modifications granted by State Authorities and all "dispensations" where the building design does not intend to comply with the Deemed to Satisfy provisions of the BCA;

(b) Email dated 16 April 2007 from Robert Putamorsi to James Briant requesting, *inter alia*, copies of approvals and plans;

(c) Email dated 30 May 2007 from Darren Morgan to James Briant requesting carpet specifications;

(d) A verbal request by Peter Chenoweth to Mark Allison and Hank Van Ravenstein at the 7 June 2007 Vermont External project team meeting, for complete set of all building permit documents for all four stages and a set of all current construction and infrastructure documents;

(e) A verbal request by Peter Chenoweth to James Briant at the 14 June 2007 Vermont External project team meeting, for complete set of all building permit documents for all four stages and a set of all current construction and infrastructure documents. Minutes of this meeting which record the request

for documentation are emailed to all attendees and to Mark Allison and Hank Van Ravenstein on 15 June 2007;

(f) Email dated 15 June 2007 from Darren Morgan to Peter Chenoweth, James Briant, Mark Allison and Hank Van Ravenstein attaching list of documents required to enable CH Group to complete the 29 June Report;

(g) Facsimile from Darren Morgan to James Briant requesting further information regarding the door schedule;

(h) A verbal request by Peter Chenoweth and Darren Morgan to Dean Mitros, James Briant, Mark Allison and Hank Van Ravenstein at 21 June 2007 Vermont External project team meeting, for complete set of all plans, approvals and drawings;

(i) Email dated 29 June 2007 from Darren Morgan to Dean Mitros and copied to James Briant and Philip David requesting access to documents lodged with the Whitehorse City Council;

(j) Two facsimiles sent 12 July 2007 from Darren Morgan to James Briant requesting full sets of building and town planning plans;

(k) Email dated 20 July 2007 from Darren Morgan to James Briant requesting documents from the original building permit;

(l) Letter dated 31 October 2007 from the AU to the 500 Burwood in which a request was made for all plans, drawings, and other relevant documents to be provided to Peter Chenoweth to assist him in assessing 9C BCA compliance; and

(m) Email dated 14 November 2007 fro, Wai Hwoon Low of Russell Kennedy to Cameron Allen of Mills Oakley attaching a list of documents not yet received by CH Group and confirming that DCWC would have to complete its report based on the documentation provided.

341 I do not accept that the lack of important design and other project documents was the product of any deliberate withholding of relevant information on the part of 500 Burwood or the consultants under its control. The evidence does not support such a finding.

342 I accept that the CH Group undertook a desk top assessment of the plans and documentation that were approved by the relevant building surveyor as part of his Building Permit approval process. Mr Chenoweth of the CH Group also conducted onsite inspections of the building under construction on 13 April 2007; 13 June 2007 and 15 October 2007 for the purposes of completing the 9C compliance reports. Mr Bailey undertook the initial desk top assessment that Mr Chenoweth later reviewed. I also accept that the October 2007 CH Group report (which provided the starting point for the Update Report of 9 November 2007) was based on a site visit conducted by Mr Chenoweth with Mr Van Ravenstein and a representative of Napier & Blakely.

343 However, CH Group did not and could not consider items that were not in existence.

344 In answer to Mr du Chateau's evidence relied on by 500 Burwood, Mr Chenoweth said:

> ---The building - the building wasn't constructed. How do I make an assessment where the exit signs are when there are no exit signs? How do I make an assessment that where the smoker (sic) detectors whether they've spaced it in correct locations without documentation of design when the building has no wires or anything hanging through it? How do I know that the penetrations for the slab have actually got the correct fire rating when all I see is holes in the slab if the building wasn't at the standard that you could undertake a completed assessment of the building for compliance? It was under construction therefore we needed the documentation to support the argument whether the building was going to comply as a 9C and then assess it from there.

Architectural Specifications

345 The Project architect, Mr Mark Allison, admitted that the architectural specifications were "only very general". He said that this was a design and construct project. His main principal, Redland, predominantly did design and construct projects and had a complete in house team of builders, electricians, plumbers, fabricators and steel

boilermakers. As such, the specifications were only limited to fixtures and fittings and colour schedules.

346 This left some significant deficiencies in the documentation available for assessment by third parties, such as a Quantity Surveyor appointed under Special Condition 14.5 of the Contract.

347 For example, configuration of the ensuites for five accessible bedrooms and the gradient from the public highway to the main entrance was absent. Although CH Group had been provided with the two Blythe Sanderson Group reports on 26 October 2007, the reports did not show the location of accessible bedrooms. Mr Allison's architectural drawings did not show the location distribution of those bedrooms.

348 Another example is that there were no Architectural Specifications detailing the smoke and fire door signage to be installed and the ceiling lining and insulation to be installed.

Balustrade

349 The Update Report states in table 4.1, clause B1 that the structural engineer's certification had not been provided. Accordingly, the report notes that it is necessary to obtain the structural certification of the design of the balustrading system employed.

350 Mr Hogg applied a risk weighting of "M" or medium and assessed the item at 50% of his capital works assessment, resulting in a $75,000 addition to his assessment overall.

351 The balustrading was designed by consulting structural engineers, Worley Parsons. Mr Van Ravenstein gave evidence that there was no requirement to obtain the structural design of the balustrade. He agreed that when he provided his certification for the Stage 6 building permit, he was satisfied as to the balustrading system and how it was fixed to the building. Had Mr Van Ravenstein not been satisfied of this, he would have issued a building order for minor works. He did not issue a building

order. Rather, Mr Van Ravenstein issued the Stage 6 building permit, considering that the balustrading was structurally compliant, and that there was no need to remove and replace the balustrading.

352 However, Mr Hogg apparently had not been provided with documentation which set this out, and was therefore unaware that Mr Van Ravenstein was satisfied of the structural integrity of the balustrading and did not require its removal or replacement. He did not review the Stage 6 building permit, or seek to review the documents underpinning the Stage 6 permit.

353 Before it was willing to issue the 9C compliance certificate, the CH Group required certificates that the structural design of the balustrades was compliant with the BCA. This was to be provided by a structural engineer. However, no such certificate was provided as at 14 November 2007. The Project architect, Mr Allison conceded that he could not locate a certificate of compliance of design and was not prepared to say that one existed. Further, no drawings prepared by Worley Parsons in relation to the balustrade could be identified.

354 On 14 November 2007 an email was sent from Mr Chenoweth to AU's solicitor, Ms Low, advising that despite numerous requests made to 500 Burwood; 500 Burwood's architect and building surveyor, a complete set of building permit or town planning documentation had never been provided at any stage of the review. Mr Chenoweth attached to his email a list of documents he had received and a list of documents he had yet to receive. The documents received by CH Group did not include the Structural Engineer's Certification of the proposed balustrade.

355 This was a plain deficiency in design documentation.

356 Further, there were no design specifications to speak of. In relation to the balustrades, the specifications for Condominium 1 included the foundry and a place to source the posts and no more. No doubt for this reason there was no structural certification of the design of the balustrading system employed.

357 Because no certificate had been provided to certify the balustrading, the Update Report in table 4.1 proceeded as follows:

(a) in order to achieve necessary 9C compliance concerning the balustrade the first step was to obtain a structural engineer's certification of the existing balustrade system employed, for which the cost estimate was $5,000;

(b) the second suggested resolution, if such certification could not be obtained, was to remove and replace the balustrades with balustrades which satisfied the load and other requirements of BCA9C. The cost estimate to do so was assessed by Mr Hogg at $150,000, and the risk "medium". In coming to this conclusion, Mr Hogg relied solely on the comments noted under item B1 of the CH Group's Update Report at table 4.1.

358 The problem of the absence of documentation as illustrated by the balustrade issue described, and the approach of the CH Group taken in its Update Report at table 4.1 and in turn, the reliance placed upon that report by Mr Hogg and his approach to it, was symptomatic of the way in which the DCWC assessment was undertaken overall.

359 Thus the absence of necessary documentation, namely a certification of the balustrading, resulted in a significant addition to the DCWC Assessment Report.

Late Delivery of Documents provided on 14 November 2007 at 5:34pm

360 As further evidence of the lack of documentation provided to the Quantity Surveyor in time for him to complete his report, on 14 November 2007 at approximately 5:45pm, Mills Oakley hand delivered a letter to Russell Kennedy enclosing some of the documents referred to in Peter Chenoweth's list of documents not yet provided. These included the following items: BCA clause D2.21 - Door hardware (Spence Door). (Although a Spence Door quote was given to Mr Darren Morgan of AU on 18 June 2007, this was without drawings and specifications. The architect, Mr Allison did not provide a copy of a door schedule to CH Group until after hours on 14 November 2007); BCA clause C3.12 - sealing electrical penetrations and hydraulic services. Mr Chenoweth did not receive a copy of Building Permit 5, together with the fire services

report of Mr Verheijden dated 13 February 2006, until after hours on 14 November 2007.

Documents provided on 3 December 2007 (Settlement)

361 A group of further design documents were presented at settlement of the Contract on 3 December 2007. These included the following items: BCA clause F1.0 - waterproofing/tanking for the subfloor external walls and clause F1.7 – substrates to be used on wall and floor finishes in wet areas. Mr Allison provided AU at settlement with a series of documents produced and prepared by Wetspot Consolidated Pty Ltd on a cover sheet dated 29 November 2007 attaching warranties and statutory declarations; BCA clause F1.13 – external window compliance with AS2047. These documents were not in existence until 28 November 2007; BCA clause C1.10 – fire hazard properties of the materials and surface finishes. This certificate was not in existence until 22 November 2007. The certificates were not provided to AU until settlement.

Conclusion as to Design Documentation as at mid-November 2007

362 Similar issues to that illustrated by the balustrade arising from the lack of design documentation arose in relation to floor and wall coverings, the ensuite configuration, door widths, door hardware, water proofing membranes, and windows.

363 In each case, the CH Group in its Update Report dealt with the deficiencies in documentation in broadly the same way as the documentation in relation to the balustrade was treated, and Mr Hogg, in putting a monetary figure to the items in the Update Report, approached his assessment in a similar way.

364 I do not accept that the Contract contemplated the existence of the level of uncertainty in design documentation demonstrated by these examples.

365 As a result, Mr Hogg could not perform the task required of him by the Contract, and did not do so.

Unresolved Construction Issues as at November 2007

366 There were a number of unresolved issues outstanding in the first half of November 2007 which were of importance to the Project.

Central Stair

367 The outstanding issue of the central stair has already been delt with in these reasons in a different context. However, the following additional observations may be made as to the state of uncertainty which bedevilled the Project in mid- November 2007.

368 At the date of Contract the central stair was neither designed nor built as "fire isolated" for the purposes of the BCA. Such a stair is expressly prohibited in a Class 9C building serving as a Residential Aged Care Facility (and indeed a Class 9A building), unless exempted.

369 As at November 2007 there was a high level of uncertainty about how that central stair might need to be dealt with under the regulations in the light of occupancy numbers and the question as to whether, because the central stair provided access to the fourth storey plant room, which was to be used as a computer room on one version of the plans, this was a "habitable room" for the purposes of the BCA, and if it was, how this would impact on the fire-rating for the stair.

370 The question concerned the fire isolation of the central staircase in Condominium 1 and compliance with the applicable regulations (being Clause D1.3 of the "BCA"). The issue of the central stair was complicated. It was connected with the question of Fire safety is a critical issue for a Residential Aged Care Facility both in terms of BCA 9C compliance and more generally.

371 The high level of uncertainty was evidenced in the cross-examination of Mr du Chateau, which included the following exchange of relevance:

> So do you accept the proposition as indeed happened here, that if you were standing on the ground on 15 November 2007 and you were aware that the 9C D1.1/3 calculation was for 480 persons, and that the relevant building surveyor's earlier alternate solution as based on a different premise and there was still an application pending for modification before the Appeals Board, that that would certainly inject a high level of uncertainty as to what might be needed to be done in relation to that central non fire isolated stair?---I would

> suggest that the population would determine maybe the width of the stair, not necessarily whether it's fire isolated or not.
>
> And when you looked at the plans, were you aware that the 19 October permit was granted in respect of the fourth level where this central stair goes up to, on the basis there was no computer room or data room, whereas in fact as the photographs show, one was partially completed at that time on that level?---I – I wasn't aware of that. No.
>
> And the application to the Building Appeals Board for modification was to deal with that issue, and the dispensation relating to the fourth level of the building being classified or otherwise as a storey? Were you aware of that?--- No. I wasn't aware of that, no.
>
> And if I put that into the mix combined with the population issue, would you accept that there's a high level of uncertainty about how that central stair might need to be dealt with?---I do accept that, yes.
>
> [Emphasis added]

372 The background to the issue of the central stair and occupancy numbers has been earlier discussed in some detail.

Occupancy Numbers

373 The evidence also discloses uncertainty as to the number of occupants reflected in the design documentation. This was a centrally important element of the design for the purposes of assessing BCA compliance.

374 The number of occupants assumed by AU was either 480 persons and 435 persons. In both cases, however, these figures were more than double the assumed maximum number of occupants, 197, which formed the basis of the 11 October 2007 Fire Safety Report and in turn underpinned the Stage 6 Building Permit issued on 19 October 2007.

375 The documentation as at mid-November 2007 contained significant inconsistency as to the centrally important design element of occupancy numbers. At this time, the "Occupancy Permit" remained to be issued under Special Condition 14.1.

376 The number of occupants at 480 was advised by Mr Chenoweth in his letter of 13 November 2007. This in turn was incorporated into Mr Hogg's cost to complete calculation.

377 However, Mr Verheijden referred to 197 persons in his Fire Report of 11 October 2007 and based his "expert judgment" on that figure.

Conclusion as to Central Stair

378 These matters are not referred to for the purpose of demonstrating that Mr Hogg erred in his assessment because his capital allowance for the central stair was wrong. Even if this was the case, it would not provide a basis for setting aside the assessment of a contractual expert.

379 Rather, they serve as an illustration of the deficiencies in the design documentation as at mid-November 2007. There were significant gaps in its content, and in some cases inconsistencies. Consequently there remained issues which had not been settled in a definitive manner.

380 In his evidence, Mr Du Chateau accepted that there was a high level of uncertainty about how the central stair might need to be dealt with in light of issues of dispensation relating to the fourth storey and the issue of occupancy for 480 or 435 persons, compared to 197 persons which formed the basis of the Stage 6 Permit.

381 A number of BCA 9C matters concerning certificates set out in the Update Report were still in issue in 2008.

Conclusion as to Whether Mr Hogg in Fact Assessed the Cost to Complete

382 By way of a summary, although the role of CH Group was to certify whether or not the building did comply with the BCA 9C classification and, if so, what remained to be done to achieve the requisite 9C certification, by reason of the lack of documentation and the outstanding issues in mid-November 2007, it was unable to do so.

383 Cross-examination of Mr Chenoweth demonstrated that the Update Report did not purport to express a conclusion as to whether or not a particular item achieved compliance with the 9C classification. For example, in relation to the carpet to be

installed in the Facility, Mr Chenoweth's evidence in cross-examination was as follows:

> So I suggest to you that looking at your two options there that it's not possible for a person reading what you've got there, put aside the figures of the cost, but just reading what you've got there and answer the question, is the carpet compliant with 9C or not, is it?---I had no evidence to say that it was compliant.
>
> Because you haven't told them. Your job was to say is it compliant with 9C or not and you haven't done it, have you?---We were seeking further documentation to clarify whether that did comply. That's what we say.
>
> You haven't done it. You haven't said here whether the carpet complies or not, have you?---No, that's correct.

384 Mr Gregory du Chateau, in his capacity as a building surveyor qualified to assess compliance with the 9C classification, gave evidence on the question of what an assessment of compliance with the 9C classification entails. When asked what approach he would adopt in dealing with each of the items of BCA compliance that are referred to in the Update Report, Mr du Chateau said:

> [M]y process would be to create myself a list of 9C requirements and then inspect, in this case being a completed building, inspect the building, or in the first instance probably do a desktop review so I understand the populations, the areas, location of stairs, the number of people and the use. And then I would inspect the building and carry out measurements, or even if need be, take samples to check that – that they did comply with 9C.

385 I do not accept that the CH Group undertook the work as suggested by Mr du Chateau. This is because of the lack of necessary documentation and the large number of unresolved construction issues that needed to be resolved in order for it to undertake the required task.

386 Indeed, this position was recognised by Mr Hogg. He gave evidence that based on information supplied by Mr Chenoweth, he understood that the CH Group report was a status report intended to provide an update on whether or not documentation was available. At page 4 of the DCWC Assessment Report, Mr Hogg outlined the methodology employed for the purposes of the DCWC assessment. That summary is consistent with Mr Hogg's stated understanding of the nature of the task performed by CH Group. The summary provided:

> The assessment of the Cost to Complete incorporates a number of key components:
>
> …
>
> 3. The cost of independent consultant reporting to achieve 9C compliance. This information should be available from the incumbent D&C Contractor, however to date considerable compliance documentation remains outstanding. Refer to the CH Group report in Appendix B.
>
> 4. A risk assessment of the cost to achieve 9C compliance. This has been done by costing each individual items (sic) raised in this CH Group Report (Appendix B) providing a risk rating (H, M, L) and applying a likelihood factor to the risk rating.

387 Mr Hogg explained that the necessity for the risk-weighting arose because upon reading the Update Report it was not possible to say positively whether a particular item of capital work did or did not need to be done. For example, in relation to BCA clause F1.0, relating to waterproofing of the subfloor external walls, Mr Hogg explained in cross-examination as follows:

> [CH Group] told you that a suggested means of resolution was either, "To provide a copy of approved waterproofing and tanking details"?---Yes.
>
> Or undertake onsite investigations and analysis of the waterproofing and tanking?---Yes, yes.
>
> Yes, now because Mr Chenoweth could not tell you or the CH Group could not tell you whether in fact the building complied or did not comply with this BCA clause, you allowed an amount of money for a report to be done of a thousand dollars? Is that right?---Yes.
>
> And then assuming that it did not comply, you've then calculated a capital works estimate. Is that right?---That's right.
>
> And then applied a risk rating to that?---Yes.
>
> Yes, and your risk rating here was low?---Yes.

388 Consequently the Update Report dated 9 November 2007, in large part recited the state of the missing documentation or outstanding issues which remained for each element of the construction considered. This did not provide any, or any proper basis upon which a quantity surveyor could undertake the contractual task of assessing the cost to bring the Development to a state where a 9C compliance certificate would be likely to issue from the CH Group.

389 I find that tables 4.1, 4.2 and 4.3 in the 9 November 2007 CH Group Report were all concerned to assess the availability of documentation which would, in turn, enable to CH Group to assess 9C classification compliance. None of the tables contain any conclusions as to the extent to which the Facility was in fact compliant with the 9C classification or specifically describe the works which were required to be done in order for the CH Group to issue its certification of 9C compliance.

390 The three categories of items referred to in the Update Report reflected what had and had not been attended to between June 2007 and November 2007 in terms of documentation. There remained outstanding a large number of items in respect of which the CH Group required further information and documentation before it would be willing to consider issuing a 9C compliance certificate.

391 The problem for the CH Group in completing the Update Report was that much of the documentation was simply not available. This meant that where there was missing documentation, the CH Group was not in a position to certify whether the relevant structure was compliant or not. Typical of the problem was the absence of sufficient documentation relating to signage. Mr Chenoweth said the following in cross-examination:

> That's because your report, so called, is not a 9C compliance report at all because you don't express an opinion about whether the building complies with 9C or not do you? ---We express that in many places but in this case here we didn't have the documentation, so we were unable to confirm or otherwise. We were seeking documentation.

392 The CH Group saw its task as a documentary review for 9C compliance, and its investigations were confined to a 9C assessment on the basis of documentation for the purpose of preparing the Update Report. Mr Chenoweth said in this regard: "We're engaged to look at documentation for compliance and that's what we were doing". It follows, if there was necessary documentation missing, the compliance exercise could not be undertaken in respect of the relevant item.

393 Accordingly, as at 14 November 2007, the work which remained to be done on the Project in order to have the CH Group issue a 9C compliance certificate was not

capable of definition. This had to await the provision of the necessary documentation. Until this occurred, there was no defined body of work which was capable of assessment by a Quantity Surveyor appointed under the Contract to cost the works. The construction was eventually completed at which time, and more than likely well before, the complete documentation became available. When the necessary documentation did become available, the work which remained to be done to secure 9C certification was crystallized and capable of being costed by the appointed Quantity Surveyor.

394 At the time of entry into the Contract, the parties, as reasonable persons, would have intended and expected that the mechanism they put in place pursuant to Special Conditions 14.1 and 14.5 would have worked to produce a sum certain pursuant to which the contract price was to be adjusted, in the event that the mechanism was triggered.

395 In my opinion, it was not the intention of the parties that they be bound by a costing assessment which was incapable of a proper evaluation because the subject matter of the costing assessment was so ill-defined, as it was. In order to produce the adjustment to the purchase price, the assessment was intended to be undertaken on a rational basis, applying the expertise and professional judgment of the selected independent quantity surveyor. In order to achieve this, the appointed expert needed to be in a position to apply his costing assessment skills to a defined body of work. I am not satisfied that it was within the expertise of the quantity surveyor to form value judgments as to what the final design would be when faced with the level of incomplete documentation and unresolved issues which bedevilled this Project in November 2007, nor am I satisfied that it was intended by the parties at the time of contracting that he would undertake this function.

396 Rather the intention of the parties, considered objectively as reasonable persons, would have been to defer finalisation of any adjustment to the purchase price for a reasonable time, if the circumstances unfolded as they did. A reasonable period of time would allow the subject matter to become amenable to being assessed in

accordance with the contractual term, by the provision of the necessary design documentation and the resolution of the major outstanding construction issues, together with a reasonable time allowance for the assessment to be undertaken. In this way the contractual intention of the parties could be fulfilled.

397 In this case, because of the absence of the necessary design documentation and the level of unresolved construction issues which existed in November 2007, the contractual mechanism agreed upon by the parties failed. The costing assessment contemplated by Special Condition 14.5 could not be undertaken within the time period set for the completion of the exercise and before the settlement, which by Special Condition 14.1 was set for 15 November 2007.

398 In these circumstances, I find that the DCWC Assessment Report was not one which complied with the contractual term reflected in Special Condition 14.5 and should be set-aside. It was founded on inadequate material.

399 In so finding, I accept that the manner in which Mr Hogg went about his task was very much a matter for him. So long as he undertook the task of assessing the cost to obtain the necessary certificates, and each of them, there was no fetter imposed upon Mr Hogg in the Contract as to how he might go about his task or as to what was or was not to be included.

400 Nevertheless, in the circumstances as I have found them to be, I find that Mr Hogg of DCWC did not assess the cost of achieving 9C compliance under the terms of the Contract, and this was because the material available to him at the time was inadequate for the intended contractual purpose. Special Condition 14.5 (a) (i) of the Contract simply could not be performed because the contractual mechanism described therein failed for reasons beyond the control of the parties.

Further Issue for Determination – Engagement of an Alternative Builder

Whether or not it is open to the Court to find that because inter alia the Contract did not require Australian Unity to engage the existing builder to complete the works and because there was no assignment of the existing building contract to Australian Unity, Clause 14.5

contemplated the reasonable cost to complete the works by an alternative builder as the Completion Cost there defined.

401 This issue falls for determination as part of the first question in the proceeding, namely, whether or not the quantity surveyor performed the Special Condition 14.5 task within the terms of the Contract.

402 500 Burwood submitted that "Completion Cost" is defined under the Contract as the cost of obtaining the Certificates (as defined in Special Condition 14.1). The issue of those Certificates must, given the nature of the Certificates, presuppose the completion of the Stage 1 building works.

403 It was put to Mr Hogg that had the existing builder and the existing consultants been prepared to complete the works, it would have been unnecessary for him to include the allowance of $206,468 for independent contractors' and consultants' costs to complete. In reply Mr Hogg said that allowance forms part of a cost to complete assessment *if the existing builder is unable to complete the works*.

404 However, as 500 Burwood submitted, there is no evidence that the engagement of an independent contractor was necessary to enable the completion of the Stage 1 work.

405 Mr Hogg did not speak to the existing builder Redland in order to determine whether or not it would be prepared to continue to carry out the work. Mr Hogg said in this regard:

> ---That wasn't a – that wasn't a question for – for me. That's why it was separated out as a – as a separate line item.
>
> Yes?---That it could be assessed. It could be added or deducted from the cost to complete as the parties saw fit.

406 Nevertheless, Mr Hogg included in his assessment the sum of $206,468, representing a contractor establishment premium and consultant fees to complete. This was calculated based on a percentage of the assessed cost of completing the Stage 1 works, being $1,376,456, and was included on the assumption that a new team of builders and consultants would be engaged to complete the works.

407 I am satisfied that there was no proper basis for Mr Hogg to include this additional cost in his assessment.

408 As the Contract did not permit this approach to the assessment, the report, to the extent that it included an assessment of $206,468 to complete the works, will be set aside.

Counterclaim

409 The Contract provided that within six months of the date of settlement , AU Nominees was to notify 500 Burwood in writing of any defects and for those defects to be rectified by 500 Burwood.

410 Special condition 18 provided:

> Defects Liability Period
>
> 18.1 For the purposes of this Special Condition, a 'defect' includes:
>
> (a) any fault, failure, omission or defect, whether minor or major;
>
> (b) any fact, circumstance, occurrence, event or matter which results in any of the fixtures, fittings, plant and equipment, buildings and/or improvements, including any component thereof, either failing, breaking down or not operating or performing to specification;
>
> (c) a failure to meet or obtain normal certification compliances in accordance with all relevant legislative requirements, Australian Standards and codes, including the Building Code of Australia; and
>
> (d) any breach of or failure to comply with any legislative requirements or the requirements of competent authorities, identified by the Purchaser or its officers, employees, agents or contractors, including a building surveyor
>
> 18.2 Without limiting Special Condition 18.1, the Works will be regarded as being defective if the floor tiles laid or installed in the Residential Aged Care Facility do not:
>
> (a) meet accreditation requirements under the Aged Care Act; or
>
> (b) satisfy or comply with the applicable safety and slip rating standards and certification assessments.
>
> 18.3 The Vendor will procure the Builder to rectify any defects or other faults identified by the Licensed Building Surveyor or agreed by the Licensed Building Surveyor as being a defect or fault in any part of the

Works which are due to defective materials or faulty workmanship provided the Purchaser has notified the Vendor of the defects in writing within 6 months from settlement in respect of the Residential Aged Care Facility and Independent Living Units.

18.4 The obligations of the Vendor under this Special Condition shall cease upon the expiration of the 6-month period specified in Special Condition 18.3.

18.5 The Purchaser shall not under any circumstances be entitled to a delay or refuse settlement on the grounds there are defects in any part of the Works.

18.6 The Vendor shall not be under any obligation with respect to any defects in the Works except those defects which are the responsibility of the Builder under the Building Contract and which are notified in accordance with Special Condition 18.3.

18.7 If the rectification work is not commenced or completed within a reasonable time (having regard to the nature of the rectification work), the Purchaser may have the rectification work carried out at the Vendor's expense, but without prejudice to any other rights that the Purchaser may have against the Vendor with respect to such omission or defect and the reasonable cost of the rectification work incurred by the Purchaser shall be a debt due from the Vendor and shall be payable on demand.

18.8 To ensure the Vendor's compliance with Special Condition 18.3, the Vendor must deliver to the Purchaser at settlement a bank guarantee securing the sum of $75,000.00 ('Bank Guarantee'). The Vendor agrees that the Bank Guarantee may be applied or set-off by the Purchaser to satisfy, in full or in part, any moneys payable by the Vendor under this Special Condition 18.

18.9 The Bank Guarantee:

(a) must be in favour of the Purchaser (or any Nominee);

(b) must be unconditional; and

(c) may have an expiry date provided such expiry date is no earlier than a date which is 6 months after settlement.

411 The questions for determination under the counterclaim are whether the Second Defendant, AU Nominees, is entitled:

(a) to the sum of $91,666.66, being the security deposit paid by Whitecross under the Lease (as defined in Special Condition 29.1 of the Contract);

(b) to retain the sum of $75,000 in accordance with Special Condition 18 of the Contract ("the $75,000 retention"); and

(c) if the answer to (a) is yes and the answer to (b) is no, to apply or set off the $75,000 retention in diminution of the security deposit of $91,666.66 paid by Whitecross under the Lease (as defined in Special Condition 29.1 of the Contract).

412 Pursuant to Special Condition 18.8 of the Contract AU was entitled to and did retain $75,000 at settlement as a retention fund in relation to the defects liability period.

413 However, neither AU nor AU Nominees has given notice to 500 Burwood of defects in accordance with Special Condition 18.3 of the Contract. The notice must in accordance with the terms of that provision specify the defects. No particulars of the defects have been given in any of the documents said by AU and AU Nominees to constitute notice for the purposes of Special Condition 18.3.

414 There was no evidence led in relation to any defects in the tiling for the purposes of Special Condition 18.2 of the Contract and in the circumstances, AU Nominees is not entitled to keep the $75,000 retention.

415 Contrary to Special Condition 29.6(g) of the Contract 500 Burwood did not pay by way of adjustment at settlement the security deposit under the lease, $91,666.66. That sum, as the parties agree, is a security deposit paid by a tenant (identified by the parties in their respective pleadings as an incorporated body called Whitecross Community Care Group Pty Ltd).

416 500 Burwood failed to provide the lease security in the sum of $91,666.66. There is no answer to that claim.

417 At trial AU contended, as pleaded, that it is entitled to set off the amount so retained, namely the $75,000 retention, against the sum of $91,666.66, which 500 Burwood failed to adjust and pay in favour of AU at settlement.

418 I find for AU on the counterclaim in the sum of $91,666.66. It is appropriate to order that this amount be offset against the $75,000 retention. After set-off, there should be judgment for AU in the sum of $16,666.66.

Conclusion

419 The parties submitted that, rather than making submissions as to relief they would each seek should the Court find that DCWC assessment is invalid, after handing down its decision the Court should then hear from the parties as to whether:

(a) the assessment of "Completion Cost" pursuant to Special Condition 14.5 of the Contract ought to be remitted to DCWC or to another quantity surveyor; further or alternatively to (a);

(b) the purchase price payable at settlement of the Contract ought to be reduced by the reasonable cost of carrying out the works necessary to cause the Certificates (as defined in Special Condition 14.5) to be issued.

420 The situation in the present case is analogous to the principle for setting time at large where a contractual mechanism which involves a time limit fails. An example is provided by the old Victorian case of *Campbell v Bent*.[48] Although the report is silent on the constitution of the Court, a reference to the Court daily list published in the *Argus* of 12 September 1879 reveals that the bench comprised the Chief Justice (Sir William Stawell) sitting with Barry and Stephen JJ. The Court observed:

> PER CURIAM. The agreement between the parties in this case was for the purchase and sale of certain land, and provided that the purchase money should be paid in four instalments. The dates for the payment of the whole of the purchase money, except the balance, are fixed, and the completion of the purchase is required on 9th October. That was impossible, because the third instalment, 1009l., was to be paid on the day after. It therefore remains for a jury, under such circumstances, to decide what is a reasonable time for completion.[49]

421 A contemporary application of the principle in *Campbell v Bent* is to be found in *Macro*, where Robert Walker J took the view that if the contractual machinery for ascertaining value had broken down, the court had jurisdiction to resolve the difficulty by prescribing alternative machinery, provided that the individual expert nominated was not an essential and indispensable part of the bargain. Contrary to the view expressed in *Sudbrook Trading Estate Ltd v Eggleton*, his Honour considered that where a

48 *Campbell v Bent* (1879) 5 VLR (L) 337.
49 *Campbell v Bent* (1879) 5 VLR (L) 337, 342.

company auditor was not uniquely well qualified for the task, the court could and should provide alternative machinery.[50]

422 I find that DCWC was not uniquely qualified to perform the task required of it under Special Condition 14.5 of the Contract.

423 I have taken the view that it is inappropriate in this case that I determine the cost of the works under Special Condition 14.5 of the Contract, even if I am empowered to do so. This is because the parties, by their agreement, intended that the exercise be undertaken by an appropriately qualified independent quantity surveyor and not by an arbitrator acting under curial supervision.

424 The proper course is, in my opinion, to remit the assessment to an independent quantity surveyor agreed on by the parties or, failing such agreement, to refer the determination to an expert quantity surveyor by way of a reference to a Special Referee under Order 50 of the Supreme Court Rules, with directions that the parties may make such submissions and provide such material as they shall be advised to that expert.

425 In the circumstances, but subject to further submissions on the issue, the question for determination by the Special Referee may be framed to be: founded upon a completed set of design documentation for the Development and the resolution of all outstanding construction issues as if such was available and resolved on 15 November 2007, but excluding therefrom any non-essential variations to the design introduced by AU, given the stage of construction achieved as at 15 November 2007, what is the assessment as at that date of the cost of carrying out the works necessary to have caused the Certificates referred to in Special Condition 14.1 of the Contract to be issued and provided to the Purchaser?

426 It is, in my view, inappropriate to express any view on the method of assessment to be adopted or the discrete issues relevant to the selection and application of a

50 *Sudbrook Trading Estate Ltd v Eggleton* [1983] AC 444.

methodology or the material or matters to which the Special Referee should have regard, unless such directions are sought by the Referee.

427 I will hear the parties as to the content and form of the necessary orders, and as to costs.
