

JUDGEMENT : HABERSBERGER J : Supreme Court of Victoria at Melbourne Commercial & Equity Div. Building Cases List 12th October 2007

1 On 14 October 2004, the writ in this proceeding was issued by the plaintiff, Danidale Pty Ltd ("Danidale"). This company carried on business as "Bernie Cornfoot & Sons Earthmoving". Mr Bernard Cornfoot was a director of Danidale. By its statement of claim indorsed on the writ, Danidale pleaded that on or about 13 October 2003 it agreed to strip and remove to stockpile approximately 40,000 bank cubic metres of topsoil and to construct temporary sedimentation basins at the Craigieburn Bypass Stage 4 Project ("the Bypass Project"), in consideration for which the defendant, Abigroup Contractors Pty Ltd ("Abigroup"), agreed to pay Danidale the sum of \$203,186, plus GST ("the Subcontract Agreement"). Danidale pleaded that there were four variations to the Subcontract Agreement, namely, the topsoil variation, the unsuitable material variation, the plant hire variation and the excavation of rock variation. Alternatively, it pleaded that there were three separate agreements, namely, the unsuitable material agreement, the plant hire agreement and the excavation of rock agreement. Danidale claimed that pursuant to the Subcontract Agreement, as varied, alternatively pursuant to the Subcontract Agreement, as varied, and the separate agreements, Abigroup was indebted to it in the sum of \$563,771.14, including GST, together with interest at the Subcontract Agreement rate of 18 per cent per annum, compounded at six monthly intervals.

2 Abigroup disputed its alleged indebtedness in respect of the various claims and counterclaimed for damages for a number of breaches of the Subcontract Agreement by Danidale. It subsequently withdrew one alleged breach on the ground that the amount of the damages claimed would not justify the time spent in proving it. This left it, at the start of the hearing, with a counterclaim for damages totalling \$6,576. Towards the end of the plaintiff's case, counsel informed the Court that, for the same reason, Abigroup sought only nominal damages for the remaining alleged breaches of contract.

3 The scope of the dispute can best be seen by looking at the break up of Danidale's claim. In its final submissions, Danidale claimed that the amount owing by Abigroup was the sum of \$474,348.33, plus GST. That amount was calculated as follows:

Contract Lump Sum	\$203,186.00
Excavation of Rock	\$362,729.00
Plant Hire	\$ 17,050.00
Additional Stripping of Topsoil	\$130,609.80
Cost of Surveyor	\$ 5,200.00
Unsuitable Material	<u>\$ 11,250.00</u>
	\$730,024.80
Less Reductions in Scope of Works	
Low Flow Pipes and Beaching	\$ 600.00
Rock Mattresses	<u>\$ 1,485.00</u>
	\$ 2,085.00
	\$727,939.80
Less Paid	\$217,881.08
Credits for Fuel	<u>\$ 35,710.39</u>
	<u>\$253,591.47</u>
	<u>\$474,348.33</u>

4 In its final submissions, Abigroup's position appeared to be, although it was not expressly stated, that the sum of \$30,357.66, plus GST, was owing to Danidale. That amount was calculated as follows:

Contract Lump Sum	\$203,186.00
Excavation of Rock	\$ 0.00
Plant Hire	\$ 315.00
Additional Stripping of Topsoil	\$109,055.70
Cost of Surveyor	\$ 0.00
Unsuitable Material	<u>\$ 11,250.00</u>
	<u>\$323,806.70</u>
Less Reductions in Scope of Works	
Low Flow Pipes and Beaching	\$ 9,000.00
Rock Mattresses	\$ 1,485.00
Reduced Size of Sedimentation Basins	<u>\$ 29,372.57</u>
	<u>\$ 39,857.57</u>
	\$283,949.13
Less Paid	\$217,881.08
Credits for Fuel	<u>\$ 35,710.39</u>
	<u>\$253,591.47</u>
	<u>\$ 30,357.66</u>

5 In order to understand the dispute between the parties about Danidale's various claims and Abigroup's claims for reductions in the scope of the works, it is necessary to set out the factual background to the making of the Subcontract Agreement and to the various claims in some detail. It will be appreciated from the above figures that the most significant part of this dispute is that relating to the excavation of rock claim. I will deal with the factual background to each claim separately.

The Factual Background

The Excavation of Rock Claim

- 6 Mr Leigh Hahn was a Project Engineer, Earthworks and Drainage, employed by Abigroup on the Bypass Project. By a facsimile dated 13 September 2003, he invited Danidale to submit a quotation for the stripping of topsoil for the Bypass Project. The anticipated scope of works was described as being to “strip and remove to stockpile 40,000 bank cubic metres (approx.) of topsoil”. Payment was to be made “on a schedule of rates basis with quantification of the material in stockpile by Abigroup’s surveyors”. The facsimile also advised tenderers “to visit the site before tendering to satisfy yourself as to the nature and extent of the works”.
- 7 By a facsimile dated 18 September 2000, Mr Hahn invited Danidale to submit a quotation for the construction of six sedimentation basins for the same project. The anticipated scope of the works was described in some detail. Payment was to be made “on an itemised and quantified basis (Bill of Quantities) for each item at each location”.
- 8 The first facsimile followed a telephone conversation between Mr Hahn and Mr Cornfoot. There was a disagreement between them, which it is not really necessary to resolve, as to whether this telephone conversation related only to the stripping of topsoil (as maintained by Mr Cornfoot) or also included reference to the construction of temporary sedimentation basins (as stated by Mr Hahn). Mr Hahn said that he said to each of the three tenderers that he telephoned, including Mr Cornfoot, that rock was expected to be encountered at the site of the subcontract works. Moreover, Mr Hahn said that rock excavation would have been clearly evident to any prospective tenderer visiting the site.
- 9 By a facsimile dated 26 September 2000, Beck & Associates Pty Ltd (“Beck & Associates”) advised Abigroup that Danidale offered to carry out the stripping and stockpiling of topsoil at a rate of \$2.95 per bank cubic metre (“bcm”), excluding GST, and a lump sum of \$5,000 for “mobilisation/demobilisation of plant and equipment”.
- 10 By a facsimile dated 30 September 2003, Beck & Associates advised Abigroup that Danidale offered to carry out the construction of sedimentation basins in accordance with the following rates, excluding GST:
Excavation using a scraper and/or dozer in OTR [other than rock] materials \$ 4.85/cu. m
Excavation in rock \$85.00/cu. m.
- 11 A post-tender meeting was held on 3 October 2003 at Abigroup’s site office. Mr Cornfoot gave evidence that he had a conversation with Mr Neil David shortly before he went into that meeting. Mr David was the General Superintendent for Abigroup in charge of the road construction. Mr Cornfoot said that Mr David said to him that Danidale’s topsoil rate was okay but the rock rate was too high. Mr David said that he doubted that he would have had this conversation.
- 12 The post-tender meeting was attended by Mr Cornfoot and Mr Ben Byth, Abigroup’s Project Manager, Earthworks and Drainage, and Mr Hahn. Part of the negotiations between the parties resulted from Mr Byth requesting Mr Cornfoot to reduce some of the rates quoted by Danidale. Mr Cornfoot said that he agreed to reduce his rate for stripping topsoil to \$2.70 per bcm and to halve his quoted mobilisation fee, but that he refused to reduce his OTR sedimentation basin excavation rate because there was “not enough material in that job”. Mr Cornfoot gave evidence that Mr Byth said that his rate for the excavation of rock was “far too high” and that Abigroup could supply the machinery to do the job if rock was encountered. He disputed that Mr Byth said that Abigroup might use Danidale’s equipment at hourly hire rates. It was, however, agreed at the post-tender meeting that excavation of rock from the sedimentation basins was excluded from the proposed subcontract, and that if rock was discovered in the sedimentation basins, Abigroup was to be informed and the various options for proceeding would be considered, including that Abigroup would undertake that work itself.
- 13 Mr Cornfoot said in his witness statement that Mr Hahn told him that Abigroup intended to award both the topsoil stripping contract and the sedimentation basin excavation contract together because the sedimentation basins had to be excavated at the same time that topsoil stripping was being undertaken, so that there would be somewhere to catch sediment in the event of heavy rain. If one contractor had both contracts, it would be much easier to co-ordinate. Mr Hahn stated that he told Mr Cornfoot that the reason that Abigroup wanted to let both contracts to a single contractor was not because it was easier to co-ordinate, but in order to make an individual contractor responsible for both.
- 14 Following the negotiations, by a letter dated 7 October 2003, Mr Byth wrote confirming Abigroup’s intention to enter into subcontracts with Danidale. Despite its date, the letter of intent was not “drafted” by Mr Hahn for Mr Byth until 8 October 2003, and was not received by Danidale until 10 October 2007. The subcontracts were said to be for:
- Stripping of topsoil on a schedule of rates basis at \$2.70 per bank cubic metre measured by Abigroup surveyors in designated stockpiles.
 - Construction of Sedimentation Basins #1—#4, #7 & #8 on a schedule of rates basis at \$4.85 per bank cubic metres measured by Abigroup surveyors, inclusive of all detailing, beaching and piping.
 - Mobilisation of plant and equipment for the above at a lump sum price of \$2,500.

All amounts were “exclusive of GST”. The letter stated with respect to the anticipated scope of works for the construction of temporary sedimentation basins: “Excavate, shape and detail each basin. Please note that Abigroup reserve the right to conduct the excavation if rock is encountered.”

The letter also stated that *"whilst a formal subcontract is being prepared and shall be forwarded to you, your subcontract will be as per the Head Contract ..."*

- 15 No formal subcontract was provided to Danidale before it commenced works on 13 October 2003. Mr Cornfoot said that Danidale commenced stripping in an area north of Harvest Home Lane, as directed by Abigroup. According to Mr Cornfoot, as he could not locate the setting out of sedimentation basin 7, he telephoned Mr Hahn, who attended the site a few minutes later, and that Mr Hahn agreed that the basin had not been pegged out. Mr Hahn said that he did not recall this alleged telephone conversation or specifically going to see Mr Cornfoot. Mr Cornfoot said that later that day a VicRoads official queried why they were stripping the topsoil before constructing the sedimentation pond. He said that he telephoned Mr Hahn and told him the problem. The following entry appeared in Mr Hahn's site diary for 13 October 2003: *"Ike : D11 to rip sed basin no. 7 for Cornfoot."*

I discuss this further below.

- 16 According to Mr Cornfoot, on the morning of 14 October 2003, Mr David arrived and asked him *"to go north to Curly Sedge Creek and start at the no-go zone and work south towards Taylor's Cut"*. Mr Cornfoot said that the excavators struck rock in sedimentation basins 4 and 1 (which Mr Cornfoot mistakenly thought at the time was called sedimentation basin 5). He contacted Mr Hahn who attended the site and they looked at both sedimentation basins. Mr Hahn told him to take all the clay from sedimentation basin 4 and expose the rock and that he would get back to Mr Cornfoot later in the day to let him know what was to happen about excavating the rock.
- 17 Mr Cornfoot said that following a dispute about whether Danidale was working in a culturally sensitive area without an Aboriginal monitor being present, Mr Hahn returned to the site and directed that Danidale go back to the first area, north of Harvest Home Lane. Work then commenced on excavating sedimentation basin 7, but the excavators soon struck rock. According to Mr Cornfoot, he contacted Mr Hahn and he came to the site of sedimentation basin 7. After a discussion with Mr Cornfoot, Mr Hahn called a D11 bulldozer over and told the operator to *"show Cornfoot how to rip this rock out"*. The D11 could not penetrate the rock. Mr Cornfoot said that Mr Hahn then received a call from Mr David who asked what Mr Hahn was doing with his D11. Mr David then came to the site, confronted Mr Hahn and said to him: *"Bernie Cornfoot has got a rock rate Get him to dig the effing rock out."*

Mr Cornfoot said that he would do it at his quoted rate of \$85 per bcm and Mr Hahn agreed to that. Mr Cornfoot then said that he wanted it confirmed in writing because Mr Hahn had made *"such a scene"* about the rock rate in the post-tender meeting. Mr Hahn said that he would confirm it in writing. Mr Cornfoot then asked how: *"he would enter the document that he was going to send to us back [sic] into the contract"*

and Mr David said: *"just put it in the back of the contract and it's part of the contract."*

- 18 In his witness statement, Mr Hahn said that on 14 October 2003 he inspected sedimentation basin 4 and that he made an entry in his site diary for that day indicating that rock had been encountered by Danidale at sedimentation basin 4. Yet in his evidence, Mr Hahn said that he did not go to sedimentation basin 4 on 14 October. He said that he agreed the \$85 per bcm over the telephone and told Mr Cornfoot that he would attempt to get to sedimentation basin 4 so that they could estimate the quantity of rock together. Mr Hahn said that he went to sedimentation basin 4 around lunch time on the next day, 15 October, and that Mr David was also present on that occasion. Both he and Mr David told Mr Cornfoot to move back to this original area of work.
- 19 Mr David could not recall the specifics of the conversation. He thought he was probably at sedimentation basin 7 on 14 October 2003 and that some of the words used were words he might have said. He did not agree that he would have discussed a specific rate. Mr David said that although he was aware, at the time, from conversations with Messrs Hahn and Byth, that Mr Cornfoot could not excavate rock because Abigroup considered that his rate was too high, he did not deal with rates. Mr David said that he never had an argument with Mr Hahn and he did not remember the D11 going to the sedimentation basin. Mr David said that he never said anything about putting written confirmation at the back of the contract. He said he would be totally out of order to say something like that to Mr Cornfoot.
- 20 By a facsimile apparently sent at 8.34 a.m. on 15 October 2003, Mr Hahn wrote to Mr Cornfoot as follows:
As discussed on-site yesterday with Neil David and myself. The natural material, which required excavation at Sedimentation Basin #4 was boulderous rock therefore necessitating extraction with an excavator and pick. Since Abigroup did not have any suitable plant in the area we requested that you complete this work. Thank you for allowing us the opportunity to inspect the site.
- 21 Mr Cornfoot gave evidence that his office clerk, Ms Sonia Pozzebon, read Mr Hahn's facsimile to him over the telephone. He said in his witness statement: *"The content of the fax was not what I had discussed with Leigh Hahn. He did not refer to the agreed rate of \$85 per cubic metre to dig the rock."*
Mr Cornfoot said that he asked Ms Pozzebon to contact Beck & Associates to draft a response.
- 22 Danidale responded to Mr Hahn with a facsimile apparently sent at 10.48 a.m. on the same day. The first sentence of the facsimile, apart from the reference to GST, came from the draft prepared by Beck & Associates but the rest was added by Ms Pozzebon after talking to Mr Cornfoot. The responding facsimile read as follows:
We refer to your facsimile of 15-10-03 and confirm that payment for removal of the rock is in accordance with our offer of 30-9-03, that is, \$85.00 per cubic metre + GST.

Please note that Sedimentation Basins #5 and #7 are also in rock and this will be extracted with excavator and pick at the same rate.

On an Abigroup copy of this document, Mr Michael Lowrie, Abigroup's Construction Manager, later wrote:

Action BB [Mr Byth]

Too Expensive!

- 23 Ms Pozzebon said that Mr Cornfoot told her on the morning of 15 October 2003 that his partner, Ms Robyn Pangbourne, was going to take the letter to site to be signed by Abigroup. Before that was done, she spoke again with Mr Cornfoot, who told her to amend the letter by adding a reference to sedimentation basin 4. The amended version of Danidale's response dated 15 October 2003 read as follows:

We refer to your facsimile of 15-10-03, re the natural material at Sedimentation Basin #4 being boulderous rock, therefore necessitating extraction with an excavator and pick. We confirm that payment for removal of the rock is in accordance with our offer of 30-9-03, that is, \$85.00 per cubic metre + GST.

Please note that Sedimentation Basins #5 and #7 are also in rock and this will be extracted with excavator and pick at the same rate.

There was a dispute about when this letter was taken to Mr Hahn by Ms Pangbourne. Mr Hahn said that he did not receive it until 14 November 2003 whereas Ms Pangbourne said that she took the letter to Mr Hahn on 15 October 2003. Whenever it was, the letter was initialled or signed at the foot by Mr Hahn above the following entry:

Leigh Hahn, Abigroup

14th November 2003.

- 24 Ms Pozzebon stated that she gave this letter to Ms Pangbourne later in the morning on 15 October 2003. She said that she did not tell Ms Pangbourne to tell Abigroup that the letter she gave to her was different to the letter faxed earlier that morning.
- 25 Ms Pangbourne said that on 15 October 2003 she was at home when she received a telephone call from Mr Cornfoot. He asked her to collect a letter from Ms Pozzebon and take it to the site and give it to Mr Hahn to sign. Mr Cornfoot insisted that he needed the letter signed because he could not get on with the job without it. Ms Pangbourne said that she collected a letter from Ms Pozzebon and went to Abigroup's site office. She told Mr Hahn that she had come on behalf of Bernie Cornfoot, handed him the letter and asked him to sign the letter for the rock rate. Mr Hahn signed it in front of her. He did not photocopy it. When he handed the letter back to her, Ms Pangbourne said that she would ring Mr Cornfoot to tell him that it was okay to start.
- 26 Ms Pozzebon said that later on the same day, Ms Pangbourne returned the letter to her with Mr Hahn's signature on it. She then filed it. Ms Pozzebon said that she did not recall noticing that Mr Hahn had dated the letter "14th November 2003". She said that this incident "was definitely on 15 October", although she later agreed that she only could state the date because it appeared on all of the correspondence.
- 27 Ms Pangbourne said, in cross-examination, that she could not recall whether the large contract with Abigroup arrived before or after she took the letter to Mr Hahn. She said that she specifically recalled mentioning "rock rate" to Mr Hahn. Ms Pangbourne said that she had "a quick glance" at the letter and saw that it was signed, but she did not notice the unusual date below Mr Hahn's name. Mr Cornfoot had never raised with her that the two dates on the letter were different.
- 28 In cross-examination, Mr Cornfoot said that when he got home on the night of 15 October, he looked at the letter to see that Mr Hahn had signed it. He also said that he did not notice the incorrect date. He said that it had always been his view that the document was dated the day it was signed, namely 15 October 2003.
- 29 According to Mr Hahn, on 16 October 2003 he spoke to Mr Cornfoot near sedimentation basin 7. He said that he told Mr Cornfoot that he agreed to \$85 per bcm for excavation of rock at sedimentation basin 4 only. Mr Cornfoot denied that this had been said.
- 30 On 24 October 2003 Mr Hahn sent a facsimile to Mr Cornfoot about seven safety improvement notices served that morning. Mr Hahn said that Danidale had been disregarding specific instructions with respect to the safe and orderly conduct of the work, specifically the construction of the sedimentation basins and stripping of topsoil in areas without Cultural Heritage monitors. Danidale ceased all activity on site until the safety improvement notices were satisfactorily complied with on 25 October 2003. Mr Hahn said that he spent approximately four hours dealing with the issues raised by these notices.
- 31 Subsequently, in November 2003 there was an unauthorised float of equipment onto the site. The police attended and spoke to Mr Lowrie and Mr Hahn. Following an investigation, Mr Hahn spoke to Mr Cornfoot, who admitted that he had been involved. Mr Lowrie said that he spent approximately two hours in connection with this issue.
- 32 In his witness statement, Mr Cornfoot said that he believed that in or about mid November 2003 he collected the Subcontract Agreement, which comprised seven different categories of documents including a letter of appointment, held together with a bulldog clip, from Abigroup's site office. By the letter appointment, which was incorrectly dated 13 October 2003, Abigroup appointed Danidale to carry out the construct sedimentation basins and stripping of topsoil works at the Bypass Project: "*in accordance with the requirements of the sub-contract documentation for the Fixed Lump Sum of \$203,186.00 plus GST, not subject to Rise and Fall.*"

One paragraph of the letter read as follows: *"It is the intent of this Agreement that the Works comprising the Subcontract will produce a completely finished article and any items obviously required for such, but not specifically detailed, are deemed to be included in the contract sum. This Agreement is a performance contract and it is the Subcontractor's responsibility to complete the installation in accordance with the contract requirements."*

- 33 Mr Steven Crocker was the Contracts and Insurance Administrator for Abigroup on the Bypass Project. He prepared the Subcontract Agreement. Prior to doing that, Mr Crocker had received two internal documents called Subcontract Letting Agreements. They contained Abigroup's budgets for each of the stripping of topsoil and construction of sedimentation basins subcontracts and an estimate of what Danidale's quotations would come to, which was a total of \$203,186. Mr Crocker said that, as a result of an error in the preparation of the letter of appointment and the General Conditions of Subcontract, both of these documents nominated a lump sum contract price rather than a schedule of rates. Mr Crocker said that he sent the Subcontract Agreement to Danidale on 5 November 2003.
- 34 The letter of appointment instructed Mr Cornfoot to read the documents carefully, date and sign the Formal Instrument of Agreement and initial every page of the seven categories of documents. Mr Cornfoot said, in cross-examination, that he did not notice that the Subcontract Agreement was for a lump sum. Later, he said: *"I don't correct other people's errors. No one does it for me."*
- 35 On 12 November 2003, according to Mr Hahn's site diary, he was telephoned by Mr Cornfoot, who told him that his contract did not mention "rock rate". The entry continued: *"Asked him to notate the agreement."*
- Mr Hahn said in his witness statement that during the call Mr Cornfoot queried why the Subcontract Agreement did not provide that payment for excavation of rock would be at the rate of \$85 bcm. Mr Hahn replied that Abigroup had never agreed to such a rate and that Mr Cornfoot had been told at the post-tender meeting that his rate was not acceptable to Abigroup. Mr Hahn said that neither he nor Mr Cornfoot mentioned sedimentation basin 4 during this discussion. Mr Hahn said that he told Mr Cornfoot that if he wanted to take the matter up with Mr Byth, he could do so. Mr Hahn said that he asked Mr Cornfoot to sign the agreement, which he believed contained what had been negotiated and agreed, and send it back to Abigroup. He said that he recorded this by his note in his site diary about asking Mr Cornfoot "to notate the agreement". Mr Hahn said that he told Mr Cornfoot that he would not be paid on time if he did not return the signed Subcontract Agreement.
- 36 This conversation was not referred to by Mr Cornfoot in his witness statement. He gave evidence that he had forgotten it. He said that the conversation was along the lines of what was recorded in Mr Hahn's note. Mr Cornfoot added that he told Mr Hahn that he: *"would prefer to put the signed document that we'd had signed for the rock rate into the back of the contract as discussed with Neil David and Leigh Hahn at sediment basin no. 7."*
- 37 In cross-examination, Mr Hahn said that he believed that "notate" was the correct word to use to describe signing the contract. He disagreed with the suggestion that "notate" meant to include a rate of \$85 per bcm in the Subcontract Agreement. Mr Hahn said that, from what Mr Cornfoot told him, the only missing part was the \$85 rate for sedimentation basin 4. He believed that the others would be charged separately at different hourly rates.
- 38 Mr Hahn gave evidence that, on the morning of 14 November 2003, Ms Pangbourne and her children (in fact it was probably only one child) attended Abigroup's site office. He said that Ms Pangbourne identified herself as Mr Cornfoot's wife and handed him a piece of paper. She said "Bernie asked me to deliver this fax to you" and asked him to confirm receipt of the fax. Mr Hahn said that he looked at the fax which he thought was a copy of the fax dated 15 October 2003 previously sent to him. He did not compare the documents and did not notice that words had been added. Mr Hahn said that he photocopied the document and as there was no "Received" stamp at the photocopier, he initialled and dated the bottom of the facsimile. He gave Ms Pangbourne a copy with his initials on it and placed his photocopy in the day file. Mr Hahn said that he did not recall Mr Cornfoot's initials being on the document when he initialled it in Ms Pangbourne's presence.
- 39 Mr Hahn agreed in cross-examination that he did not indicate his disagreement, either verbally or in writing, with the contents of the letter handed to him. He said that he thought it had been satisfactorily resolved by his conversation with Mr Cornfoot on 16 October 2003. He said that he made no connection between the telephone conversation with Mr Cornfoot on 12 November and Ms Pangbourne's appearance with this letter, asking him to confirm receipt of it. Mr Hahn agreed that Abigroup had not been able to find the photocopy of the facsimile which he said he had made.
- 40 Mr Cornfoot said that he read the Subcontract Agreement carefully, to the best of his ability, and signed the section to be signed by the subcontractor. He said that he took the facsimile signed by Mr Hahn and put it at the back of the Subcontract Agreement. Mr Cornfoot said that he gave the whole of the Subcontract Agreement and the facsimile signed by Mr Hahn to his wife and asked her to take it to Abigroup's site office. He said that he was told on the next day that Abigroup had not accepted the Subcontract Agreement because he had not initialled each page. He therefore initialled each page of the Subcontract Agreement including the letter signed by Mr Hahn. The next day he took them to Abigroup's site office. He could not say precisely when all of this occurred.
- 41 Ms Louise Dowler, a contract administrator employed by Abigroup, signed as a witness to Mr Cornfoot's signature and inserted the date, 8 December 2003. She said this would have been the date she signed. Ms Dowler said that "under no circumstances" would she sign as a witness if the person signing was not present. Mr Crocker said that the executed Subcontract Agreement was returned to Abigroup's head office on 9 December 2003.

- 42 Mr Cornfoot said in his witness statement, that on 24 November 2003 he sent the 20 tonne excavator to sedimentation basin 8. It struck rock immediately. Mr Cornfoot gave evidence that at this time he saw Mr Byth sitting in his car nearby. He said that he spoke to Mr Byth and asked him whether he wanted Danidale to continue excavating the rock, and if he did, that Mr Cornfoot wanted to get a bigger excavator as the others were busy elsewhere. Mr Cornfoot said that Mr Byth told him to "go ahead" and get the bigger excavator and that the work would be: "paid for in accordance with the agreement you have with Leigh Hahn on the other sedimentation ponds."
- He agreed in cross-examination that neither he nor Mr Byth mentioned \$85 per bcm as the agreed rate. He also agreed that, in his mind, this conversation with Mr Byth was a critical one. Yet, because there was no reference to this conversation in the statement of claim indorsed on the writ, he agreed that he did not tell his lawyers about it when he first went to see them.
- 43 Mr Byth denied that this conversation took place. He specifically denied telling Mr Cornfoot that the excavation of rock at sedimentation basin 8 would be paid for at the rate agreed with Mr Hahn for the other basins. He did agree, however, that he had some conversations with Mr Cornfoot on site.
- 44 On 9 December 2003, Mr Hahn noted in his site diary: "Get sedimentation basin quantities to Bernie."
- He said that this was his reminder to get Abigroup's surveyors to measure the basins so that Mr Cornfoot would have the correct information from which to prepare his invoice. Mr Cornfoot stated the rock excavation to sedimentation basin 8 was not completed until 13 December 2003, having recommenced on 2 December with the 45 tonne excavator. He agreed that this meant that eleven days were spent excavating rock from sedimentation basins. Mr Hahn stated that if Danidale continued working on site after 10 December, it did so contrary to Abigroup's instruction of 8 December.
- 45 A completed Subcontract Agreement was sent by Abigroup to Danidale by letter dated 16 December 2003. It had been signed by Mr Byth on behalf of Abigroup. The letter signed by Mr Hahn did not form part of either party's copy of the executed Subcontract Agreement.
- 46 Clause 1.0 of the Formal Instrument of Agreement was as follows:
The following documents shall form part of the Subcontract.
1.1 Letter of Appointment
1.2 Subcontract Post Tender Meeting Minutes
1.3 Formal Instrument of Agreement and General Conditions of Subcontract.
1.4 Special Conditions of Subcontract.
1.5 Specification sections, Scope of Work and addenda as listed in the Specification Schedule.
1.6 Drawings as listed in the Drawings Schedule.
1.7 Scope of Works.
In the event of any discrepancy, inconsistency or ambiguity in the documents, the order of precedence used to resolve that inconsistency shall be as listed above.
- 47 However, there were no completed formal minutes of the post tender meeting. Nor was there a document called "Specification sections" or one called "Specification Schedule" or any addenda to such a document, or a document called "Drawings Schedule". Moreover, although there was a document called "Scope of Works" included in the contractual bundle, there was no document called "Scope of Work". An additional document included in the bundle was one headed "Price Schedule". It contained the agreed rates for stripping of topsoil "on a schedule of rates basis at \$2.70 per bank cubic metres measured by Abigroup surveyors in designated stockpiles" and construction of sedimentation basins 1 to 4 and 7 and 8 "on a schedule of rates basis at \$4.85 per bank cubic metres measured by Abigroup surveyors, inclusive of all detailing, beaching and piping". The Price Schedule also included the lump sum price of \$2,500 for "mobilisation of plant and equipment" for the above work, and an hourly rate for hire rates for various pieces of equipment. The hire rates were expressed in terms of both "Stand-By" and "Non-Rock".
- 48 Other relevant provisions of the Subcontract Agreement will be considered in due course.
- 49 By a facsimile dated 8 December 2003, but possibly faxed on 6 December, Mr Hahn referred to a discussion with Mr Cornfoot "this morning". The presently relevant part read: "Apart from the rock excavation at Sedimentation Basin #10 [sic], which you should complete by tomorrow, and the low flow pipes/outlet channel lining at all basins, which Abigroup will complete and deduct an agreed amount from your schedule of rates – that scope is also complete."
- 50 Mr Cornfoot said in his witness statement that, in December 2003, he engaged the services of surveyors, RE & LM Gertzel Pty Ltd ("Gertzel"), in circumstances examined in more detail below, in respect of the additional stripping of topsoil claim. After receiving the survey results of the sedimentation basins from Mr John Gertzel on or about 16 December 2003, he used the Gertzel figure for sedimentation basin 8, treated it as 100 percent rock, and made a conservative assessment himself for the quantity of rock in the other sedimentation basins. He then asked Ms Pozzebon to prepare an invoice using these figures. This became invoice No. 756, which was incorrectly dated 31 October 2003. By that invoice Danidale billed Abigroup \$483,465.94, plus GST, made up of \$119,291.94 for stripping of topsoil, an unspecified charge of \$47,039 and charges of \$287,385 and \$29,750 respectively

for “construct sediment basins wetlands 9. 3,381.0m³ x \$85.00 metre” and “construct sediment basins wetlands. South side of Curly Sedge Creek. 350 metres x \$85.00.” Mr Cornfoot agreed that the reference to sedimentation basin 9 should have been to 8. Mr Cornfoot said that he handed Mr Hahn a copy of this invoice just before the Christmas site shutdown. He stated that Mr Hahn said that he had to split the invoice into two, separating the topsoil stripping claim from the rock claim and that Mr Hahn said that he could not process the combined invoice.

51 According to Mr Hahn, Mr Cornfoot handed him invoice No. 756 on or about 19 December 2003, which was the last day before the Christmas break. He said that he thought Mr Cornfoot was playing a pre-Christmas practical joke. He asked Mr Cornfoot if he was serious and he said he was and that he believed he was entitled to payment of it. Mr Hahn replied that there was no way that he could or would recommend the invoice for payment. He said that the \$85 rate was neither agreed nor authorised. Mr Hahn stated that he told Mr Cornfoot that he would be directing the invoice to Mr Byth and Mr Lowrie.

52 On or about 7 January 2004, Mr Cornfoot met Mr Hahn on site and together they inspected the sedimentation basins and agreed the volume of rock extracted as a percentage of the total volume extracted. The agreed figures were:

Sedimentation Basin	Total Volume m ³	Rock Percentage	Rock Volume m ³
1	175.9	80	140.7
4	150.0	80	120.0
7	588.9	95	559.0
8	<u>3,447.7</u>	100	<u>3,447.7</u>
	4,362.5		4,267.4

With Mr Beck’s assistance, Mr Cornfoot calculated that the amount owed for excavation of the four sedimentation basins in question, calculated by multiplying the rock volumes by \$85 per bcm and the volumes of clay by \$4.85 per bcm, was \$370,000.

53 Mr Cornfoot said that he asked Ms Pangbourne to prepare an invoice using this figure and a separate invoice No. 758 for topsoil stripping. By invoice No. 759 dated 30 December 2003, Danidale sought payment of \$370,000 plus GST of \$37,000, for “Construct Sediment Basins As discussed Leigh Hahn volumes given by Abi Group [sic] surveyors”. Mr Cornfoot said in his witness statement that he handed these two invoices to Mr Hahn on site on or about 12 January 2004. He stated that Mr Hahn said he would process them. Later, in evidence he said that Mr Hahn said that he was not going to be paid for this work at that rate. Rather surprisingly, Mr Cornfoot gave evidence that he had a conversation with Mr Hahn about invoice No. 759 “in late December”. He claimed that he asked Mr Hahn why he had not been paid for the invoice and that Mr Hahn replied:

You don’t honestly expect me to sign off for this to be paid. I’m going to lose my job.

54 Mr Hahn stated that these invoices were either left on his desk or in his pigeon hole. Mr Cornfoot did not deliver them to him personally. He stated that he did not see or speak to Mr Cornfoot on 12 January 2004. Mr Hahn denied that he told Mr Cornfoot that he could lose his job over this.

55 Abigroup prepared a response to the invoice for \$370,000. It was the following letter dated 12 January 2004:
Abigroup Contractors Pty Limited confirms that we are in dispute over your claim (Invoice #759) received at site today. We do not agree with basis of your claim for excavation of rock in the sedimentation basins is [sic] at a cubic metre rate: we rejected this arrangement in the tender negotiations; re-stated the correct rates in the Letter of Intent; did not include that proposal in the Subcontract; provided rates for hourly hire of machines in the Subcontract; and issued you with External Hire Booklets to record those hours.

We subsequently estimated with you the volumes of rock and OTR in each basin so that correct payment could be made against machine hours and schedule of rates respectively.

Abigroup staff has held discussions with you at the site and state again that we intend to resolve this matter such that you are recompensed for fair value of work completed.

We remain available to assist.

It is not clear that this letter was actually sent. Whatever the situation, Abigroup has paid Danidale nothing in respect of the excavation of rock claim.

56 Before looking at subsequent events concerning the excavation of rock, it is necessary to go back in time a little in order to set out the factual background to the other claims made by Danidale.

The Additional Stripping of Topsoil and the Unsuitable Material Claims

57 Although the stripping of the topsoil was commenced by Danidale in mid October 2003, the survey of the stockpiles by Abigroup was not undertaken until mid to late November 2003. It had been agreed that surveys would be carried out on the 26th of each month. Mr Cornfoot stated that he asked Mr Hahn a number of times to arrange for the Abigroup surveyors to measure the stockpiles so that he could submit an invoice and get paid for the work. Mr Hahn stated that “in or about November 2003” he requested Mr Daniel Smith, a senior surveyor employed by Abigroup, to survey the stockpiles. Mr Bruce Lyons was one of the surveyors used by Abigroup to carry out this task. He recorded in his diary performing survey work on 13, 21 and 22 November 2003. The

- preliminary results were contained in a handwritten note from Mr Smith to Mr Hahn on or about 25 November 2003. It referred to a figure of 40,083 bcm of topsoil.
- 58 By a facsimile dated 25 November 2003, Mr Hahn advised Mr Cornfoot that Abigroup's surveyors had "conducted a preliminary survey of the stockpile volumes last weekend. The estimated volume is 40,083 bank cubic metres". By that facsimile, Mr Hahn also requested Danidale to excavate unsuitable material: *"from beneath the Type B embankment at the Curly Sedge Creek west abutment and place it in the C-zones between Ch 19,280 and 19,460."*
- Mr Hahn said that, in a prior conversation on site with Mr Cornfoot, he had asked Danidale to remove the unsuitable material and agreed to a rate of \$3.75 per bcm for this work. He said that after Mr Smith surveyed the stockpile of unsuitable material, he told Mr Cornfoot that he should invoice Abigroup for the removal of 3,000 bcm. He denied Mr Cornfoot's evidence that, in the initial conversation with Mr Hahn, he was told that there were 6,000 bcm.
- 59 By invoice No. 733 dated 26 November 2003, Danidale billed Abigroup for \$108,224.10, plus GST, for stripping of 40,083 bcm of topsoil at \$2.70 per bcm, as well as \$22,500, plus GST, for excavation of 6,000 bcm of unsuitable material. Mr Cornfoot subsequently amended this invoice by sending a further copy of it with the typed date of 26 November 2003 crossed out and replaced with a handwritten date of 31 October 2003. This invoice billed Abigroup for \$11,250, plus GST, for excavation of unsuitable material. Mr Hahn stated that he instructed Mr Cornfoot to make the change because the original volume of unsuitable material invoiced was wrong. Mr Hahn agreed that the change in the date of the invoice was an attempt to get Danidale paid before the Christmas break. On or about 17 December 2003, Danidale received payment of \$123,377.76 for part of invoice No. 733. Contrary to the agreement reached at the post-tender meeting, retention had been deducted.
- 60 Danidale completed the stripping of topsoil in early December 2003. Mr Cornfoot stated that he estimated that Danidale had stripped approximately twice the original subcontract volume. He was not satisfied with the "preliminary survey". He wanted to be paid for all the work and despite Mr Hahn's promises, Abigroup's surveyors had still not measured the total volume. He said in evidence that he felt that Abigroup had "short changed" him. In December 2003, he therefore telephoned Mr John Gertzel of Gertzel and asked him to prepare a survey of the stockpiles.
- 61 By the facsimile dated 8 December 2003 referred to previously, Mr Hahn advised Mr Cornfoot that: *"Your topsoil stripping scope is now complete. Abigroup will complete the Merri Creek area due to the environmental sensitivity."*
- Mr Cornfoot was requested to "arrange for demobilisation" of plant and equipment on 10 December.
- 62 Mr Matthew Johnson of Gertzel commenced a survey of the stockpiles on 11 December 2003. He completed his survey of 38 stockpiles five days later and his volumetric calculations in another three days. He calculated that the total volume of topsoil stripped was 88,374.7 bcm.
- 63 As previously stated, Mr Cornfoot said that just before the Christmas site shut down he handed Mr Hahn a copy of invoice No. 756, which included a charge of \$119,291.94, plus GST, for stripping of topsoil. This represented 44,182.2 bcm of additional topsoil at \$2.70 per bcm. Mr Hahn disputed Mr Cornfoot's evidence that he was requested by Mr Hahn to split this invoice into two. Invoice No. 758 was delivered to Abigroup sometime in January 2004. This invoice, incorrectly dated 30 October 2003, repeated the charge of \$119,291.94, plus GST, for stripping of 44,182.20 bcm of topsoil at \$2.70 per bcm.
- 64 Mr Cornfoot gave evidence that, in mid-January 2004, he discussed with Mr Hahn the calculation of the volume of topsoil stripped by Danidale. He pointed out that Abigroup's figures did not include all of the stockpiles. He said that a list was shown to him by Mr Hahn. That document bore the following handwritten note by Mr Smith:
*Lee, [sic]
Added missing Stk Piles, took some from theirs. Total f-up on my behalf. Having some of these pickup op [sic] again to check.*
- 65 Another Danidale invoice, the second one given the number 758 and incorrectly dated 31 October 2003, billed Abigroup for \$238,609.80, plus GST, for stripping of 88,374 bcm of topsoil at \$2.70 per bcm. Mr Cornfoot stated that he handed this invoice to Mr Hahn on site on or just after 23 January 2004. At about the same time, Danidale received a payment for \$81,325.43 in respect of the claim for the stripping of additional topsoil.
- 66 Mr Cornfoot stated that he prepared and submitted invoice No. 795 dated 19 December 2003, being a further claim for \$11,979.90, plus GST, for topsoil stripping "done" in the month of December of 4,437 bcm. This brought the total topsoil stripping claim to approximately 88,700 bcm. This invoice was paid in full (\$13,177.89) on 23 February 2004.
- 67 The payments of \$123,377.76, \$81,325.43 and \$13,177.89 referred to above total \$217,881.08, which is the agreed amount previously paid by Abigroup to Danidale in respect of the claims the subject of this proceeding.
- 68 By invoice No. 834 dated 31 January 2004, Danidale billed Abigroup for \$6,790.40, plus GST, for the cost of Danidale's surveyor measuring the amount of topsoil removed. Mr Cornfoot agreed that he mistakenly included other costs from Gertzel in this claim.
- 69 Mr Smith said that, in about February 2004, he did a review of the survey material when it was received from Danidale. As a result, he produced a final survey report which produced a figure of 80,390.8 bcm. Thus, the difference between Gertzel's figure of 88,374.7 bcm and Abigroup's 80,390.8 bcm was 7,983.9 bcm. At \$2.70 per bcm, the difference in monetary terms was \$21,556.53, plus GST.

The Plant Hire Claim

- 70 Mr Cornfoot gave evidence that, on 15 November 2003, he spoke to Mr Hahn and in response to a request from Mr Hahn, he offered to hire a water cart for the sum of \$300 per day for a 6 day week and a float fee of \$250, all plus GST. He said that Mr Hahn accepted that offer. The 12,000 litre mobile tanker was delivered to the site. It remained there until early December 2003 when Mr Cornfoot found it to be covered in a thick layer of dust. Concerned that the dust would damage the mechanical parts of the tanker, Mr Cornfoot replaced it with a larger stationary tank that had a 17,000 litre capacity. He did not notify anyone at Abigroup that he had made this change. Mr Cornfoot subsequently said that it was a tank with a 22,000 litre capacity.
- 71 On 19 November 2003, Mr Hahn recorded in his site diary that he had directed Mr Cornfoot to send "his water cart to crusher". According to Mr Hahn, that day was particularly hot and dry and he was concerned that two mobile crushing plants at a place known as Power-line Cut might have to be shut down because of the dust they were generating. Spraying the crushers with water would help to suppress the dust. Mr Hahn said that Abigroup did not have any suitable tanks available and he was aware that Danidale had a tank on site that was not in use. He therefore telephoned Mr Cornfoot and asked him whether he could deliver his tank to the crushers. Mr Cornfoot said that he would. Mr Hahn said that they did not discuss a price for the hire of the tank or a period for the hire of the tank. Mr Hahn described the tank as a box approximately one metre in dimension which held approximately 1,000 litres of water. He said that it was an insignificant and unutilised piece of equipment. He said that he saw the tank there the next morning. Mr Cornfoot denied that he owned a 1,000 litre water tank.
- 72 Mr Hahn said that on or about 9 December 2003, he observed that the mobile crushing plants and the Danidale water tank were no longer present at Power-line Cut. He said that the water tank was no longer needed because one of the mobile crushing plants was stationed next to a source of water. He did not observe the water tank anywhere on site.
- 73 Mr Hahn said that when he rang Mr Cornfoot he thought Danidale was just going to do Abigroup a favour. He said that it would be one of those things that someone does on site and you throw that person a carton of beer and that would be the end of it. Mr Hahn said that any hire arrangement was terminated on 10 December by his facsimile dated 8 December 2003 referred to previously.
- 74 Mr Trevor Axford was Abigroup's earthworks foreman for stage 3 of the Bypass Project. He gave evidence that in late 2003 he saw a water truck positioned next to a mobile crushing plant north of Harvest Home Lane. It was covered in dust and unregistered. He subsequently saw a round tank, like an old fuel tank, with a capacity of approximately 3,000 to 4,000 litres, in the same location.
- 75 In his witness statement, Mr Cornfoot said that, on or about 3 February 2004, he spoke to Mr Robert Watkins of Abigroup asking when he would be finished with the water tanker and that Mr Watkins said that Mr Cornfoot could take it as Abigroup did not need it any more. Mr Cornfoot said that he filled out Abigroup's External Equipment Hire Order No. 216633 ("EEH Order No. 216633") in Mr Watkins' presence, who then signed it. Mr Cornfoot said that he then prepared hire invoices 786, 787, 788 and 789 for the hire of the water tanker for the months November 2003 to February 2004 "based on my agreement with Hahn". He said that he sent these invoices to Abigroup.
- 76 In cross-examination, Mr Cornfoot said that he sent all of the invoices at the one time because he was too busy to issue them month by month. When it was pointed out to him that many other invoices were issued in the relevant period, Mr Cornfoot said they were not sent because they were the smallest accounts Danidale had. That explanation was also shown to be incorrect by reference to numerous other invoices for even smaller amounts. Mr Cornfoot maintained that invoices for floats were in a different category. Mr Cornfoot denied the suggestion that he deliberately held back charging for the water cart. At one stage, Mr Cornfoot even said he wrote out the docket and Mr Watkins signed it on 15 November 2003. He also denied that he prepared the invoices and then he claimed that he had never checked them.
- 77 Abigroup's EEH Order No. 216633 was for the hire of a "water tank" and for "float to site". It was dated "15 Nov 2003". Mr Cornfoot initially said that the docket was in the same state when signed but eventually he agreed that the entries on the docket, "15/11—19/12, 3/1—3/2/04", "\$300 x 6 days per wk + GST" and "\$250 + GST" opposite the reference to the float were added after Mr Watkins signed the docket. The first two were added by Ms Pozzebon some time after 3 February 2004. The writer of the third entry was not ascertained. The end date of the hire of "3/2/2004" had probably been added afterwards.
- 78 By invoice No. 786 dated 30 November 2003, Danidale billed Abigroup for \$3,900, plus GST, for hire of water tanker from 15 to 30 November 2003 at \$300 per day (based on a 6 day week). The charge was said to be "As per Docket No. 216633". The invoice also contained a charge of \$250 plus GST for floating the water tanker "site to site". Abigroup's copy of this invoice bore a stamp showing receipt on 5 February 2004. Mr Hahn wrote the following note on it:
- No agreed rate.
 - Docket rec'd by Bob in Feb 04.
 - Originally dry hire of unregistered water tanker for use as static tank, 1 week only.
 - Do not pay remainder.

- 79 Mr Hahn said that he referred to “water tanker” because this was the term used in the invoice. He said that he understood the phrase “unregistered water tanker” to refer to a “a truck mounted tank without any road registration”. He could not explain why he did not include in his note his disagreement with the claim that a water tanker had been hired and delivered to the site.
- 80 By invoice No. 737 dated 31 December 2003, Danidale billed Abigroup for another \$5,100, plus GST, for the hire of the water tanker from 1 to 19 December 2003. By invoice No. 788 dated 31 January 2004, Danidale billed Abigroup for another \$7,200, plus GST, for the hire of the water tanker from 5 to 31 January 2004. Mr Hahn wrote the following note on Abigroup’s copy of this invoice:
*Absolutely do not pay
Instructed to demobilise all equipment/plant 8 Dec ’03.*
- 81 By invoice No. 789 dated 29 February 2004, Danidale billed Abigroup for another \$600, plus GST, for the hire of the water tanker from 1 to 3 February 2004. Mr Hahn wrote the following note on Abigroup’s copy of this invoice:
*Refer to note on invoice #788.
Do not pay.*
- 82 Abigroup has paid Danidale nothing in respect of the plant hire claim.

Subsequent Events

- 83 On 13 January 2004, Mr Hahn received an email from a Ron Silverstein:
I have been appointed as consultant to check Bernies Cornfoot [sic] claim. I understand you will now be settling Bernies claim for 88374 cubic metres at \$2.70 per cubic metre. Please advise me of your company attitude to Bernies claims for the various sedimentation basins.
- 84 Mr Byth’s diary for 13 January 2004 contained an entry relating to a telephone conversation with Mr Cornfoot. According to the entry Mr Cornfoot told Mr Byth that Mr Hahn had “breached trust on the job” and that he had “lied”. It also recorded Mr Cornfoot agreeing that the claim was “over the top.” Mr Cornfoot denied that he said that. Mr Byth gave evidence confirming that the note was accurate.
- 85 According to an entry in Mr Byth’s diary for 16 January 2004, Mr Silverstein told him in a telephone conversation that the letter being signed by Mr Hahn was “*the clincher/crucial*”.
- 86 Mr Cornfoot stated that he met Mr Lowrie on site on 23 January 2004. He wanted to ask Mr Lowrie why he had not been paid for the excavation of rock. He said that Mr Lowrie told him that Abigroup had done a calculation of the work involved in the rock excavation and came up with a smaller sum. Mr Cornfoot said that he replied that the rate was agreed. Mr Lowrie then said that Mr Hahn did not have the authority to sign off on such an agreement.
- 87 Mr Cornfoot gave evidence that he and Mr Beck met with Mr Lowrie and Mr Hahn in February 2004. He said that Mr Lowrie said that Abigroup had calculated a figure which he offered to pay to Danidale for the rock excavation. Mr Cornfoot said it was “90 something thousand dollars”. Mr Cornfoot refused the offer because he was under contract to dig the rock at \$85 per bcm.
- 88 Mr Lowrie and Mr Byth both said that they met Mr Cornfoot and Mr Beck on 19 February 2004 to discuss the dispute about the rock excavation claim and the topsoil claim. Mr Lowrie gave evidence that Mr Cornfoot said that his costs were “90 odd thousand”. He said that they struggled to get information on costs from Mr Cornfoot. Mr Byth said that Mr Cornfoot advised them that his costs of performing the sedimentation basin works was \$93,000, but Mr Byth could not obtain clarification from Mr Cornfoot whether this figure was the costs to him or the costs plus a margin. Mr Cornfoot denied mentioning a figure of \$93,000. Mr Byth said to Mr Cornfoot that he considered this figure overstated the claim by at least \$15,000. He said that they could not get any firm figures from Mr Cornfoot about the number of hours worked. He made a note of the main points coming out of this meeting.
- 89 Mr Byth said that Abigroup was keen to settle the dispute. Both Mr Byth and Mr Lowrie were uncertain whether an offer was made to Mr Cornfoot at that meeting.
- 90 Mr Lowrie said that at a subsequent meeting he offered Mr Cornfoot \$100,000 to settle the issue. By a facsimile dated 27 February 2004, Mr Byth wrote to Mr Cornfoot:
*Abigroup write to confirm the valuation of Sediment Basin Works completed at the Craigieburn Bypass Project as agreed by Messrs Michael Lowrie of Abigroup and Bernie Cornfoot of Bernie Cornfoot Earthmoving on the 25th February 2004.
At this meeting it was agreed that all works related to the Sediment Basins were valued at a total of \$100,000.00 (One Hundred Thousand Dollars). This sum covers all costs incurred by Bernie Cornfoot Earthmoving associated with both the conduct of the physical works and any overhead costs incurred and allows for a margin on these costs.
At the above meeting it was also agreed that Abigroup would release retention held for topsoil stripping works conducted under the Subcontract.
Abigroup will process currently received Invoices on the basis of the above understanding and expedite the payment of any monies due.
If there are any further queries in relation to this matter you are requested to contact Ben Byth of our office.*

Obviously this settlement, which Mr Cornfoot denied in evidence, did not proceed. Mr Lowrie said that Mr Cornfoot did not sign the documents required by Abigroup before it would pay the amount offered. Mr Lowrie said that, in yet another meeting, he increased his offer to either \$115,000 or \$120,000, he was unsure which.

- 91 On 16 March 2004 the solicitors then acting for Danidale wrote to Abigroup enclosing a "Notice of Dispute in accordance with Clause 47.1 of the Subcontract Agreement". The Notice of Dispute, which was signed by Mr Cornfoot, stated in paragraph 5: "*On 14 November, 2003, Mr Leigh Hahn for and on behalf of the Main Contractor confirmed the rate for the rock extraction both orally and by counter-signing a copy of the letter from the Subcontractor to the Main Contractor dated 15 October, 2003.*"

In cross-examination, Mr Cornfoot said that he had not read the Notice of Dispute before he signed it, but he had told the solicitors what had happened.

- 92 A letter dated 9 August 2004 signed by Mr Cornfoot was sent to Mr Lowrie about the dispute. He claimed payment of \$564,371.14. Mr Cornfoot said that although he signed the letter, he did not draft it. He explained to the writer what had happened on the job. In respect of the rock excavation issue, the letter said:

Entitlement to payment for this item arises from a written agreement between Abi [Abigroup] and BCE [Bernie Cornfoot & Sons Earthmoving] for BCE to excavate on Abi's behalf, rock occurring in the sedimentation basins, which Abi represented to BCE it would remove as part of the lump sum. The agreed rate was \$85/cm and the agreed volume of rock removed by BCE is 4267.40cm.

We agree with Mr Lowrie that the removal of rock was outside the scope of the subcontract. Therefore, the agreement for BCE to undertake that work is not an agreement that is within the framework of the original subcontract or subject to those terms.

The parties agreed the applicable rate for the excavation of the rock before the work began and jointly measured the volume excavated. The quantum which Abi now has an obligation to pay is defined as the product of those two agreed figures.

- 93 In respect of the water cart issue, the letter said, referring to Abigroup's EEH Order No. 216633:
The hire order was issued by Abi on 15/11/03 and covered the period to 3/2/04. The order contains the rate at which the equipment is to be hired, the periods of hire and incidental charges. The monthly hire charges have been advised to Abi in invoices 786, 787, 788 and 789.

We note that the Abi Commercial Manager has expressed the view that the item was hired for 1 week only, the hire rate included GST and implied that for the balance of the hire period, BCE entered into some other arrangement with a third party.

These comments were at best, made without reference to the express terms of the Equipment Hire Order and are therefore manifestly incorrect.

The Expert Evidence

- 94 The plaintiff called as its expert witness, Mr Barry Tozer, a consulting construction engineer with over forty years' experience in the building and construction industry in Australia. Mr Tozer was asked to give his opinion on whether \$85 per cubic metre for the excavation of rock in each of the sedimentation basins 1, 7 and 8 was a reasonable rate, if the work was to be valued in accordance with clause 40.5(c) of the Subcontract Agreement.
- 95 Mr Tozer approached that task by considering what would be known by a person prior to undertaking the work and proceeded on the basis that a contingency would often be included in the rate to allow for the cost of the unknown elements. Mr Tozer concluded that \$85 per cubic metre was a reasonable rate for rock excavation in sedimentation basins 1 and 7, and that \$50 per cubic metre was a reasonable rate for rock excavation in sedimentation basin 8, being considerably larger than the other two, if full details of the extent of rock excavation had been known prior to commencement.
- 96 It was pointed out to Mr Tozer in cross-examination that his calculations concerning sedimentation basin 8 involved him allowing for over 500 hours for breaking out rock and excavating broken rock, whereas on Mr Cornfoot's evidence he spent between about 95 and 112 hours in performing this work. Mr Tozer said that he did not think that this result was "extraordinary". He rejected the proposition that this demonstrated that his approach of considering what might be involved rather than taking account of what actually happened was flawed.
- 97 Mr Tozer also rejected the criticism that his reliance on the rates quoted in the 2004 edition of Rawlinsons Australian Construction Handbook was inappropriate given the disclaimer in it about not relying on the rates without checking in detail the specific requirements of the contract. He said that what Rawlinsons did was exactly what he did.
- 98 The defendant's expert witness was Mr Robert Simonsen, an engineer with over forty years' experience in the civil construction, mining and consulting engineering industries. Mr Simonsen prepared three reports dated 5 March, 22 March and 20 April 2007. In his 5 March report, Mr Simonsen concluded, based on his analysis of Danidale's dockets, the volumes excavated and assumed excavators with hydraulic hammers only, that a reasonable rate to excavate rock in the sedimentation basins would be approximately \$17.75 per bcm. In his April report, Mr Simonsen concluded that an additional figure of \$12.37 per bcm less \$4.50 per bcm should be added to the \$17.75 per bcm to take account of the cost of "moving or rehandling the rock for subsequent loading out for disposal". This resulted in a figure of \$25.62 per bcm. By a slightly different route, Mr Simonsen had concluded

that the reasonable rate “for the work excluding haulage and disposal costs, and in accordance with a subcontract structure such that each rate was independent” was \$26.30 per bcm.

- 99 Mr Simonsen also addressed the question of what would be a reasonable rate for the hire of a water tanker/tank in November 2003. In his first report, he expressed the opinion that a reasonable rate for the hire of a small mobile water tank would be \$16.20 per day. In his second report, Mr Simonsen expressed the opinion that a reasonable rate for the hire of the 12,000 litre unregistered mobile tanker described by Cornfoot “would not be less than \$292.50 per day”. This was calculated by deducting from the figure of \$62.50 per hour, which Mr Cornfoot said Danidale had charged Abigroup for that tanker and a driver in 2002, the cost of \$30 per hour for the driver. Mr Simonsen said that he estimated this labour cost based on his experience. He used a nine hour day in his calculations.
- 100 Mr Lowrie gave evidence that, in his experience, the cost of labour in 2003 for plant operators such as water truck operators was around \$45 to \$48 per hour. He also said that, in his experience, the full cost for the operation of a water truck such as the one described by Mr Cornfoot in 2003 was approximately \$5 to \$7 per hour. Taking the midpoint of these two figures, Mr Lowrie came up with an hourly rate of \$10 and a daily rate of \$93.30 based on a six day, 56 hour, working week.
- 101 Despite this evidence, in its final submissions Abigroup conceded that if it was found that it hired an unregistered water tanker of the type described by Mr Cornfoot, the Court could use Mr Simonsen’s figure of \$292.50 per day rounded up for convenience to \$300 per day, plus GST.

Consideration of the Issues

The Excavation of Rock Claim

- 102 The resolution of this claim first involves deciding a number of conflicts in the evidence. Mr Twigg of counsel, who appeared on behalf of Danidale, submitted that the conversation on the afternoon of 14 October 2003 at sedimentation basin 7 was an agreement by Abigroup to a rate of \$85 per bcm for excavation of rock in the future from any sedimentation basin, not a rate for particular sedimentation basins. He argued that this was logical because, at the time of this conversation, all three basins excavated had contained rock.
- 103 In my opinion, the agreement between Mr Cornfoot and Mr Hahn for Danidale to excavate rock at \$85 per bcm extended only to sedimentation basin 4. That is what was said in Mr Hahn’s facsimile sent early the next morning. I consider that if, as maintained by Mr Cornfoot, agreement had been reached on 14 October 2003 to pay \$85 per bcm for all future rock excavations or for sedimentation basins 1, 4, and 7, then not only would one expect Mr Hahn’s facsimile to say so, but more importantly one would expect that Mr Cornfoot’s response would have made that clear. On the contrary, it does not do so. Instead, it confirmed the agreement with respect to sedimentation basin 4 at \$85 per bcm, and then added the reference to sedimentation basins 1 and 7. This suggests to me that agreement had yet to be reached about what would occur if rock was encountered at those basins. Silence by Abigroup does not constitute acceptance of Danidale’s offer.
- 104 Moreover, even apart from the wording of the facsimiles, I am not prepared to accept Mr Cornfoot’s evidence about the alleged conversation at sedimentation basin 7 on 14 October 2003. Generally, I preferred Mr Hahn’s evidence to that of Mr Cornfoot. But here, a third person was allegedly involved and I accept Mr David’s evidence that he did not have an argument with Mr Hahn or get involved with issues such as rates or contractual dealings. I reject Mr Cornfoot’s evidence that Mr David mentioned his rock rate to him, or that it was too high, when he ran into Mr David on his way to the post-tender meeting on 3 October 2003. I consider that this evidence was given in an attempt to bolster the likelihood of Mr David making the comments attributed to him during the discussion at sedimentation basin 7. As I have said, I do not accept Mr Cornfoot’s version about that conversation.
- 105 Whilst the note in Mr Hahn’s site diary about a D11 going to sedimentation basin 7 for Mr Cornfoot is some support for Mr Cornfoot’s version, it was an entry for 13, not 14, October 2003. Moreover, it was common ground that Danidale started work on 13 October at sedimentation basin 7. I have, nevertheless, taken this and all the other matters raised in the final submissions into account in reaching my conclusion.
- 106 I also reject Mr Cornfoot’s evidence that he made an agreement with Mr Byth on 24 November 2003 that the excavation of rock at sedimentation basin 8 would be paid for “in accordance with the agreement” with Mr Hahn on the other basins. I consider that if this discussion had in fact occurred, it would have received a great deal of prominence in the subsequent negotiations, whereas it was never mentioned. It seems to me that it was subsequently realised that the alleged agreement of 14 October 2003 arguably did not include sedimentation basin 8. Moreover, I cannot understand why Mr Cornfoot did not ask for written confirmation of this agreement, just as he had with sedimentation basin 4. As he had to arrange to bring in the large excavator, he had more than sufficient time to obtain confirmation from Abigroup, without putting his partner to the trouble of personally taking a letter to Mr Hahn.
- 107 I am, however, not persuaded that agreement was reached between Abigroup and Danidale that, apart from sedimentation basin 4, the excavation of rock would be done at hourly rates. Mr Hahn’s evidence on this was fairly vague, if not non-existent, and there was no follow up on the part of Abigroup in respect of the charges to be made by Danidale. It seems to me, therefore, that Mr Cornfoot proceeded on the mistaken basis that he had, or would receive, Abigroup’s agreement to \$85 per bcm, and that Abigroup did not really turn its mind to the question of excavation of rock, apart from sedimentation basin 4. Subject to the terms of the Subcontract

Agreement, if relevant, this would leave Danidale in the position of being entitled to a reasonable rate for the excavation of rock from sedimentation basins 1, 7 and 8.

- 108 Next, I am quite satisfied that the amended version of Danidale's facsimile of 15 October 2003 was not handed to Mr Hahn until 14 November 2003. In my opinion, to have signed or initialled a document and then dated it a month ahead would be extremely unlikely behaviour by Mr Hahn. Even more extraordinary would be that he was able to choose a date which just happened to fit in with what clearly occurred two days earlier on 12 November. I accept Mr Hahn's evidence on this issue. His signing the facsimile should not be treated as acceptance of the rate of \$85 per bcm for the other sedimentation basins.
- 109 I am strengthened in this conclusion by the inherent implausibility of the relevant evidence of Ms Pangbourne, Ms Pozzebon and Mr Cornfoot. Each of them said that they looked at the document sufficiently closely to see that Mr Hahn had signed or initialled it, yet not one of them saw that there was this most unusual date immediately below the signature/initials. I cannot accept that evidence.
- 110 Further, it seems to me that the visit by Ms Pangbourne logically followed the discovery by Mr Cornfoot that the Subcontract Agreement did not contain his "rock rate". He wanted to have the 15 October 2003 facsimile signed by Mr Hahn, as support for his claim to \$85 per bcm of excavated rock. This conclusion does not depend on a finding one way or the other about the content of the telephone conversation between Mr Hahn and Mr Cornfoot on 12 October 2003. In any event, I accept Mr Hahn's evidence that he urged Mr Cornfoot to sign the contract so that his company could get paid. I also accept his evidence that when he apparently used the phrase "notate the agreement" he meant "execute" the document. If, as Mr Cornfoot maintained, Mr Hahn told him, in effect, to add the facsimile signed by Mr Hahn to the Subcontract Agreement, one would have expected that this would have been remembered by Mr Cornfoot as an important fact. Yet, as has been previously mentioned, Mr Cornfoot made no reference to this conversation in his witness statement.
- 111 I also reject Mr Cornfoot's evidence that he included a copy of the facsimile signed by Mr Hahn at the back of the Subcontract Agreement bundle of documents which he returned to Abigroup in late November or early December 2003. One would have expected there to have been an immediate response from Mr Cornfoot when the executed copy of the Subcontract Agreement, minus the facsimile, was delivered to him shortly after 16 December 2003. Yet, Mr Cornfoot never complained about this omission. Mr Hopkins of counsel, who appeared on behalf of Abigroup, also pointed out that it was not pleaded by Danidale that this letter formed part of the documents constituting Subcontract Agreement and that the plaintiff's case was not opened on this basis.
- 112 Finally, notwithstanding that Mr Cornfoot said that he looked carefully through the documents constituting the Subcontract Agreement for reference to his rock rate, he said that he did not notice that it provided for a lump sum price. I cannot accept this evidence. The lump sum price was referred to in the very first paragraph of the letter of appointment and again in the Formal Instrument of Agreement in the very place where one might have expected to find the rock rate. Further, Mr Cornfoot appeared to say in cross-examination that he had realised that the lump sum price was a mistake on the part of Abigroup.
- 113 Having made these various finds of fact, I turn now to consider the legal issues that arise for determination.
- 114 The first issue to decide is whether excavation of rock was included in lump sum price of \$203,186, plus GST. Despite the fact that both sides agreed that Danidale's quotations and Abigroup's letter of intention to enter into subcontracts were all rates based, and that the lump sum of \$203,186 was mistakenly included, both Danidale and Abigroup agreed that the formal Subcontract Agreement, signed after a large part of the work had been performed, represented the contract between them. Neither side sought rectification of the contract, on the basis that they had not intended a lump sum price. I must therefore proceed on this basis.
- 115 Where the parties disagreed was in respect of the question of what work was included in the lump sum price. Danidale submitted that excavation of rock was not part of the scope of the works that Danidale agreed to perform pursuant to the Subcontract Agreement, whereas Abigroup contended that the Subcontract Agreement included construction of the sedimentation basins to completion, irrespective of whether this involved the excavation of clay (OTR) or rock or both.
- 116 Mr Twigg emphasised that the scope of works contained the following statement in respect of the construction of temporary sedimentation basins: "*Excavate, shape and detail each basin. Please note that Abigroup reserve the right to conduct the excavation if rock is encountered.*"
- These words had appeared in the letter of intention dated 7 October 2003, at a time when the contract was clearly intended to be rates based. Mr Twigg submitted that there was no need for an express reservation if the contract did not mean that rock was excluded from the scope of works, because if the parties had intended that such work be performed by Abigroup as a variation, the variation provision in the subcontract would cover the eventuality and the provisions would otherwise be otiose. He submitted that the parties had intended at all times since the post tender meeting, on 3 October 2003, that rock excavation was not to be part of Danidale's contract.
- 117 Further, Mr Twigg emphasised that, according to clause 1.0 of the Formal Instrument of Agreement, in the event of any discrepancy, inconsistency or ambiguity in the contractual documents, the stated order of precedence was to be used to resolve that inconsistency. Mr Twigg pointed out that clause 1.5 which read: "*Specification sections, Scope of Work and addenda as listed in the Specification Schedule appeared before clause 1.6: Drawings as listed in the Drawing Schedule.*"

- 118 Attention was also drawn to the fact that although there was a similar list of documents in order which were said to comprise the subcontract set out in the letter of appointment, a change had been made to item 5 in the formal instrument of agreement to add the words "Scope of Work" as quoted in the preceding paragraph. Thus, Danidale submitted that the express reservation which it relied on in the scope of works took precedence over the drawings.
- 119 Mr Hopkins submitted that the letter of appointment, the first contractual document in order of precedence, made it clear that in return for the lump sum payment Danidale had, in part, to construct each of the six sedimentation basins as "a completely finished article". Next in order of precedence were the General Conditions of Subcontract. Mr Hopkins relied on the following parts of the General Conditions. Clause 3.1 provided, in part, that:
- Unless otherwise provided in the Contract, the Subcontractor shall execute and complete the work under the Subcontract in accordance with the requirements of the Subcontract.*
- And clause 4.1 stated that:
- Without limiting the generality of Clause 3.1, the Subcontractor warrants to the Main Contractor that the Subcontractor –*
- (a) ...
- (e) *shall execute and complete the work under the Subcontract in accordance with the Design Documents so that the Subcontract Works, when completed, shall –*
- (i) *be fit for their stated purpose; and*
- (ii) *comply with all the requirements of the Subcontract and all legislative Requirements.*
- 120 Thus, Mr Hopkins submitted, the General Conditions confirmed what was set out in the letter of appointment – that Danidale's obligation was to complete the sedimentation basins in accordance with the drawings referred to in the Subcontract Agreement. The relevant drawings showed in detail the work to be undertaken in respect of each sedimentation basin the subject of the Subcontract Agreement, including the dimensions of the excavated basin, and the installation of the beaching, rock mattresses and low flow pipes. No differentiation was made in the drawings between rock and clay.
- 121 Mr Hopkins then submitted that the expression on which Danidale placed so much reliance was only found in the document last in order of precedence, the "Scope of Works". This document was not the unknown "Scope of Work" found in the category of documents higher in order of precedence than the Drawings and the Scope of Works. Mr Hopkins submitted that the words "excavate, shape and detail each basin" again described the overall extent of Danidale's obligation and corresponded with what was said in the documents earlier in the order of precedence. He submitted that the reservation to Abigroup of the right to excavate rock, if encountered, did not have the effect of removing that work from Danidale's tasks. This was simply an acknowledgement of the possibility that Abigroup might vary the lump sum contract by doing this work itself, if rock was encountered.
- 122 I have concluded that, for the reasons advanced on behalf of Abigroup, the correct construction of the Subcontract Agreement is that the cost to Danidale of excavating rock from the sedimentation basins is included in the lump sum price. Although one must construe a contract in the context of its factual matrix, I agree with Mr Hopkins that in the unusual circumstances of the making of this contract, it is unhelpful to concentrate on the prior negotiations about schedules of rates. Those negotiations became largely irrelevant when the parties elected to enter into the Subcontract Agreement containing the lump sum price. If the words of the Subcontract Agreement itself are clear, as I consider they are, then there is no need to go beyond them.
- 123 Danidale pleaded in its reply that, if Abigroup were to resile from its representations about the excavation of rock, it would suffer detriment because the excavation of rock was considerably more expensive than the excavation of soil and the subcontract sum was calculated on the basis that the material to be excavated was soil and did not include excavation of rock. It therefore pleaded that it would be unconscionable for Abigroup to resile from the representations and was estopped from doing so.
- 124 I do not accept this argument. The topsoil component of the Subcontract Agreement (40,000 bcm at \$2.70 per bcm) amounted to \$108,000, leaving \$95,186 for the sedimentation basin component. The evidence disclosed that the total volume excavated from the six sedimentation basins in question was 4,703.8 bcm. At \$4.85 per bcm this comes to \$22,813.43. Thus, if all the excavation had been OTR, arguably Danidale would have enjoyed a windfall gain under the lump sum price of \$72,372.57. In fact, only 436.4 bcm of soil was removed and the balance, 4,326.5 bcm, was rock. At \$4.85 per bcm, the cost of removing the soil was \$2,116.54, leaving \$93,069.46 for the cost of excavating the rock. If that work had been excluded from the Subcontract Agreement lump sum price, Danidale would have made a windfall gain of \$93,069.46. Although perhaps not knowing the precise figures, Mr Cornfoot understood, I consider, the potential benefit to be gained if he could receive the lump sum price plus the cost of excavating the rock. Having elected to proceed down this path, there is nothing unconscionable, in my opinion, in the outcome. As Mr Hopkins pointed out, this figure was remarkably close to the \$93,000 or \$90,000 odd that Mr Byth and Mr Lowrie said had been mentioned by Mr Cornfoot as his cost of excavating the rock. I accept their evidence on this point.
- 125 My conclusion is, therefore, that Danidale fails in its excavation of rock claim. This means it is strictly not necessary to consider this claim further. Even so, I will briefly set out my views on the remaining issues.

- 126 I have found that Danidale would have been entitled to recover the cost of excavating rock from sedimentation basin 4 at the rate of \$85 bcm. As there were 120 bcm of rock in that sedimentation basin, this would result in a figure of \$10,200.
- 127 For the remaining basins the quantity of rock was 4,147.4 bcm. I consider that whether one was applying clause 40.3 or clause 40.5 of the General Conditions of the Subcontract Agreement or normal contractual principles the result would be the same. Danidale would be entitled to receive a reasonable rate for that work. I do not accept Mr Tozer's conclusion that \$85 per bcm, or even \$50 per bcm for sedimentation basin 8, was a reasonable rate. In my opinion, the excessive number of hours included in Mr Tozer's calculations showed that his analysis was in some way flawed. I consider that he was led into error by attempting to calculate a reasonable rate from the position of standing in the shoes of a tenderer not knowing how much rock there would be, rather than calculating the rate on the basis of what was known about the work actually performed.¹ A reasonable rate is assessed by having regard to what the defendant would have had to pay under a normal commercial arrangement and to the costs of the work actually performed.² The former category does not necessarily include the \$85 per bcm agreed for sedimentation basin 4, because that was an example of Abigroup agreeing to a rate it had previously considered too high under the pressure of other constraints. It did not agree that rate for the other basins. The latter category allows the actual costs to play a part as evidence, but they are not necessarily determinative.
- 128 If I had to decide a reasonable rate for rock excavated by Danidale, I would accept the conclusion of Mr Simonsen that a reasonable rate was \$17.75 per bcm. I consider that this is the appropriate figure to use and not his \$26.30 per bcm figure, which allowed for work not performed by Danidale. By my calculations, 4,147.4 bcm at \$17.75 per bcm equals \$73,616.35.
- 129 Thus, if I had found that the cost of excavating the rock was not included in the Subcontract Agreement lump sum, I would have held that Danidale was entitled to recover \$83,816.35, plus GST, under its excavation of rock claim. I note that this is less than the \$93,069.46 windfall which Danidale would have gained had I reached this alternative conclusion.

The Additional Stripping of Topsoil and Unsuitable Material Claims

- 130 The contract provided that the quantum of topsoil stripped by Danidale was to be as measured by Abigroup's surveyors. Mr Hopkins therefore submitted that Danidale was bound by the final figure produced by Mr Smith. He argued that Danidale had been unable to demonstrate any deficiency in the methodology of the surveys undertaken by Abigroup and that there was, accordingly, no basis for Danidale to assert that the contractual procedure did not apply.
- 131 I do not agree. I accept Mr Twigg's submission that Abigroup's November 2003 survey was incomplete in that it covered no more than about half of the topsoil stripped by Danidale at that stage, and that Abigroup never completed that survey. If Danidale had not engaged Gertzel to carry out its survey, there would have been no assessment of the volume of some of the stockpiles and no final figure could have been produced by Abigroup's surveyors.
- 132 Further, Abigroup's surveyors did not carry out the task at the agreed times, or even in a reasonably timely manner. No survey was performed by Abigroup's surveyors on or about 26 October 2003, as had been agreed. Nor was there a survey on or about 26 December 2003. Even the survey work done in November did not include surveying of stockpiles completed on or after 26 November.
- 133 This means it is necessary to consider why there was this discrepancy of 7,983.9 bcm between the two survey results. In respect of all but three of the 38 stockpiles, it is fair to say the difference between them is within (or close to) the accepted tolerance for this sort of work, being plus or minus 5%, or if it is not, the amount of the difference does not account for much of the overall difference. Together, these 35 stockpiles account for 20%, or 1,608.4 bcm, of the overall difference.
- 134 The remaining 80% can be attributed to two factual disputes between the parties. One significant difference is that the calculations for stockpiles 21 and 23 between them account for 49%, or 3,913.8 bcm, of the overall difference. Abigroup submitted that this difference could be explained by the fact that Mr Johnson had conceded that he had not checked the calculations of his assistant, Mr Denis Stubbs, who may have carried out the work in respect of stockpiles 21 and 23. Mr Johnson could not say which of them had done these particular calculations. He did say, however, that "basically it's pretty hard to make a mistake. The software does the work for you." On the other hand, Mr Smith had performed all the calculations himself using the raw data collected by Abigroup's surveyors.
- 135 I am satisfied that the correct calculations are those performed on behalf of Danidale. In my opinion, the survey work carried out by Gertzel was more professional than that done by Abigroup's surveyors. I am strengthened in this conclusion by the handwritten comment by Mr Smith quoted above.
- 136 The second significant difference is whether stockpile 22 was a stockpile of unsuitable material or topsoil. It accounted for 31%, or 2,461.70 bcm, of the overall difference. Not surprisingly, Abigroup submitted that if stockpile 22 was unsuitable material, this had been claimed separately by Danidale, being the claim for \$11,250, and Abigroup should not have to pay twice for the one item.

¹ See *Pavey & Matthews Pty Ltd v Paul* (1986) 167 CLR 221, 263 (Deane J); *Kane Constructions Pty Ltd v Sopov (No. 2)* [2005] VSC 492, [34] (Warren CJ); *Weldon Plant Ltd v The Commission for New Towns* [2000] BLR 496, 501 (Judge Lloyd QC).

² See *Pavey & Matthews Pty Ltd v Paul* (1986) 167 CLR 221, 263 (Deane J); *Brenner v First Artists' Management Pty Ltd* [1993] 2 VR 221, 263 (Byrne J). See also *Keating on Construction Contracts* (8th ed, 2006) para 4-020.

- 137 Mr Cornfoot's evidence about the unsuitable material work was unsatisfactory in a number of respects, in particular how he had come to send an invoice to Abigroup for twice the volume of material moved. But he stated that the only unsuitable material Danidale had removed had been 3,000 bcm placed in the C-zones at Abigroup's request. He said that the topsoil stockpiles were well outside the C-zones.
- 138 Mr Hahn gave evidence that he had seen the stockpile of unsuitable material not in the C-zones, despite his instruction. He said that it was north of the shared pathway, adjacent to Craigieburn East Road. He thought it was between chainages 19,380 and 19,420. Mr Smith gave evidence that, according to the data, stockpile 22 was somewhere between chainages 19,710 and 19,915, that is, between 330 and 495 metres from where Mr Hahn said the unsuitable material had been stockpiled.
- 139 I therefore see no reason not to accept the figure calculated by Danidale's surveyors for stockpile 22. This conclusion also means that Abigroup owes Danidale \$11,250, plus GST, for the unsuitable material claim.
- 140 The final issue was whether Danidale could recover from Abigroup the cost of engaging Gertzel to carry out the survey of the stockpiles. In my opinion, it can. The survey of the stockpiles had to be done quickly before the contents were used for other purposes. As I have found, Abigroup's surveyors did not act within a reasonable time, and when they did commence the task, they did not complete it. Without Gertzel's work, therefore, Danidale may have been left unable to recover for this additional work.
- 141 Mr Hopkins submitted that Danidale had no legal basis for any such claim. He pointed out that no claim for damages for breach of contract had been pleaded in respect of this item. The amount had simply been claimed. In the circumstances, I would, if necessary, give Danidale leave to amend its statement of claim to plead that claim. In my opinion, the matter was fully investigated and Abigroup would not be prejudiced by the late amendment.
- 142 Again, Danidale's invoicing left a lot to be desired. Although it initially claimed \$6,287, plus GST, for this work, a closer analysis of Gertzel's invoices revealed that some of them related to other work. The final claim made was for \$5,200, plus GST, after giving credit for the non-Bypass Project work. I did not understand that Abigroup disputed the quantum of the reduced claim.

The Plant Hire Claim

- 143 Clearly, there was a conversation in November 2003 between Mr Hahn and Mr Cornfoot about Abigroup using a Danidale water tanker/tank alongside the mobile crushing plants. Given that the date of 15 November 2003 was not written by Mr Cornfoot on the EEH Order No 216633 until 3 February 2004 and that Mr Hahn's site diary recorded the conversation as taking place on 19 November 2003, I find that the latter date was the starting date of Abigroup's use of a water tanker/tank.
- 144 I am not persuaded that Mr Cornfoot spelt out the terms of \$300 per day for a six day week and a float fee of \$250, all plus GST. I accept Mr Hahn's evidence that these matters were not discussed. According to Mr Hahn's note on invoice No. 786, however, one week's hire was initially agreed. Moreover, I consider that Mr Hahn must have appreciated that Danidale would be charging for the use of the water tanker/tank. Part of my reasoning for rejecting Mr Cornfoot's evidence about the hire rate was that it seems to me that he deliberately delayed making any charge for the water tanker/tank in the knowledge that once his excessive claim was articulated Abigroup would swiftly bring the hire to an end. I consider that this is the most likely explanation for Danidale not sending out its invoices on a monthly basis. The credibility of Mr Cornfoot was not assisted by the false claims made in the letter of 9 August 2004 about "the express terms" of EEH Order No. 216633.
- 145 Next, I find that what was initially provided by Danidale was a 12,000 litre unregistered water tanker. Mr Hahn's use of the expression "unregistered water tanker for use as a static tank" is decisive, in my opinion. The same cannot be said of Mr Cornfoot's use of the phrase "water tank" in EEH Order No. 216633 because, by the time that form was filled out, "water tank" was the correct description. In any event, Mr Cornfoot's evidence was supported by Mr Axford's observation.
- 146 Finally, I find that any hiring by Abigroup was terminated by its letter dated 8 December 2003 which stated:
The hourly hire tasks, which we requested of you, are now also complete – thank you for that
The letter also requested "demobilisation" of Danidale's plant and equipment on 10 December 2003. Mr Cornfoot said that, by this stage, he had replaced the water tanker with the larger tank. Mr Axford's later observation did not support Mr Cornfoot's evidence in this regard. In the circumstances, regardless of what the particular equipment was, I do not consider that Danidale is entitled to any hiring charge after 10 December 2003. It chose to leave the tank there without any continuing agreement by Abigroup to pay for its hire.
- 147 In the light of these findings, applying Abigroup's concession, I find that a reasonable rate for the unregistered water tanker or substituted tank was \$300 per day for 19 days between 19 November and 10 December 2003, making a total of \$5,700 plus \$250 for the float, plus GST.
- 148 If I am wrong on the termination issue, then Danidale would be entitled to another 39 days between 11 December 2003 and 3 February 2004 for the hire of a water tank. I accept Mr Axford's evidence that the water tank was not as large as claimed by Mr Cornfoot, and Mr Simonsen's opinion that a reasonable rate for a small tank would be \$16.20 per day, thus making an additional entitlement of \$631.80, plus GST.

Reductions in the Scope of the Works

- 149 There were three items which Abigroup submitted decreased the lump sum price because they reduced the scope of the works to be performed by Danidale. By the time of final submissions, the parties had agreed on the figure of \$1,485 for the rock mattresses supplied by Abigroup and not Danidale, so this need not be considered further.
- 150 The second item was a deduction for the low flow pipes and beaching not installed or performed by Danidale. The dispute was over the appropriate amount. Mr Hahn gave evidence that he had worked out a figure of \$9,000 as the value of the work not carried out. He was not cross-examined about this estimate. Danidale conceded that a figure of \$600 should be deducted but this was not justified in any way. In the circumstances, I do not accept Mr Twigg's submission that, as Mr Hahn's figure was just an assertion, it should not be relied on. I see no reason why I should not accept his evidence that this was the appropriate amount to be deducted.
- 151 The final item was a deduction for the reduced size of the sedimentation basins. Mr Hahn gave evidence that the original set of drawings (version A) showed that Danidale was required to excavate 10,760 bcm from the six sedimentation basins. He said that he gave a new set of drawings (version B) to Mr Cornfoot in late October or November 2003. He claimed that this amended set required Danidale to excavate 4,703.8 bcm, or 6,056.2 bcm less. In cross-examination, it was shown, and Mr Hahn agreed, that the version B set of drawings contained the same dimensions for the six sedimentation basins as the version A set of drawings. Mr Hahn then said that he had made a mistake and that he should have referred to a third set of drawings (version O) given to Danidale. This statement was not challenged by Danidale. Indeed, there was no dispute that the volume excavated by Danidale from the six sedimentation basins was 4,703.8 bcm.
- 152 I therefore consider that Abigroup is entitled to this deduction of \$29,372.57 (6,056.2 bcm at \$4.85 per bcm). If necessary, I would give leave to Abigroup to amend its defence and counterclaim to refer to the correct set of substituted drawings. Again, I do not consider that any prejudice would flow from the late amendment.

Calculation of Danidale's Overall Claim

- 153 Based on the above, I have concluded that the amount owed by Abigroup to Danidale is \$69,021.44, calculated as follows:

Contract Lump Sum	\$203,186.00
Excavation of Rock	\$ 0.00
Plant Hire	\$ 5,950.00
Additional Stripping of Topsoil	\$130,609.80
Cost of Surveyor	\$ 5,200.00
Unsuitable Material	<u>\$ 11,250.00</u>
	<u>\$356,195.80</u>
Less Reductions in Scope of Works	
Low Flow Pipes and Beaching	\$ 9,000.00
Rock Mattresses	\$ 1,485.00
Reduced Size of Sedimentation Basins	<u>\$ 27,372.57</u>
	<u>\$ 39,857.57</u>
	\$316,338.23
Less Paid	\$217,881.08
Credits for Fuel	<u>\$ 35,710.39</u>
	<u>\$253,591.47</u>
	\$ 62,746.76
Plus GST	<u>\$ 6,274.68</u>
	<u>\$ 69,021.44</u>

Abigroup's Counterclaim

- 154 Finally, there is the question of Abigroup's counterclaim. In my opinion, Abigroup established that Danidale had breached the terms of the Subcontract Agreement, at least to the extent of Abigroup being forced to issue seven safety improvement notices. This was not disputed by Danidale. As stated above, in the end, Abigroup sought only nominal damages rather than spending time trying to establish the quantum of its loss, if any. I am satisfied that it did suffer some monetary loss. In the circumstances, I am prepared to fix the amount of the nominal damages at \$1.44, so that, after setting off the amount of the counterclaim, Danidale will be entitled to judgment in the sum of \$69,020.

Interest and Costs

- 155 After the parties have had an opportunity to consider my reasons, I will hear submissions on the questions of interest and costs.

For the Plaintiff Mr JAF Twigg instructed by Giannakopoulos Solicitors
 For the Defendant Mr ND Hopkins instructed by Maddocks