

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D766/2004

CATCHWORDS

Appointment to dual roles of project manager and construction manager – obligations of parties under Project Management Agreement and Construction Management Agreement – whether pre-incorporation contracts – s131 of the *Corporations Act 2001* – whether contracts ratified – reasonable completion date for project – damages for delay – whether claims sustainable – claims based on inaccurate calculations – responsibility of project manager/construction manager for design issues and workmanship of contractors

APPLICANT	MX Projects Pty Ltd (ACN 105 196 263)
RESPONDENT	Hyber Pty Ltd
SECOND RESPONDENT BY COUNTERCLAIM	Matthew Xhilaga
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	27-31 March, 3-7 April, 11 April, 26-28 April, 1-10 May, 21 July, 23-24 August 2006
DATE OF ORDER	23 February 2007
CITATION	MX Projects Pty Ltd v Hyber Pty Ltd (Domestic Building) [2007] VCAT 271

ORDER

1. The Applicant shall pay to the Respondent the sum of \$28,268.38.
2. The Respondent's claim against the Second Respondent by counterclaim is dismissed.
3. Costs reserved. Liberty to apply. I direct the principal registrar to list any application for costs for hearing before me allowing half a day.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant Mr A. Dickenson of Counsel

For the Respondent Mr G. Hellyer of Counsel

For the Second Respondent by
Counterclaim Mr A. Dickenson of Counsel

REASONS

- 1 The respondent (Hyber) is a developer and is one of a number of companies in what can best be described as the 'Andah Group of Companies'. Tony Wu is in effective control of the group. His son, Dustin Wu, has been the sole director of Hyber for the past 10 years, since he was 18 years of age. In April 1998, Hyber purchased the subject land in Toorak Road, Camberwell and in 2000 engaged Peter Sgourakis, architect, to provide the following services for the redevelopment of the site, which was to include demolition of the existing buildings and construction of eight apartments, a retail area and underground carpark:
 - a schematic design;
 - b working drawings;
 - c obtain town planning approval;
 - d make application for building permit
- 2 Hyber also engaged Burns Bridge Pty Ltd to provide a job cost estimate and to review documentation prepared by Peter Sgourakis. A quotation for the works was obtained by Burns Bridge from Syncon (a builder) in the sum of \$2,365,000.00 in April 2002.
- 3 At the time, Matthew Xhilaga ('the second respondent by counterclaim') was employed by Burns Bridge and worked on this project. It is alleged by Hyber, that whilst still at Burns Bridge, Mr Xhilaga had discussions with Tony Wu and suggested that there would be significant cost savings if, instead of contracting with a builder to carry out the works, Hyber were to engage Burns Bridge as project manager. Hyber alleges that in February 2003, Mr Xhilaga indicated that he was going to leave Burns Bridge to commence his own project management business and that he would be interested in performing those services for Hyber on this project. For his part, Mr Xhilaga alleges that Tony Wu contacted him 'out of the blue' enquiring whether he would be interested in being the project manager. It is also alleged by Hyber, and denied by Mr Xhilaga, that he represented he was a registered commercial and domestic builder and that he would provide all necessary insurances and warranties.
- 4 Mr Xhilaga left Burns Bridge in April 2003 and in May 2003 entered into a Project Management Agreement ('the PMA') and Construction Management Contract ('the CMC') with Hyber – whether on his own behalf or as promoter for the applicant, MX Projects Pty Ltd ('MX Projects'), is one of the issues in dispute. The lump sum fees payable under each of the contracts were \$85,000.00 plus GST and \$60,000.00 plus GST respectively. Both agreements were subsequently terminated by Hyber – the PMA on 15 December 2004 and the CMC on 29 December 2004. An occupancy permit was issued on 15 February 2005.

- 5 MX Projects and Mr Xhilaga were represented by Mr Dickenson of Counsel for part of the hearing and otherwise by Mr Xhilaga. MX Projects called the following witnesses: Alan Saric (painter), Daniel Westover from Tips & Flanagan (electrician), Robert Bell of BHB Plumbing Pty Ltd (plumber) and Lindsay Patone (engineer).
- 6 Hyber was represented by Mr Hellyer of Counsel and called the following witnesses: Dustin Wu (director of Hyber), Tony Wu, Peter Aggelidis (site foreman), Ray Martin (building consultant), John Greeno of Rider Hunt and Mr Ray Bongiorno of Burns Bridge.

Amendments by the parties of their claims

- 7 MX Projects commenced proceedings on 16 November 2004 seeking payment of the sum of \$78,155.00. It has since amended its claim and now claims \$102,080.00. Its claim was initially for payment of outstanding fees. On March 2006, three days before the commencement of the hearing (the third scheduled hearing date), it made significant amendments to its claim alleging, for the first time, that it was entitled to payment of additional fees, because of delays in the project beyond its control, describing the additional fees as delay fees.
- 8 Hyber lodged a counterclaim on 12 April 2005 \$307,430.30 with a qualification that further particulars would be provided for some of the items. The counterclaim has been amended a number of times, including an application for leave to further amend made mid-morning on the first day of the hearing. The further amendment was for repayment of fees allegedly overpaid under both the PMA and the CMC. Hyber sought leave during examination in chief of its principal witness, Dustin Wu, to further amend its counterclaim to include a claim for blinding concrete in the sum of \$4,140.00. The late and continuing amendments to the counterclaim, including quantum, is indicative of, what MX Projects alleges was, a propensity by Hyber to change its mind during the course of the project. Hyber now claims \$503,467.16.
- 9 The proceeding was first set down for hearing commencing on 25 July 2005 with an estimated hearing time of five days. That hearing date was vacated by order of the Tribunal dated 21 July 2005, and the proceeding set down for hearing commencing on 28 November 2005 with an estimated hearing time of ten days, at which time Hyber was given leave, until 4 August 2005, to file and serve Amended Points of Defence and Counterclaim, which it did. On 26 September 2005, Hyber was granted leave to file and serve further Amended Points of Defence and Counterclaim and these were filed on 7 October 2005.
- 10 The second scheduled hearing date was vacated following an unsuccessful Compulsory Conference on 9 November 2005 and orders made directing the proceeding be set down in March 2006 with a revised hearing time of twenty days.

- 11 Both parties continued to amend their claims. On 8 March 2006 Hyber was given leave to file and serve amended Points of Counterclaim as foreshadowed in the letter from its solicitors dated 2 March 2006. Further Amended Points of Counterclaim were filed on 14 March 2006. On 23 March 2006, leave was granted to MX Projects to file and serve Further Amended Points of Claim dated 10 March 2006 and the hearing date of 27 March 2006 confirmed.

THE HEARING

- 12 Taking into account the ill-health of Mr Xhilaga, and one of Hyber's witnesses, and the availability of the Tribunal and Counsel, the hearing was fragmented. It commenced on 27 March 2006 with closing submissions completed on 24 August 2006. Written submissions were received from both parties, including in excess of 200 pages from Hyber which were supplemented by extensive oral submissions. I have carefully read and considered the submissions together with the authorities to which I was referred.
- 13 I pause to mention here my concerns about the significant costs incurred by MX Projects in preparing the Tribunal Book, which now amounts to twelve volumes. The Tribunal Book, as initially filed, comprised nine volumes. It seems that all of MX Projects' discovered documents have simply been photocopied, without any consideration as to their relevance. Many of the documents are not in chronological order. In many instances, multiple copies of the same documents have been included particularly where a document has been forwarded to others by facsimile. Not only does this mean that excessive photocopy costs have been incurred but I expect the preparation costs for the parties were significant. I noted that Counsel for both parties had extracted (and referred me to) a small proportion of the documents contained in the Tribunal Book for the purpose of cross-examination.

Presentation of the Applicant's case

- 14 At the commencement of day six of the hearing Mr Dickenson advised that his instructor's retainer had been terminated and sought leave to withdraw, which was granted. Mr Xhilaga then proceeded to conduct the case on behalf of MX Projects and on his own behalf. On the morning following the closing of MX Projects' case, the Principal Registrar was advised by facsimile that its former solicitors had been re-engaged and that MX Projects (and Mr Xhilaga) would again be represented at the hearing by Mr Dickenson.
- 15 Mr Hellyer completed cross examination of Mr Xhilaga on the morning of 6 April 2006. Mr Xhilaga, who at that time was not represented, was given some time to prepare for re-examination. On 7 April it became clear that he was far from prepared. He sought further time and confirmed that he would be in a position to fully respond on the following Tuesday – the next

scheduled sitting day. On the Tuesday he forwarded a medical certificate indicating he was unwell and would not be able to attend for the rest of the week.

- 16 The hearing resumed on 26 April, some two and a half weeks later. It quickly became apparent that Mr Xhilaga was still unprepared. He had not collected his copy of the Tribunal Book because, he said, he had been too unwell to do so. A further medical certificate was not provided. He also said that he had ten folders of documents at home which he had not brought with him (it later became apparent that these were a further copy of the Tribunal Book). Considerable time was wasted during the hearing whilst he tried to locate documents in the Tribunal Book and the matter stood down, on a number of occasions, to enable him to consider his notes, with a view to confining himself to re-examination rather than simply summarising the evidence which he had previously given. Following the luncheon adjournment, there was little or no progress as Mr Xhilaga seemed to prepare his re-examination 'on the go'. Inexplicably Mr Xhilaga seemed focussed on the transcript rather than the notes he had written for himself during cross examination. This obvious lack of preparation, organisation and focus were indicative of the manner in which he was alleged, by Hyber, to have approached the roles of project manager and construction manager.

THE PARTIES TO THE CONTRACTS

Are these pre-registration contracts within the meaning of s131 of the Corporations Act 2001?

- 17 Before considering whether the PMA and the CMC are pre-registration contracts within the meaning of s131 of the *Corporations Act 2001* I make the observation that the parties appear to have been, what can best be described as, sloppy, in the preparation of the two contracts. The description of the parties varies between the contracts and in some instances, in the same contract.
- 18 On the cover of the PMA Hyber is simply named as the Principal and MX Projects as the Project Manager – without the 'Pty Ltd' in each instance. On page 1 of the PMA the parties are named as Hyber Pty Ltd and MX Projects Pty Ltd. On the cover of the CMC the Principal is named as Hyber Pty Ltd and the Construction Manager as MX Projects (again without the 'Pty Ltd'), and in Schedule 1 on page 19, Hyber is named as the Principal and MX Projects as the Project Manager (again without the 'Pty Ltd').
- 19 MX Projects maintains that Mr Xhilaga entered into the PMA and the CMC on behalf of MX Projects before the company was incorporated, and that the contracts were subsequently ratified by the company. Hyber's position is that the PMA and CMC should not be regarded as pre-registration contracts and that the obligations of the Project Manager and Construction Manager respectively were to be performed by Matthew Xhilaga and not by

MX Projects. Hyber submits that the contracts were in fact entered into by Matthew Xhilaga in his personal capacity, but if it is found that he did so on behalf of MX Projects, that it is entitled to the benefit of s 131 and particularly s131(4) of the *Corporations Act 2001* which provides:

- (1) If a person enters into, or purports to enter into, a contract on behalf of, or for the benefit of, a company before it is registered, the company becomes bound by the contract and entitled to its benefit if the company, or a company that is reasonably identifiable with it, is registered and ratifies the contract:
 - (a) within the time agreed to by the parties to the contract; or
 - (b) if there is no agreed time—within a reasonable time after the contract is entered into.
- (2) The person is liable to pay damages to each other party to the pre registration contract if the company is not registered, or the company is registered but does not ratify the contract or enter into a substitute for it:
 - (a) within the time agreed to by the parties to the contract; or
 - (b) if there is no agreed time—within a reasonable time after the contract is entered into.

The amount that the person is liable to pay to a party is the amount the company would be liable to pay to the party if the company had ratified the contract and then did not perform it at all.

- (3) If proceedings are brought to recover damages under subsection (2) because the company is registered but does not ratify the pre registration contract or enter into a substitute for it, the court may do anything that it considers appropriate in the circumstances, including ordering the company to do 1 or more of the following:
 - (a) pay all or part of the damages that the person is liable to pay;
 - (b) transfer property that the company received because of the contract to a party to the contract;
 - (c) pay an amount to a party to the contract.
- (4) If the company ratifies the pre—registration contract but fails to perform all or part of it, the court may order the person to pay all or part of the damages that the company is ordered to pay.

20 I find that Matthew Xhilaga entered into the PMA and the CMC on behalf of MX Projects. He discussed his intention to incorporate a company, to perform the obligations under the PMA and CMC, with Tony Wu, who I am satisfied was his primary contact during the negotiation phase. Although Tony Wu may not be a director of Hyber it is clear, on his own evidence, that he is in effective control of all companies within the ‘Andah Group of Companies’ of which Hyber is but one. It is immaterial, in my view, that Mr Xhilaga did not have this discussion with Dustin Wu. Tony

Wu made it quite clear during cross examination that he is in overall control of the decision making process in relation to all companies within the Group including Hyber. This is perhaps best illustrated by the process for payment of Hyber's accounts. Although Dustin Wu would authorise payment of a particular invoice, the cheques were drawn by office staff and signed by Tony Wu – the sole signatory.

- 21 For MX Projects to have become entitled to the benefits of the contracts, it was necessary first for it to be registered, which it was on 20 June 2003, and secondly for MX Projects to have ratified the contracts. I was not addressed by Counsel for either party as to what, if any, steps are necessary for the ratification of a pre-registration contract. However, I am assisted by the observations made by Barrett J in *Aztech Science Pty Ltd v Atlanta Aerospace (Woy Woy) Pty Limited* [2004] NSWSC 967 where, after discussing the general requirements for ratification of a company's actions he said at paragraphs 49-50

It is generally said that ratification may be express or implied. Express ratification occurs when the alleged principal has, by unequivocal language or conduct, acknowledged that the contract is his. Implied ratification may arise in various ways. It often occurs when the alleged principal, although not expressly acknowledging the contract as his own, acts in a way that can only be explained on the basis that he accepts the contract as his own. The essence is, in either case, a manifestation of the principal's intention to be bound.

Determining whether there has been ratification, in the sense relevant to the law of agency, therefore depends on an assessment of the conduct of the alleged principal. The conduct may consist of acts of the alleged principal himself or acts of someone else who clearly acts with the authority of the alleged principal. The reference here to "acts" extends also to omissions to the extent that, in the particular context, omissions are capable of being of probative value. And it goes without saying that, in a case such as the present, conduct can be relevant only if occurring after the time at which the alleged principal came into existence.

- 22 In *Aztech Science v Atlanta Aerospace (Woy Woy)* [2005] NSWCA 319 Basten JA makes it clear that in considering whether there has been ratification of the contract by the company, once incorporated, the conduct of the company, and the individual, following incorporation must be considered. In approving the observations made by Batten J at first instance, referred to above, (with some qualification) he said:

...what may be sufficient conduct constituting acceptance by the company of the contract, executed expressly for its benefit, should be considered in the particular circumstances of the case. [83]

and

The second factor of importance, is that Mr Azzi was not only the promoter under the contract, but was also the directing mind of

Aztech, once registered. That fact might render his conduct equivocal in other circumstances; however, in the circumstances of the contractual provisions noted above, an inference that, after registration, he was acting on behalf of the company may be drawn with reasonable confidence, that the company had in fact accepted the contract. The relevant conduct therefore needs to be considered.[86]

23 The situation in this proceeding is entirely analogous to that in *Aztech Science*. Mr Xhilaga was the promoter under the contract and, to use His Honour's words, was also 'the directing mind of MX Projects, once registered'. In the present case, all invoices, apart from Mr Xhilaga's initial invoice for works carried out before the contracts were executed, were issued in the name of MX Projects Pty Ltd. Correspondence between the parties, and from MX Projects to contractors, and others, was clearly identifiable as being from the company. Most importantly all payments made by Hyber were made to MX Projects Pty Ltd.

24 When considering what conduct might constitute ratification Basten JA said:

In my view the better inference ...is that, Mr Azzi, who became the governing mind of Aztech once it was formed, maintained his commitment to the agreement, and acted on that commitment. The payment on 26 February by Mr Azzi may be seen as a demonstration of his continuing commitment to carrying out the agreement and thus provides evidence of ratification by Aztech, on or before that date.

If it were necessary for Aztech to communicate its ratification to the other parties to the contract, I would find that it impliedly did so by making the payment to Atlanta Aerospace for the work done by Dr Daveys, such payment being made on the date on which the invoice was received, namely 26 February 2003. [89-90]

25 Again, this is entirely analogous to the present situation where, following the incorporation of MX Projects, Mr Xhilaga continued to perform the PMA and the CMC. MX Project's ratification of the PMA and the CMC was notified to Hyber by the rendering of all invoices and correspondence in the name of the company. Hyber clearly accepted that MX Projects was the contracting party when it made payment to the company and not to Mr Xhilaga personally. Not only did Hyber make all payments to MX Projects, it also addressed the Notices of Termination, on which it seeks to rely in support of its claim for a refund of alleged overpayments under the contracts, to the company.

26 Further, although MX Projects may be in breach of its obligations under one or other of the contracts (and whether it is in breach is discussed below), a breach does not, of itself, amount to a failure to perform all or any part of the contracts, particularly as the project was approximately 90% complete as at the date of termination of the contracts. Even if I were satisfied that MX Projects had failed to perform, the power to order payment of any damages by Mr Xhilaga under s131(4) of the *Corporations*

Act is discretionary. In exercising any discretionary power, a court or tribunal must be satisfied it is fair to do so, in all the circumstances. The Tribunal has an overriding obligation under s97 of the *Victorian Civil and Administrative Tribunal Act 1998* to ‘...act fairly and according to the substantial merits of the case in all proceedings’. It would be difficult to be satisfied that it would be fair to exercise the discretion in the present situation where the project was nearing completion at the respective dates of termination of the PMA and the CMC.

Hyber’s withdrawal of its admission that MX Projects Pty Ltd was the contracting party

- 27 For completeness, I should consider the submission on behalf of MX Projects that Hyber, having initially conceded that MX Projects Pty Ltd was the contracting party, subsequently sought to withdraw the admission without leave of the Tribunal. Having reviewed the file, I note that leave was granted to Hyber, on 26 September 2005, to file and serve an Amended Defence. It is apparent from an Affidavit of Kelvin Oldridge dated 23 September 2005, filed in support of the application to file and serve an amended Defence, that the basis of that application was Hyber’s assertion that the relevant contracts were entered into with Matthew Xhilaga rather than MX Projects (the second un-numbered paragraph on page 2 of Mr Oldridge’s affidavit). Despite being opposed by MX Projects, leave was granted and, at the same time, Mr Xhilaga was joined as an applicant to the proceeding (this order was rescinded on 8 March 2006 and Mr Xhilaga removed as an applicant to the proceeding). In granting leave to file and serve the amended Defence the Tribunal implicitly granted leave to Hyber to withdraw the admission, which, after all, was the basis of the application. However, having said that, it is perhaps surprising that such leave was not sought until less than two months before the second scheduled hearing date of 28 November 2005.
- 28 The application (in September 2005) to further amend the Points of Defence was made very late in the proceeding, after Hyber had already filed Amended Points of Defence on 4 August 2005. The admissions by Hyber (that MX Projects was the contracting party) were made at a time when a company search had been obtained by Hyber’s solicitors and, in this regard, I refer to the affidavit of Lisa Hurbugh dated 24 June 2005 (filed in support of Hyber’s unsuccessful application for security for costs) where, at paragraph 5, she deposes to the results of the company search including that MX Projects was incorporated on 20 June 2003.

Issue Estoppel

- 29 For completeness, I should also address Mr Dickenson’s submission that, in any event, Hyber is estopped from denying that the contracts were entered into by MX Projects Pty Ltd, as the issue had previously been determined by the Tribunal in *Carrick Hoarding Hire Pty Ltd v Hyber Pty Ltd* [2005] VCAT 189 where, at paragraph 18, the Tribunal refers to having reviewed

the contracts between the First Respondent (Hyber) and the Second Respondent (MX Projects Pty Ltd). I do not consider this to be determinative of the issue as the identity of the contracting party was not before the Tribunal on that occasion. However, I note that MX Projects Pty Ltd was joined as a party to that proceeding on Hyber's application, which reinforces my view that Hyber always understood that the project manager and the construction manager were MX Projects Pty Ltd and not Mr Xhilaga.

THE WITNESSES

30 I consider it appropriate to make some general comments and observations about the evidence of who I consider to be the primary witnesses: Matthew Xhilaga, Tony Wu, Dustin Wu and Peter Aggelidis.

Mr Xhilaga

31 Mr Xhilaga did not impress me as a witness. He appeared to be unprepared, and at times, it seemed that he did not appreciate the seriousness of the situation confronting him and his company, nor that he had to take responsibility for proving MS Projects' case and defending the counterclaim. As indicated by Mr Hellyer, during closing submissions, there were numerous instances (Mr Hellyer said his instructors had counted more than 500) where his response to questions under cross examination had been "I can't recall", "I don't recall, it's such a long time ago" or something similar. He seemed to have what can be best described as 'selective recall' of events in 2003/2004 – many events he seemed to recall with surprising precision, whilst there were many others about which he said he had no recollection at all.

32 Despite repeated requests for Mr Xhilaga to identify the date of termination of his employment with Burns Bridge, and suggestions by me as to how he might, he seemingly failed to take any proactive steps to do so. On day nine of the hearing, Mr Xhilaga objected to the filing of a Witness Statement from Raymond Bongiorno, a director of Burns Bridge, which confirms he resigned on 26 March 2003 and left on 23 April 2003. I granted Hyber leave to file this Witness Statement because of Mr Xhilaga's apparent reluctance to obtain the information himself. Not surprisingly, Mr Xhilaga sought to deny that 23 April 2003 was the date he left Burns Bridge, perhaps because he realised that it contradicted his earlier evidence that he had not carried out any work on this project, in his own right, whilst employed by Burns Bridge. He rendered an invoice to Hyber for 88 hours for services provided by him, in his personal capacity, in April 2003. It is unlikely, in my view, that these 88 hours were worked in the period between 24 and 30 April 2003, after he left Burns Bridge.

33 The date Mr Xhilaga ceased employment with Burns Bridge is significant, especially in the light of his evidence about the circumstances surrounding his involvement in the project. The project management services were

originally being carried out at Burns Bridge by Mr Xhilaga. He left in April 2003 and says that Tony Wu contacted him 'out of the blue' to take over the project management of the project. He was asked in cross examination about a letter dated 13 March 2003 relating to project management services which he alleges he sent by email to Hyber on behalf of Burns Bridge. I did not find this evidence credible. Considering the evidence from Mr Bongiorno as to Burns Bridge's usual practice in relation to letters of engagement, and noting the style of the letter is similar to all other correspondence from MX Projects to Hyber, and that Mr Xhilaga signed off as 'the project director' as opposed to 'project manager', the title used on those copies of correspondence written by him, on behalf of Burns Bridge, which I have before me, I am satisfied this letter was not sent on behalf of Burns Bridge. On balance, I find it was sent to Tony Wu by Mr Xhilaga, in his personal capacity, on or about 13 March 2003, before he resigned from Burns Bridge.

- 34 Mr Xhilaga's lack of preparation did nothing to advance his position that MX Projects had performed its obligations in a timely and efficient manner, and had not been responsible for delays in the project. He appeared to be generally disorganised, lacking in understanding and appreciation of what was required, even though it had been explained to him in great detail and he had a copy of the transcript.
- 35 He also seems to have little appreciation and understanding of the obligations of the project manager and the construction manager under the respective agreements. If I was to accept his evidence as to the proper interpretation of the obligations of the project manager/construction manager the inescapable conclusion would be that MX Projects was to take all care but no responsibility in managing this project.

Tony Wu

- 36 Although Dustin Wu is the sole director of Hyber, his father, Tony Wu clearly had a significant involvement in this project. As noted above, Hyber was incorporated on 19 June 1996 when Dustin Wu was 18 years of age. The Toorak Road project is its third. Notwithstanding his protestations that the project was entirely Dustin Wu's responsibility, it is apparent that in the early stages of the development, at least, Tony Wu was the 'driving force'. He engaged Burns Bridge to provide the initial job cost estimate and to review the documentation prepared by Peter Sgourakis. The Burns Bridge letter of engagement dated 22 October 2001 is addressed to Mr T Wu, signed by him, and apparently faxed back to Burns Bridge accompanied by a facsimile message dated 6 November 2001 from 'Tony Wu (Hyber Pty Ltd)'. On 9 January 2002 Burns Bridge wrote to Peter Sgourakis advising they had been appointed by Mr Tony Wu as the project manager (this letter was signed by Mr Xhilaga as project manager). The Burns Bridge tax invoices relating to this project are addressed to Tony Wu

– not Hyber. The invoice from Peter Sgourakis dated 6 September 2002 is addressed to Tony Wu c/- Burns Bridge.

- 37 There can be no doubt that Mr Xhilaga's initial contact in relation to the appointment of MX Projects as project manager and construction manager was with Tony Wu. The initial correspondence between Mr Xhilaga and Hyber is addressed to Tony Wu, and most of the 'post contract' correspondence is addressed to Tony Wu and Dustin Wu.
- 38 During cross examination, Tony Wu said that there are a number of companies, six or seven, within the group which are all under his direct control, including Hyber, and that he is sole signatory for cheques drawn on Hyber's account. He confirmed that he was representing Hyber and said that he had complete authority on behalf of Hyber. Although he is not a shareholder in Hyber, he gave evidence that he has a financial interest in the project and that he was very concerned about the delays in the project, and angry when he returned from Taiwan in June 2004 (where he had been since April 2004) and found it had not been completed.

Dustin Wu

- 39 Dustin Wu confirmed under cross examination that he holds a Bachelor of Architecture although he is not a registered architect. He met Peter Sgourakis when he did work experience with his firm at the end of his second year of study.
- 40 I was not impressed by Dustin Wu as a witness. He appeared selective in his answers to questions put to him in cross-examination. His responses confirmed that he was indecisive about various changes that were required during the project, for instance in relation to the changes to the Hot Water Services which will be discussed later in these Reasons. Although he constantly complained about the failure of MX Projects to comply with its obligations under the PMA and the CMC, it was equally apparent that Hyber failed to comply with its obligations under these contracts. For instance, clause 19 of the PMA requires that all instructions to the project manager be in writing. On his own evidence, Dustin Wu was in regular contact with Hyber's employees on site. He confirmed that he regularly visited the site, and gave directions and instructions to Mr Aggelidis (the site foreman) and from time to time to the trade contractors. He said that whilst he did not have specific responsibility for the tasks to be performed on this project he had overseen the works, and

I was able to direct insofar as what I see fit. (T1863:25-26)

- 41 It was apparent from his evidence, and, in particular, his answers to questions put to him in cross examination, that he adopted a very close 'hands-on' role in respect of this project. There were a number of design changes and he conceded that he was actively involved in approving and suggesting amendments to the revised drawings as prepared by Mr Xhilaga. This is consistent with Mr Xhilaga's position that Dustin Wu was intimately

involved in the project and made numerous changes to the design during the course of the works. These are set out in detail at paragraph 7 of his witness statement and it is not necessary to repeat them here.

Peter Aggelidis

42 I do not consider Mr Aggelidis' evidence to be reliable. Unfortunately Mr Aggelidis became unwell during the early stages of cross examination leading to an adjournment until he was well enough to attend. Cross examination was relatively brief focussing on the preparation of Mr Aggelidis' witness statement. Although he gave sworn evidence that his witness statement was a true statement, and that he had prepared it with the assistance of his memory, and by reference to the site diaries (which are lacking in specific details), it was apparent that he had little or no independent recollection of any of the specific events set out in it. His memory was poor – he was unable to remember the date, or even the month, when he was last at the tribunal and had become unwell. Although there are numerous statements throughout his witness statement about matters it is alleged MX Projects failed to attend to, it was apparent that he had no knowledge of what documents may have been provided.

THE PARTIES' RESPONSIBILITIES UNDER THE CONTRACTS

43 Many of the difficulties in this project arose because of the blurred responsibilities of MX Projects as project manager and as construction manager. Appointment in the dual roles is not ideal particularly as there are a number of inconsistencies between the obligations under the two contracts. It seems to me that these contracts were executed to formalise the arrangements between the parties, to provide for payment of the project and construction management fees but that otherwise the parties had scant regard for their respective obligations. I have no doubt that it seemed like an attractive proposition, to both parties, for MX Projects to be appointed to the dual roles. The fact that it became unworkable is a matter which would seem to lie fairly and squarely at the feet of both parties. As discussed elsewhere in these Reasons, it seems that neither party fully understood and appreciated their contractual obligations as project manager and construction manager, or the tensions and inconsistencies between MX Projects' obligations under the respective contracts.

Peter Sgourakis' Role

44 Peter Sgourakis' ongoing role in this project is unclear. He was engaged by Hyber in 2000 to carry out various tasks which are also included in the project management and construction management contracts. Mr Xhilaga gave evidence it was always his understanding that Peter Sgourakis was the principal consultant and that it was his responsibility to obtain all relevant permits.

45 Although the obtaining of permits is the principal's obligation under clause 8(h) of the CMC, clause 11 (b) of the PMA provides that all permits will be

obtained by the project manager. Peter Sgourakis obtained the town planning approval. The first construction program ('the initial plan') prepared by Mr Xhilaga – the only one which contains notations as to the allocation of various tasks - supports MX Projects' contention that it was always intended that Peter Sgourakis would obtain the building permit.

- 46 Whilst it is apparent that Peter Sgourakis carried out and arranged significant tasks required for the application for a demolition permit, it is unclear as to why he did not apply for that permit, or why MX Projects subsequently repeated many of those tasks.
- 47 It was suggested on behalf of Hyber that any design amendments had been requested in October/December 2003. There was no explanation as to why the drawings giving effect to these amendments had not been completed until May 2004 or why they were done by MX Projects rather than Peter Sgourakis.
- 48 Although his evidence may well have assisted in identifying and clarifying the tasks to be performed by him and MX Projects, Peter Sgourakis was not called to give evidence. I have no alternative other than to apply the rule in *Jones v Dunkel* (1959) 101 CLR 29 and draw a negative inference from Hyber's failure to call him.

MX PROJECTS' PERFORMANCE

- 49 Hyber alleges that MX Projects failed to perform many of its obligations under the PMA and CMC. As noted elsewhere in these Reasons, there can be little doubt that Mr Xhilaga does not fully appreciate the distinctions between the roles of the project manager and the construction manager under the two contracts. An example of Mr Xhilaga's lack of understanding of MX Projects' obligations under the PMA relates to the overhead canopy issues. On 29 October 2004 he wrote to Dustin Wu advising:

We further note that you confirm that Hyber wishes to adopt the "second option" to "eliminate canopy where it does not comply with the minimum clearance (approximately 5m section from west)." In order for MX Projects to action your request, we require the following:

1. a copy of an endorsed drawing by Boroondara City Council detailing the extent of the works so that we may action your request.
2. an amended structural design including a form 13
3. a building permit endorsing the amended design.

- 50 MX Projects then advised Hyber on 25 November 2004 that there was no longer a valid hoarding permit and insisted that Hyber apply for a new permit or remove the hoarding as a matter of urgency. Whilst the obtaining of permits is the principal's responsibility under the CMC, it is the responsibility of the project manager under the PMA. It was MX Project's

responsibility under the PMA to ensure that all permits were in place and maintained. This includes the building permit, the demolition permit, any permits or approvals required from Citipower and Yarra Trams for the canopy works.

- 51 There were obvious communication difficulties during the course of the project not assisted by Mr Xhilaga's insistence that he work from home, although he was offered office space in Hyber's offices. Dustin Wu alleges that there were considerable difficulties in making contact with Mr Xhilaga. Similarly, Mr Xhilaga alleges that he had difficulty obtaining instructions from Dustin Wu in a timely and responsive manner. Perhaps, indicative of his frustration about the communication difficulties, is the email Dustin Wu sent to Mr Xhilaga on 22 May 2004 requiring:

"Please come into the office this weekend and bring all files from your house. We need to file everything for Toorak Road and it is getting very disorganized".

- 52 A lack of understanding of the parties' obligations under the respective contracts was shared by Hyber which seeks to impose greater responsibility on MX Projects for the difficulties encountered on this project than provided for in the contracts. In some instances, Hyber alleges that MX Projects has failed to comply with its obligations, under one or other of the contracts, in circumstances where it was arranged for them to be performed by others – such as the updated costs reports required by Clause 18 of the PMA which were prepared by Peter Watt, and the engagement of an Occupational Health and Safety consultant. In my view this is an unwarranted criticism.

- 53 Also, Dustin Wu clearly took a much greater 'hands-on' role than is anticipated by the contracts. Dustin Wu's architectural qualifications may well have impacted on his desire for a significant degree of involvement. I do not accept it was simply because Hyber had lost confidence in MX Projects' ability to carry out the dual roles. It is clear that Dustin Wu was closely involved with the project. He attended site frequently – he said he was on site two or three times a week for a couple of hours each time (considerably more than the three one hour visits each week by Mr Xhilaga). Further, on his own evidence, he did not hesitate to give directions on-site particularly to Peter Aggelidis, the site supervisor, and his involvement increased progressively. Dustin Wu conceded under cross examination that he exercised a certain degree of control over the contract because:

"I'm the company director ... I need to control whatever I see necessary". (T1909: 20-23)

- 54 He also said that for the most part Peter Aggelidis, as the person on site, was directing the contractors as he saw fit (rather than as instructed by MX Projects), and that in April 2004

"Peter was running the show" (T1910: 31)

55 Further, although clause 15(c) of the PMA requires the project manager to:

establish a site office at the site of the works and maintain competent office at that office in order to co-ordinate and provide the general direction of the work and monitor the progress of Contractors (Clause 5(c) of the CMC imposes a similar obligation on the construction manager).

and MX Projects had someone in mind for the role of site foreman, Dustin Wu confirmed that it had been his decision that Peter Aggelidis be appointed to the role, because it was convenient for him to relocate from another of Hyber's projects.

56 Dustin Wu obviously considered that, irrespective of the provisions of the PMA and the CMC, he was entitled as the company director to play a very active role in this project, even where his instructions may have been in conflict with those given by MX Projects.

MX PROJECTS' CLAIM

The Claim

57 MX Projects claims payment of the sum of \$102,080.00 calculated as follows:

1. Invoice no 546 - 1 July 2004 - PMA fees for June 2004	\$4,675.00
2. Invoice no 547 - 1 July 2004 - CMC fees for June 2004	\$2,640.00
3. Revision of architectural and electrical drawings	\$7,040.00
4. Additional payments under the PMA for the period July to December 2004	\$51,425.00
5. Additional payments under the CMC for the period July to December 2004	\$36,300.00

58 Shortly after being engaged by Hyber, Mr Xhilaga prepared a construction program ('the master construction program') which provided for completion of the works by 6 May 2004 with practical completion to be achieved by 20 May 2004. A copy of this was forwarded to Hyber on or about 25 June 2003. The PMA provides for a 'target completion date' of 30 June but no completion date is nominated in the CMC. MX Projects relies on this target completion date of 30 June 2004 in support of its claim for payment of additional fees. Hyber maintains that the fees to be paid to MX Projects under the two contracts were lump sum fees to be paid irrespective of the time taken to complete the project.

59 The fee payable under the PMA was \$85,000.00 plus GST and the fee payable under the CMC was \$60,000.00 plus GST. Fees were claimed on a monthly basis, even when little or no work was performed by MX Projects

during the relevant month. Dustin Wu said these invoices were paid because it was always understood, by the parties, that each of the contracts was to be performed for its lump sum fee.

- 60 MX Projects relies on clause 25 of the PMA and clause 18(b) of the CMC in support of its claim that it is entitled to payment of extra fees because of delays caused by Hyber and further contends that at a meeting, on 16 July 2004, Hyber agreed to pay additional fees.
- 61 On 2 July 2004 (after the target completion date of 30 June 2004) MX Projects wrote to Hyber advising that completion of the project would be delayed because of design changes, and indicating that MX Projects would be prepared to continue providing project management services for a fee of \$8,500.00 per month plus GST. MX Projects made a similar proposal in relation the construction management fees - that Hyber pay MX Projects \$6,000.00 per month plus GST. It is perhaps helpful to set out the letter of 2 July in full omitting the formal parts:

We advise that the project has been delayed due to changes in design documentation insofar as numerous changes were made to the floor plan of all eight apartments and the retail area as per attached schedule which is not conclusive.

We further advise that pursuant to Clause 18 of the Construction Management Contract CM2-1998, the construction duties of MX Projects are delayed therefore, we are entitled to extra costs incurred by MX Projects in carrying out and completing its duties under Clause 18(b)(11). The extra costs incurred are additional monthly Construction Management fees at \$6,000 per month excluding GST under the appropriate fee payment method under Clause 15(a) commencing from 1 July 2004. Progress payments shall be continued to be paid under Clause 16.

As a consequence of the delays and the target completion date of 30 June could not be reached, we advise that pursuant to Clause 25(as) of the Project Management Agreement, Hyber Pty Ltd is to pay MX Projects a delay fee of \$8,500 per month excluding GST commencing 1 July 2004 and payable by monthly instalments in accordance with Clause 20.

A revised construction program will be issued to Hyber Pty Ltd showing the revised practical completion date providing there are no further changes to the scope of works. Although, we note your intention to construct a kitchen canopy exhaust shaft for the retail area, we will nevertheless proceed with the completion of the amenities in the retail area as per the current construction drawings unless advised otherwise in writing.

If you require further information or seek clarification please contact the underwriter.

- 62 The parties met on 16 July 2004 at Hyber's offices. Present at the meeting, in its initial stages, were Tony Wu, Dustin Wu and Matthew Xhilaga.

Other than all agreeing that the meeting was heated, their respective versions of the nature of the discussions and any agreement reached are very different. Mr Xhilaga asserts that Hyber agreed to pay MX Projects the additional fees as set out in its letter of 2 July. Dustin Wu maintains that he and his father expressed their frustration at the delays, believing that these were caused by MX Projects and that they were costing Hyber money. Dustin Wu said that Hyber confirmed it was prepared to pay MX Projects the balance of the lump sum fees for the PMA and the CMC, (the invoices for fees for June 2004) once the project was completed, but that he had made it quite clear to Mr Xhilaga that no further or additional payments would be made until completion. Following the meeting, Mr Xhilaga sent the following email to Tony Wu and Dustin Wu:

“Further to our meeting this afternoon in your offices with yourselves, we confirm that Hyber Pty Ltd will pay all moneys due and payable to MX Projects Pty Ltd at the completion of the above project as agreed”.

- 63 Commencing on 2 August 2004, MX Projects rendered monthly invoices for additional fees for the PMA and CMC for services provided during the months of July to November 2004, and a partial claim for December, to the date of termination. During this time MX Projects made repeated demands for payment, all of which were rejected by Hyber which continued to maintain that each of the contracts was to be performed for a lump sum fee, and that no agreement had been reached to make additional payments. On 1 September 2004 MX Projects sent the following letter by facsimile addressed to Mr Tony Wu and Mr Dustin Wu, Hyber Pty Ltd (omitting the formal parts):

Further to our meeting held in your offices 16 July 2004, we advise that the project has been further delayed due to slow responses to decisions that are required to expedite the progress of the project to practical completion in addition to changes made on site without informing the Project and Construction Manager, occupational health and safety items and legal issues with contractors and suppliers.

Consequently, we advise that we seek payment for outstanding invoices for professional consultancy provided forthwith as we cannot sustain providing our services further without payment. We are in an uncomfortable position where we urgently require cashflow to continue to operate the business successfully and to continue to provide Hyber Pty Ld with the consultancy services required without interruption in order to bring the project to its completion.

Please find attached invoices for professional services for month of August 2004 and statement of account to date...

Please note that we have continued to provide consultancy services in good faith being three months to date without payment and trust that you will honour your commitment by providing MX Projects Pty Ltd with a cheque for the monies outstanding to date by close of business Friday 3 September 2004.

- 64 Hyber's position is clearly set out in its letter of 9 September 2004, after MX Projects advised it was suspending its services because of non-payment of what, it claimed, were outstanding fees:

In response to your letter dated 9 September, we state that there are no outstanding professional fees for project and construction management services. We refute your claims for additional fees as both contracts are Lump Sum Contracts.

Furthermore, we believe we have overpaid MX Projects since commencement as clause 15(a) of the CM2-1998 contract state that all progress payments are to be calculated in the same proportion to the Cost of Works completed versus the Estimated Total Cost of Works. To date, you have claimed 90% of fees whereas construction is at 75% complete.

We advise you are in breach of the Project/Construction Management Agreements by suspending your services and request you complete the project in accordance with both contracts or we will seek legal action.

- 65 MX Projects withdrew its suspension of its services on 16 September 2004 but continued to make, what can only be described as, pleas for payment during September and October. Hyber failed to respond because, Dustin Wu said, its position had been clearly set out in its letter of 9 September 2004.

Discussion

- 66 This claim for payment of the outstanding invoices, and for additional fees must be understood in the context of MX Projects having claimed, and Hyber having paid it project management and construction management fees at times when there had been little or no work carried out under either contract at various times during 2003. As will be considered later in these Reasons there was little or no progress on this project until October 2003, when the demolition works were carried out, yet MX Projects received payment in full for invoices rendered for the months of May to September 2003. Although these payment arrangements are not as contemplated by the contracts, I accept they were effectively 'on account' of the fees payable under each of the contracts, with the parties both accepting that 'lump sum' fees were payable. Although MX Projects seeks to rely on clause 25 of the PMA and clause 18 of the CMC as giving rise to an entitlement for 'delay fees' there was no mention in the email of 16 July 2004 of additional payments being made. If Mr Xhilaga truly believed Hyber had agreed to make additional payments, it would not be unreasonable to expect that his email of 16 July would have confirmed this agreement. On balance, in the absence of any written confirmation of any agreement by Hyber to make additional payments I cannot be satisfied that such an agreement was reached.

- 67 I am not persuaded that MX Projects is entitled to payment of the invoices number 546 and 547 dated 1 July 2004. Payment of these two invoices would result in payment in full of the lump sum fees under both contracts. On balance, I find that the parties agreed at the meeting on 16 July 2004 that these invoices would be paid on completion of the works (as evidenced by MX Projects' letter of 16 July 2004). Hyber terminated the contracts in December 2004 before the occupancy permit was issued and at which time, if Peter Watt's assessment of the works as contained in Cost report No. 8, which is discussed later in these Reasons, is accepted, the works were approximately 90% complete. However, whilst I am not persuaded that MX Projects has any entitlement to additional project management and construction management fees, I am satisfied it is entitled to be paid for the revision of the architectural and design drawings - \$7,040.00. These are not services carried out under either the PMA or the CMC and are services for which MX Projects should be paid.
- 68 I reject any suggestion by MX Projects that termination of the PMA and CMC was in breach of an implied term in the so-called 'variation agreement' of 16 July 2004 (which will be discussed later in these Reasons). Although the parties may have agreed to co-operate to finish the project I am not persuaded there was any agreement that work would continue indefinitely. Hyber was clearly keen for the project to be completed.

HYBER'S COUNTERCLAIM

- 69 Hyber claims that it has suffered loss and damage by reason of the delays in the completion of the project and claims there are various deficiencies in the works (including but not limited to defects), which it alleges were caused by MX Projects' failure to fulfil its obligations under the PMA and the CMC.
- 70 Hyber now claims \$503,467.16 calculated as follows (where there has been an amendment to the claim I have noted in brackets the amounts previously claimed as set out in Schedule C of the Counterclaim dated 14 March 2006, 14 days prior to the commencement of the hearing):

1. Loss of rent - July 2004 to 15 February 2005	\$130,390.00 (\$137,725.00)
2. Interest - July 2004 to 15 February 2005	\$118,492.72 (\$134,361.33)
3. Wages and Salaries - July 2004 to 15 February 2005	\$80,421.50 (Notation: particulars to be provided).
4. Refund of alleged overpayment under the PMA	\$10,367.97 (new

	claim).	
5.	Refund of alleged overpayment under the CMC	\$4,318.26(new claim).
6.	Additional costs for three phase power	\$10,805.00
7.	Additional costs for CMX walling system and rendering	\$26,650.00 (\$23,625.00)
8.	Errors in relation to kitchens in apartment 4	
	(a) Paid to Norka Cabinets Pty Ltd	\$2,140.00
	(b) Paid to BHB Plumbing Pty Ltd	\$2,057.00
9.	Timber wall panels to conceal exposed bolts	\$1,122.00
10.	Staircase winders in apartments 2,3 & 4	
	(a) cost of rectification	\$34,390.00
	(b) alternative accommodation	\$8,316.00 (\$10,122.00)
11.	Glazing channels	\$990.00
12.	Alternative fixing system for canopy beams	
	(a) Amount paid to All Purpose Steel	\$6,336.00
	(b) Amount paid to BHP Plumbing Pty Ltd	(included in 8(b)) (\$2,057.00)
13.	Additional costs for steel works to canopy	
	(a) cost of All Purpose Steel carrying out the works	\$2,513.50
	(b) legal costs re dispute with Lube Engineering	\$8,914.31
14.	Reduction of width of canopy beams	\$4,092.00
15.	Intercom	\$1,144.00
16.	Additional costs re demolition and bulk excavation	
	(a) removal of old footings and rubble	\$3,427.50
	(b) blinding concrete	\$4,140.00 (new claim).
17.	Additional cost of waterproofing works	\$825.00

18. Unauthorised works	\$1,200.00
19. Inadequate handrail height	\$5,280.00
20. Costs in relation to openable windows	\$10,450.00
21. Deficiencies re wiring of hot water services	\$20,589.40 (Notation: particulars will be provided).
22. Additional costs re party walls	\$3,795.00 (Notation: particulars will be provided).

Damages for delay

- 71 Hyber's claim for damages for delay is set out in items 1, 2 and 3 above. Hyber alleges that Mr Xhilaga represented to it that the project could be completed within 10 months and it was on this understanding that the parties agreed the works would be completed by 30 June 2004. As noted above, the Occupancy Permit was not obtained until 16 February 2005.
- 72 It is submitted on behalf of MX Projects that the agreement of 16 July 2004, whereby Hyber agreed to pay the outstanding invoices on completion of the project, constituted a variation agreement. The parties effectively agreed to 'draw a line in the sand' as at that date and this included an abandonment of any rights Hyber may have to damages for delays in the project up until 16 July 2004. Further, the variation agreement was entered into in the spirit of compromise and it was an implied term that the parties would co-operate in achieving completion of the project within a reasonable time. Each of the remaining tasks to be completed '*according to the circumstances*' (Dustin Wu - T1808-1809)
- 73 Alternatively, MX Projects alleges that Hyber is estopped from seeking to rely on any rights it may have had prior to the meeting of 16 July 2004. However, these are matters which were not raised until the filing of Final Submissions. They were not pleaded, nor were they put to Dustin Wu or Tony Wu during cross examination. Although the Tribunal is not a court of pleadings it is bound by the rules of natural justice (s98 of the *Victorian Civil and Administrative Tribunal Act 1998*) which by their very essence mean that a party has a right to know the case it has to answer and be given an opportunity to do so. It would, in my view, be a denial of natural justice to give consideration to and make a finding in relation to any significant issue raised, for the first time, after the evidence had closed. In any event, for reasons which shall become apparent, I reject any suggestion that there

was any agreement that Hyber would abandon any rights it had in respect of delays which occurred prior to 16 July 2004.

What was the period of delay and who was responsible for it?

- 74 In considering Hyber's claim for damages for delay it is first necessary to identify the period of delay and what responsibility MX Projects and/or Hyber have for such delays.

The Permits

- 75 The initial project plan, sent by Mr Xhilaga by email to Tony Wu on 11 May 2003, is the only program which contains any allocation of responsibility. It notes that Peter Sgourakis is to obtain the demolition permit by 13 May 2003 and the building permit is to be obtained by 19 May 2003. As set out in paragraph 4 of his Supplementary Witness Statement Mr Xhilaga expected, at the time MX Projects was engaged as the project manager/construction manager, that Hyber would obtain the building and demolition permits by 24 June 2003. This was not an unreasonable expectation in light of Peter Sgourakis' engagement in 2000 to obtain the town planning and building permits. His role following the engagement of MX Projects is unclear.
- 76 Dustin Wu confirmed that Peter Sgourakis was the principal consultant on the project into 2003 and that, although he was replaced by MX Projects, he was to assist in the obtaining of the building permit. He said that Peter Sgourakis was required to apply for the building permit but that this did not impose an obligation on him to obtain it. This distinction, in my view, is artificial.
- 77 The application for building permit is dated 13 June 2003 but was apparently not signed and dated by Dustin Wu until 17 July 2003. There is no evidence before me as to the date on which Dustin Wu received the application for building permit for signature, or from whom it was received, and therefore I am unable to determine who is responsible for the apparent delay of more than a month in him signing it.
- 78 Although the obtaining of the permits was the responsibility of the project manager under the PMA, and of the principal under the CMC, Mr Xhilaga appears to have overlooked or misunderstood MX Projects' obligations under the PMA, perhaps because he expected the permits would be obtained by Peter Sgourakis. Mr Xhilaga consistently maintained that he believed Peter Sgourakis was the principal contractor but, as I have noted above it is difficult to determine the extent of Peter Sgourakis' involvement in the project after MX Projects was engaged.
- 79 It seems to me that irrespective of the obligations set out in the PMA and the CMC there was some confusion, at least initially, as to who would be obtaining the demolition and building permits. Once again, this is

indicative of the difficulties that arise where the same person is appointed to the dual roles.

The building permit

80 Thomas Dowling, building surveyor was initially engaged by Peter Sgourakis on behalf of Hyber for the purposes of obtaining the building permit. He was not engaged by MX Projects. Although the master construction program provided for the building permit to be obtained by 24 June 2003, it was not obtained until 1 August 2003, which MX has properly identified as a delay of five weeks. Although there was clearly some delay in the obtaining of the building permit, in the absence of a demolition permit construction could not commence.

The demolition permit

81 The initial project plan provides for the demolition permit to be obtained by 11 May 2003 and notes that it was to be obtained by Peter Sgourakis. However, under the PMA the obtaining of the demolition permit was MX Project's responsibility. The master construction program provides for the building permit to be secured by 24 June 2003 but makes no allowance for the obtaining of the demolition permit. The demolition permit was secured by the demolition contractor Dafco and was issued on 7 October 2003. Peter Sgourakis' role in obtaining the demolition permit is unclear, and once again his evidence would have assisted in clarifying this. It is apparent that he undertook a considerable amount of preliminary work for the demolition permit including:

- seeking a fee proposal for the performance of an asbestos audit from Environment and Safety Professionals (DB 659)
- obtained a quotation from Barmac Demoliton dated 26 November 2001
- prepared a demolition plan – April 2002
- obtained a further quotation from Barmac dated 27 May 2003 (at around the time MX Projects was engaged as project manager and construction manager)

82 Initially in response to some questions he was asked in cross-examination Mr Xhilaga said that he thought only one building permit had been required for the demolition and construction works. However, it is clear that, in the initial stages, he understood that two permits would be required as demonstrated by the allowance for both in the initial project plan and by his diary entry of 14 May 2003 where he made the following note:

- '(1) Secure demolition permit
- (3) Secure building permit'

83 Mr Xhilaga was unable to explain the delay in obtaining the demolition permit. Initially he suggested it was related to the time necessary to obtain

the hazardous materials report. I cannot be sure when the report became available. Mr Xhilaga's diary entries are of little assistance, one for 23 May 2003 indicating the report had been received and a later entry on 27 May 2003 about 'chasing up the report'. Mr Xhilaga's oral evidence was that the report was not obtained until July or August 2003. I am unable to verify this as a copy of the report is not before me. It is not clear why a further hazardous materials audit report was sought by MX Projects when an earlier report had been obtained by Peter Sgourakis in October 2001. Nor is it clear why the demolition permit was finally obtained by Dafco – the demolition contractor. Mr Xhilaga suggested the delay in obtaining the demolition permit was caused by Hyber's failure to obtain the necessary insurance and referred to a facsimile to Dustin Wu with a copy to Tony Wu dated 30 September 2003 advising that:

Prior to receiving a demolition permit, Hyber is required to effect or enter into a contract of insurance against damages by the proposed worksI suggest that Hyber effect a \$5m public liability insurance policy for a period of 10 months ...

This insurance is required immediately so that a demolition permit can be obtained by Friday 3 October 2003 and that the contractors can commence forthwith.

- 84 There is no evidence before me as to when the insurance was effected but as the demolition period was issued on 7 October 2003, it would seem there was little or no delay in Hyber arranging the insurance when requested to do so. I find that there was an initial delay in this project caused by the failure of MX Projects to obtain the demolition permit by the date on which the building permit was to be obtained under the master construction program – 16 June 2003 and certainly by the date it was obtained – 1 August 2003.

Discussion

- 85 Although I am satisfied that MX Projects is responsible for the delay in obtaining the demolition permit, and that this led to an initial delay in commencement of works on site of approximately four months, responsibility for subsequent delays is not as clear cut. Each party blames the other for the subsequent delays. There is no evidence that a further 'target date for completion' was discussed, and at the time of the meeting both parties were well aware of the stage reached by the project. In the circumstances, I accept that, by implication, the parties agreed at the 16 July meeting that the works would be completed within a reasonable time. In my view, the only basis upon which a reasonable time can be assessed is by reference to the master construction program.
- 86 Although the master construction program provided for construction to commence on 14 July 2003, it did not commence until 20 November 2003 (a month after the demolition works were completed) when drainage and

electrical works commenced. The time allowed in the master construction program for the total development was 238 days with a commencement date of 12 May 2003 and a completion date of 20 May 2004. The programmed construction period (including demolition and clearance of surface vegetation) was 168 days or 10 months. As the construction period actually commenced on 20 November 2003, the 'adjusted' completion date, if the works had otherwise proceeded in accordance with the times programmed for the completion of each task, was 20 September 2004. The target completion date as set out in the PMA was 30 June 2004 – approximately six weeks after the programmed completion date of 20 May 2006. . In the circumstances I consider it appropriate to allow a similar 'buffer period', and find that the reasonable date for completion of the works was 31 October 2004, and that the calculation of any damages which I may allow for delay should be from 1 November 2004. The occupancy permit was not obtained until 16 February 2005 – approximately two months after termination of the PMA and six weeks after termination of the CMC.

Causes of further periods of delay

- 87 Hyber alleges that many of the delays were caused by the failure of MX Projects to engage the trade contractors in a timely manner. However, in making these allegations Hyber seeks to rely on the dates for engagement of each contractor/commencement of the contract works as set out in the master construction program. The master construction program was never updated (despite promises by MX Projects to do so), and the dates for performance of each of the contracts were rendered obsolete when demolition was not completed until 20 October 2003 and construction did not commence until 20 November 2003, rather than the programmed dates of 30 June 2003 and 14 July 2003 respectively. Therefore although the works were initially delayed by four months, the progress of the works once works commenced on-site is relevant and must be taken into account in properly assessing any period of delay.
- 88 Unfortunately neither party has seemingly undertaken any critical path analysis which would have assisted in assessing any period of actual delay. One might well have expected such analysis to have been carried out by MX Projects before commencement of and perhaps during the construction period. While there may well have been delays in the carrying out and completion of some of the trade contractors' works, this does not mean that the period of such delays equates to an overall delay in the project. There is no evidence that each trade contractor performed its works independently of the other contractors or that they were the sole contractor on site at any given time. A critical path analysis would have assisted in identifying the impact, if any, of a 'contractor's delay' on the overall completion date. In the absence of a revised construction program and any critical path analysis it is difficult to determine/allocate responsibility for the delays. Certainly Dustin Wu took a very 'hands-on' approach, providing instructions directly

to trade contractors and to Peter Aggelidis, the site supervisor. In a number of instances, where he was unhappy with quotations which had been obtained by MX Projects he obtained alternative quotations, at times for a different scope of works to that which was the subject of the MX Projects' tender, for example: the joinery works. Remarkably, despite concerns that Dustin Wu's indecisiveness was causing delays to the project MX Projects did not claim any extensions of time.

- 89 A further difficulty with Hyber's claim for delay damages is that Hyber alleges that the breach by MX Projects of its obligations under the PMA and the CMC has delayed the works but it has not led any evidence as to the delay attributable to each breach, or how each alleged breach affected the progress of the works. Hyber filed an expert report from Adam Cole in relation to its delay claim, but during the hearing it indicated it would not be calling him to give evidence. I can only conclude that his evidence would not have assisted Hyber (*Jones v Dunkel*).
- 90 In addition to delays in obtaining the permits Hyber alleges that MX Projects failed to proceed with the performance of its obligations under the agreement in a timely manner. A significant amount of time was spent in cross-examining Mr Xhilaga to confirm that during the period of this project, MX Projects was also engaged as project manager on other projects. This was not denied by Mr Xhilaga. Hyber alleges that because of his involvement on other projects MX Projects was unable to devote sufficient time to its project thus contributing to the delays. However, Hyber has not led any evidence as to the period of any such delay
- 91 Although various assertions are made by both parties about the time taken to complete a particular task and that any additional time taken for such task over and above the time allowed for in the master construction program is the period of the delay, there is no evidence to support the allegation that the project was, in fact, delayed for such period. In reality, if one considers the periods of alleged delay cumulatively they would have resulted in a much later completion date than that actually achieved.
- 92 For its part MX Projects alleges that Hyber is responsible for much of the delay primarily because of frequent design changes requested by Dustin Wu, the difficulty in obtaining instructions from him and the failure by Hyber to pay contractors within a reasonable time.
- 93 There are various other allegations about MX Projects' failure to perform its obligations under one or other of the contracts, but in each instance there is no analysis or evidence as to the period of delay caused to the project.
- 94 On 20 October 2004 Philip Chun & Associates completed a pre-final inspection and noted sixteen items requiring attention before an occupancy permit could be issued. Mr Xhilaga states in his supplementary witness statement that he believed that the project was ready for a pre-final inspection on 11 October 2004. His allegation that Hyber was responsible for any delay because it failed to arrange for the building surveyor to carry

out the inspection until 20 October 2004 ignores the fact that it was MX Projects' responsibility to do this under the PMA.

- 95 MX Projects does not seem to have appreciated the urgency for these works to be completed and in fact sought to pass responsibility for them to Hyber. Paragraph 84 of Mr Xhilaga's Supplementary Witness Statement is instructive:

“The items noted in the pre-final inspection report could have been attended to immediately by adopting a pro-active approach to preclude any further delays in obtaining the occupancy permit once the final inspection has been undertaken”.

- 96 Mr Xhilaga said that in his opinion these items could have been attended to 'immediately'. However, it seems the only steps taken by MX Projects to progress these works was to send the list to Peter Aggelidis by facsimile and ask him to attend to them. Once again Mr Xhilaga seems oblivious to MX Projects' responsibilities. I have no doubt that its failure to adopt a proactive approach in ensuring these items were attended to led to further delays for which it is responsible.
- 97 Whilst Hyber may have contributed to some of the delays in the project, had MX Projects understood its obligations and arranged the pre-final inspection for 11 October 2004 and then taken the pro-active approach Mr Xhilaga believes was appropriate, the works might well have been completed by the end of October 2004 or shortly thereafter. I am therefore satisfied on balance that MX Projects is responsible for the delays in completing the works - 1 November 2004 to 16 February 2005.

Loss and Damage occasioned by delay

- 98 Until the filing of its Final Submissions in Reply Hyber claimed both loss of rent and holding costs for the period of the alleged delay. It concedes in its Reply Submissions that this claim should be in the alternative. It also claims that it has incurred additional wages and salary payments to Bruce Cadman and Peter Aggelidis.

Claim for loss of rent

- 99 Hyber claims loss of rent on the apartments for 7 months. In its final submissions Hyber concedes that management and administration fees, and maintenance costs should be deducted from its loss of rent claim resulting in an amended claim of \$130,390.50 (reduced from \$137,725.00). The claim for loss of rent has been calculated by multiplying the rent for each apartment by 7 months – the period of the alleged delay. It is helpful to set out the dates of each of the leases:

Retail Area	5 November 2004
Apartment 1	24 February 2005
Apartment 2	26 March 2005

Apartment 3	25 February 2005
Apartment 4	2 June 2005
Apartment 5	18 May 2005
Apartment 6	2 March 2005
Apartment 7	20 July 2005
Apartment 8	15 June 2005

100 Interestingly, I note that the retail area was apparently leased on 5 November 2004, 4 months after the alleged completion date, and that the apartments were let over a period of 7 months. There is no evidence before me as to the steps taken by Hyber to lease the apartments in a timely manner and/or to mitigate its loss, for example, whether there was any reduction in rent.

101 Dustin Wu confirmed under cross examination that it had been Hyber's original intention to sell the property when the project was completed. It was not until the Occupancy Permit was issued in February 2005 that Hyber decided to lease the apartments rather than sell them. I reject the submission on behalf of Hyber that although the decision to lease was not taken until February 2005 this was not a bar to Hyber's claim for loss of rent. For Hyber to succeed in its claim for loss of rent it must have been in the reasonable contemplation of the parties at the time the contracts were entered into that the apartments would be leased, but that decision was not made until after the Occupancy Permit was obtained. I do not know whether the apartments were offered for sale during the construction period. The rule as stated by Alderson B in *Hadley v Baxendale* (1954) Exch 341; 156 ER 145 is apposite:

Where two parties have made a contract which one of them has broken the damages which the other party ought to recover in respect of such breach of contract should be such as may fairly and reasonably be considered as *either* causing naturally, i.e. according to the usual course of things, from such breach of contract itself, *or* such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it

In *Koufos v Czarndnikow Ltd* [1969] 1 AC 350 Lord Reid said:

“The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from a breach of contract to make it proper to hold that the loss flowed notionally from that breach or that loss of that kind should have been within his contemplation” [385]

102 Therefore, to apply Lord Reid's test, the question is whether a reasonable man in the position of Mr Xhilaga/MX Projects would have realised, at the time the contract was entered into, that Hyber would suffer loss of rental

payments if the project was not completed by the target completion date of 30 June 2004.

- 103 Whilst it may well have been in the reasonable contemplation of the parties, when the contracts were entered into that Hyber would suffer loss and damage if the project was not completed by the target completion date, it was clearly not in their reasonable contemplation that Hyber would suffer loss and damage in the nature of rent for the period of any delay. The decision to rent the apartments was not made until after the Occupancy Permit was obtained – some two months after the contracts were terminated.
- 104 Even if I were satisfied that Hyber had a prima facie claim for loss of rent, it had a duty to mitigate any loss. As noted above, there is no evidence before me that any attempts were made to market and sell the apartments during the period of construction. I am aware, from a perusal of the real estate advertisements in major newspapers, that it is not unusual for properties under construction to be sold before completion (often before construction commences). Nor is it unusual for rent sought for apartments to be discounted to achieve timely leases. The claim for loss of rent is denied.

Claim for extra wages

- 105 Hyber claims it has incurred wages and salaries for an additional period of seven and a half months as a result of the delay in the works. The claim is for wages paid to Bruce Cadman, a labourer employed by Hyber, for the period 1 July 2004 to 16 February 2005 - \$32,680.07 and for wages paid to Peter Aggelidis, who was employed by Andah Pty Ltd, for the same period - \$47,741.43. Leave was sought and granted to Hyber to amend its claim to accurately reflect what it claims was the actual amount of the additional wages and salaries (the figures set out in Dustin Wu's Witness Statement were incorrect). It seems that the actual records were not referred to initially in particularising this claim, rather it seems to have based on a simple calculation of 7/12 of each man's annual salary.

Peter Aggelidis

- 106 The wage records for Mr Aggelidis indicate he was employed by Andah Pty Ltd and relate to the period 9 July 2003 to 29 June 2005, although he gave evidence he had been employed by Andah as a site foreman since 2002. It is apparent from his 'timesheets' as recorded in the Daily Job Report (Site Diary) and included in the Tribunal Book, that although he was on site on 10 November 2003, he did not return to site until 19 January 2004 on which date he records that the bricklayer and Formpro were on site. There is no evidence before me as to the date on which he would have been expected to commence on site had there not been any period of delay. As site foreman one might have expected him to start on-site close to the commencement of construction and that in all probability he would then have been required

on-site for the duration of the project. However, he was not available to commence work on this project until December 2003, five months after 14 July 2003 being the programmed date for commencement of construction. Previous to this he had been working on one of Andah's projects in Glenferrie Road, Hawthorn.

- 107 It is submitted by MX Projects that any additional wages paid by Mr Aggelidis were not paid by Hyber as he was employed by Andah. It is conceded that Hyber and Andah are part of a family group of companies. Although invited to do so, Tony Wu did not produce any financial records to establish that this was a cost incurred by, or that any loss had been sustained by Hyber although he did say that *"the accountant from KPMG and also the internal accountant of my company will work out a transfer of funds ..."*.
- 108 I consider both Tony Wu's and Dustin Wu's evidence in relation to the financial arrangements and relationship between the companies within the Group to be less than satisfactory. Tony Wu, in particular, seemed reluctant to answer questions put to him about the group's financial arrangements. Both indicated that their accountants are KPMG. Neither was able to indicate who at KPMG acted on behalf of the group. I found this surprising particularly from Tony Wu who is obviously an astute and experienced businessman.
- 109 However, as Mr Aggelidis' services were provided to another company within the same group, it is reasonable to accept that there would have been some accounting between the various companies within the group, and I do not consider the lack of documentary evidence in this regard to be fatal to this claim. I am not persuaded that Hyber has incurred any additional salary other than for the period 1 November 2004 to 16 February 2005 which I allow - \$21,363.09.

Bruce Cadman

- 110 The payroll records which have been tendered in support of this claim commence on 3 March 2004 and end on 23 September 2005, although the claim is for the period 1 July 2004 to 16 February 2005. As the payroll records for Peter Aggelidis commence in 2002 when he said he started working for Andah, it seems likely, on balance, that Bruce Cadman commenced in March 2004. There is no evidence before me as to when he commenced on site, or the period of time it had been anticipated a labourer would otherwise be engaged on this project during the period of construction. Bruce Cadman was not called to give evidence. In the absence of any contrary evidence I accept he was on-site for the period 3 March 2004 to 16 February 2005 – a period of 11 months. I will allow the claim for the period 1 November 2004 to 16 February 2005 which I calculate at \$13,120.29.

Claim for Overpayment

- 111 Following the morning recess on the first day of the hearing, Hyber sought leave to amend its counterclaim to seek recovery of what, it says, is the overpayment of fees to MX Projects in the sum of \$10,367.97 under the PMA and \$4,318.36 under the CMC. MX Projects maintains its objection to the late amendment in circumstances where the works are now complete and says it did not have an opportunity of carrying out its own assessment of the stage the works had reached as at the date of termination.
- 112 I am concerned at the very late amendments to the counterclaim. The contracts were terminated in December 2004. There have been a number of amendments to the counterclaim, yet it was not until the morning of the hearing that this claim for a refund of overpayment of fees was raised for the very first time.
- 113 I accept the submission on behalf of MX Projects that both agreements contemplate that any pro-rata adjustment of fees will be on the basis of an estimate of the revised total cost of the project 'as estimated by the project/construction manager'. MX Projects was not requested to provide such an estimate and the agreements do not contemplate any adjustment on the basis of estimates procured by the principal.
- 114 I do not find the calculations included in Hyber's submissions to be of much assistance and unfortunately, MX Projects has not included any calculations in its submissions. It has therefore been necessary for me to carry out my own calculations.
- 115 Hyber relies on Progress Cost Report No 8 dated December 2004 prepared by Peter Watt of Burns Bridge and, what is described as, the 'Estimated Final Cost' of \$2,387,210.00 for the basis of its calculations. Peter Watt was not called to give evidence and his methodology and assessments are untested. There was no explanation for Hyber's failure to call Peter Watt, and I infer that his evidence would not have been of assistance to Hyber (*Jones v Dunkel*). However, I note that in Progress Cost Report No 8 the following observations are made:

PROGRESS to December 2004

The units are basically complete with some minor works to be attended to.

The shop is complete as informed by Hyber, the fit out of amenities and finishes will be by the tenant.

Depending on the tenancy and the canopy along Toorak Road the project may not be completed by February 2004 (sic)

There is a further note that:

VARIATIONS

The allowance for contingency is progressively released for the developer to cover on-site charges.

The 'Estimated Valuation of Works in Progress' includes a contingency allowance of \$103,344.00, hence the 'Estimated Final Cost' of \$2,387,210.00. The value of work completed as at 16 December 2004 is recorded as \$2,135,520.00 (which I calculate as 89.46% of the 'Estimated Final Cost'). There are no details of any variation amounts having been claimed or allowed. I have not been provided with copies of the Progress Cost Reports for the period post 16 December 2004 bearing in mind that the CMC was terminated on 29 December 2004.

- 116 Hyber relies on Clause 27(b) of the PMA which provides for a pro-rata adjustment of a lump-sum project management fee upon termination of the PMA. Here, the lump sum project management fee was \$85,000.00 plus GST – a total of \$93,500.00. There is simply no evidence to support the assertion, set out in Hyber's final submissions, that it had paid MX Projects \$93,500.00 as at the date of termination. Consistent with MX Projects' position, Dustin Wu states in his witness statement that the invoices dated 1 July 2004 represent the balance of the fees under the PMA and the CMC. Mr Xhilaga states in his witness statement that up until the end of June 2004 MX Projects had been paid the sum of \$84,150.00 for services rendered under the PMA for the period May 2003 to May 2004. The invoice for the month of June 2004 for \$4,675.00 remains unpaid and forms part of its claim. Copies of the relevant invoices are annexed to his witness statement which confirm this amount is inclusive of GST. The GST exclusive sum is \$76,500.00 or approximately 90% of the total project management fee.
- 117 Hyber claims that it has paid MX Projects the sum of \$93,500.00 in project management fees. However, this is including the initial invoice for \$9,845.00 dated 9 May 2003 for services rendered in April 2003 before the PMA was entered into May 2003. I accept that these services were rendered by Mr Xhilaga in his personal capacity before MX Projects was engaged as the project manager, and that the fees are additional to and separate from the contractual fees to be paid to MX Projects under the PMA. However, I am not persuaded that Hyber's calculations are correct being based on the 'Estimated Final Cost of the Works' which as I have noted above includes an allowance for contingency, Hyber calculates that the pro-rata fee inclusive of GST which was payable was \$83,642.03, \$507.97 less than the \$84,150.00 which I find has been paid in project management fees.
- 118 The calculation of the pro-rata construction management fee is also flawed. Hyber alleges it has paid MX Projects \$63,360.00 by way of construction management fees. However, a review of the invoices which are exhibited to Mr Xhilaga's witness statement, indicate that although the invoices (not including invoice no 547 for services rendered in June 2004) total \$63,165.61 only \$59,400.00 is for construction management fees. The balance is comprised of various disbursements. On my calculations, \$59,400.00 is 90% of the construction management fee, and any

overpayment is minimal. In such circumstances, I am satisfied that Hyber has no entitlement to repayment of an alleged overpayment which cannot be substantiated.

- 119 Further, having regard to s97 of the VCAT Act and s53(1) of the *Domestic Building Contracts Act 1995* I am not persuaded it would be fair to make any order for repayment of what I find to be a minimal overpayment, the claim for overpayment being predicated as it is on inaccurate calculations.

Claim for holding costs

- 120 Hyber initially claimed it had incurred additional holding costs and/or foregone interest in the sum of \$134,361.33 for the period 1 July 2004 to 16 February 2005 calculated as follows:

- a \$105,381.33 on the Bank of Melbourne construction loan of \$2,408,000.00 – 230 days at 6.94%
- b \$28,980.00 on the Westpac property investment loan of \$700,000.00 – 230 days at 6.57%

- 121 Hyber now claims it has incurred interest in the sum of \$118,492.72 for the period 1 July 2004 to 16 February 2005 calculated as follows:

- a \$28,980.00 on the Westpac property investment loan of \$700,000.00
- b \$17,162.07 on the construction loan of \$2,408,000.00 as follows, by reference to the Bank of Melbourne statement which was tendered in evidence.

30 July 2004	\$ 7,806.66
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31 August 2004	<u>\$ 9,355.41</u>
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	\$17,162.07
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- c \$72,350.66 on the construction loan of \$2,408,000.00 as follows, by reference to the Westpac statement which was tendered in evidence:

i 30 September 2004	\$9,676.50
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ii 29 October 2004	\$10,595.00
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iii 30 November 2004	\$12,898.36
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iv 31 December 2004	\$13,100.60
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v 31 January 2005	\$13,588.54
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vi 28 February 2005	<u>\$12,491.66</u>
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	\$72,350.66
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The total interest claimed on the construction loan is therefore \$89,512.73.

- 122 Unfortunately, Hyber's submissions in relation to this claim were of little assistance. Whilst it is submitted Hyber has incurred additional holding costs there is no evidence as to the holding costs it says it would otherwise have incurred had the project proceeded without delay. MX Project's

submission that interest did not begin to accrue until later than it would otherwise have done, had there not been any delay in commencement of construction of the works, is clearly correct. I have now had an opportunity of reviewing and considering the relevant loan approval letters to which I was referred in Hyber's submissions. Once again, it has been necessary for me to make my own calculations.

The property investment loan

123 I have been referred to a copy of an undated loan approval letter from Westpac for the property investment loan of \$700,000.00 and there are some handwritten notations (which neither Dustin nor Tony Wu was asked to identify) indicating that a new account had been opened and the commencement date was 24 June 2004. However, copies of the relevant bank statement confirming that the facility had been drawn down were not tendered. There is no evidence before me as to the interest incurred in relation to this loan. Further, there is no indication in the letter of approval that the facility was to be used for this project, and no evidence that it was. Its purpose as set out on page 2 of the letter is "To pay in full existing Commercial Bill Facility" and it has a 20 year term. I cannot be satisfied on the evidence before me that any amounts have been drawn down and if they have, that they have been used for this project. The claim is therefore disallowed.

The construction loan

124 The construction loan was approved by the Bank of Melbourne on 12 February 2004. Finance Details are attached to the letter of offer and confirm that the facility, which is described as a Bank Bill Business Loan, is comprised of the following:

Construction	\$2,170,000.00
Authority Levies and Fees	\$ 108,000.00
Capitalisation of Interest & Fees	<u>\$ 130,000.00</u>
	\$2,408,000.00

125 The primary difficulty with this claim is understanding and calculating any additional holding costs and/or interest foregone (which I interpret as interest incurred) by reason of the delay. Whilst it may be that some of the delay in the completion of the project is the responsibility of MX Projects and that Hyber should be compensated for any loss or damage it has incurred as a result of such delay, it is equally apparent, by reference to the bank statements that were tendered in support of this claim, that because of the initial delay in the commencement of the works, the timing of the first drawdown under the loan facilities was delayed until 2 March 2004. The first drawdown was for \$449,000.00. Dustin Wu gave evidence that up until that date, the project had been financed through inter company loans (although no details about these are before me). By 30 June 2004, the

\$1,264,567.90 had been drawn down, including interest and loan fees. As at 30 November 2004, \$2,195,985.04 had been drawn down, including interest and loan fees and the closing balance on 28 February 2005 was \$2,416,270.84dr.

- 126 Hyber's initial interest claim was clearly miscast. It was patently incorrect and unsustainable to claim interest on what was said to be the total loan facility of \$2,408,000.00. As noted above, the facility of \$2,408,000.00 included the sum of \$130,000.00 for capitalisation and interest and fees. There is no evidence that Hyber has incurred additional interest over and above that included in the loan facility. Whilst the loan balance as at 28 February 2005 is described as a closing balance, there is no evidence as to what, if any, payments have been made in reduction of that loan, or by whom such payments have been made.
- 127 The amount claimed for additional holding costs and/or interest foregone in relation to the construction loan is \$89,512.73, substantially less than the \$130,000.00 included in the facility for capitalisation of interest and fees. I cannot be satisfied on the evidence before me that Hyber has incurred any additional holding costs and/or interest foregone than it would have otherwise incurred had the project not been delayed.
- 128 Incidentally, I note that at 28 February 2005, the closing balance on the Bank Statement is \$2,416,270.84dr, \$8,270.84 or 0.035% over and above the loan amount. As at 28 February 2005, I calculate, by reference to the Bank Statement, that \$2,280,890.00 has been drawn down by way of, what are described as, loan top up or transfer/replenishment by authority, \$108,290.84.00 has been capitalised by way of interest and fees (interest of \$107,940.84 and fees of \$350.00). Although this amount is not claimed it is still significantly less than the \$130,000.00 allowed for in the calculation of the loan facility.
- 129 However, the relevant period ended on 16 February 2005 – the date of the issue of the Occupancy Permit. The Bank Statement reveals that \$69,000.00 was withdrawn from the loan account after 16 February 2005 - \$30,000.00 on 17 February and \$39,000.00 on 23 February. Using the interest rates set out on the reverse of the Bank Statement and, with the assistance of a compound interest calculator, I have calculated the balance of the account as at 16 February 2005 as \$2,341,852.60 or \$66,147.40 less than the facility of \$2,408,000.00.
- 130 I cannot be satisfied there has been any additional holding costs and/or interest foregone in respect of the construction loan and the claim is disallowed.

Claim for defective building work/claim for reimbursement of additional costs incurred.

- 131 Many of Hyber's claims are for rectification costs or reimbursement of additional costs it has incurred because of a failure by a trade contractor to

carry out its contract works in a proper and workmanlike manner. Where trade contracts were entered into they identify Hyber as the Principal, and MX Projects as the Construction Manager. Any claim Hyber has in relation to the works, the subject of those trade contracts, should properly be made against the contractor. There is no privity of contract between MX Projects and the trade contractors which could make it difficult for it to recover any amounts it was ordered to pay in respect of a contractor's performance of the contract works.

- 132 Hyber has obtained an expert report from Ray Martin building consultant. MX Projects does not seek to rely on an expert report, primarily, as I understand it, because it does not consider that it has any liability in respect of the defective work or additional costs incurred by Hyber. MX Projects argues that Hyber should make any claims arising from defective building works against the relevant contractor.
- 133 Many of these claims relate to costs incurred as a result of deficiencies in the working drawings which were prepared by Peter Sgourakis, the architect engaged by Hyber for the project. Whilst MX Projects was required under the PMA to advise as to the 'buildability' of the project (clause 10(a)), there is no specific obligation to carry out what has been described on behalf of Hyber as a 'design review'. Although Hyber appears to have assumed that being required to advise on 'buildability' necessitates the undertaking of a design review, it seems to me that being required to advise on the 'buildability' of the project did not require MX Projects to check the design to ensure it complied with the Building Code of Australia ('BCA'). The project manager is not responsible for the design of the works (clause 6(b), PMA) nor is the construction manager (clause 7(a)(iii), CMC). Rather the principal positively accepts responsibility for the design (clause 9(c), CMC).
- 134 Further, it seems that Hyber seeks to impose on MX Projects unrealistic obligations for the failure of trade contractors to carry out their works in a proper and workmanlike manner. Whilst I accept that MX Projects was obliged under the PMA and the CMC to 'manage the works' and 'make them happen' it was not its responsibility, either as project manager, or construction manager, to closely supervise each contractor in the performance of their contract works. I will consider each of the claims in turn.

Three Phase Power - \$10,805.00

- 135 Hyber alleges that it incurred additional costs in relation to the installation of three phase power when it was not required. It is common ground that the contract initially included instantaneous hot water services which would have required three phase power. The parties also agree that there were discussions about changing this and various options were discussed. Mr Xhilaga and Dustin Wu disagree about when the decision to change to storage units was made. Dustin Wu alleges this decision was made in April

2004, and Mr Xhilaga says it did not happen until July 2004. I accept that there were discussions about the alternative systems for some months, but cannot be satisfied on the evidence before me that the decision to change to storage units was finally made in April 2004, as alleged by Hyber. Mr Westover of Tips & Flanagan, the electrical contractor, gave evidence the three phase power conduits were installed in February 2004. The cabling was installed on or about 14 April 2004.

- 136 A quotation dated 30 June 2004 for instantaneous systems was obtained by MX Projects which supports its position that a decision about the storage hot water systems had not been made at that time. It was not until 20 July 2004 that a quotation for the supply and installation of storage units was obtained. It was apparent from Dustin Wu's evidence that he kept changing his mind about whether instantaneous or storage hot water services were to be installed.
- 137 The evidence of both Mr Xhilaga and Dustin Wu was generally unsatisfactory. However, even I was persuaded that the change was made prior to the electrical works being carried out, the evidence in relation to the additional cost which had been incurred by Hyber is totally unsatisfactory. Hyber sought to rely on Mr Greeno's calculations. However, as Mr Greeno confirmed under cross-examination, he relied on the figures given to him by Mr Cass of his office as he does not have any personal expertise in the area. Mr Cass was not called to give evidence, and MX Projects was therefore denied an opportunity of testing the evidence. Whilst the Tribunal is not bound by the rules of evidence (s98) it is nevertheless required to '*...act fairly and according to the substantial merits of the case*' (s97). It would be patently unfair to accept, at face value, these unsubstantiated, untested calculations and the claim is disallowed.

CMX walling system and rendering - \$26,650.00

- 138 This claim is made in circumstances where the renderer was introduced to Mr Xhilaga by Dustin Wu. MX Projects had approved the engagement of Bowens at a significantly lesser cost but this recommendation was rejected by Dustin Wu because Bowens refused to include a liquidated damages clause in their trade contract. In Dustin Wu's opinion, this indicated a lack of commitment to the project and its time constraints. Dustin Wu gave evidence that he accepted the Renderworld quotation at the rate of \$85 plus GST on the understanding that the total area requiring rendering was 400m² and that he would not have accepted this price had he realised that actual area was 675m². Dustin Wu confirmed that he had contacted Con of Renderworld, as they had previously done work for Hyber, and arranged for him to meet with Mr Xhilaga. Although Hyber is critical of MX Projects for allegedly failing to carry out a competitive tendering process for this work, Mr Xhilaga gave evidence that only one quotation had been obtained because Bowens was the only contractor in the metropolitan area available

at the time to carry out the works. The added benefit was that Bowens was both a supplier and installer.

- 139 Apparently Renderworld were not qualified installers for the CMX walling system. Although Mr Xhilaga said they 'did the course' before carrying out the works, Hyber concedes that installation of CMX walling systems is a specialised process and that qualified installers were scarce. I accept that Dustin Wu introduced Renderworld to MX Projects and that they were engaged at Dustin Wu's insistence.
- 140 I reject any suggestion that Dustin Wu relied on any representation from Mr Xhilaga as to the total area requiring rendering being 400m². Dustin Wu has a degree in architecture. He is obviously well able to understand drawings and make his own calculations, and in any event he had a copy of the cost plan prepared by Peter Watt, the quantity surveyor, clearly showing the area to be rendered was 670m². It is immaterial he did not have it with him at the meeting with Con of Renderworld.
- 141 Further, Dustin Wu was not able to provide any explanation as to what reasonable alternative arrangements could have been made for this work to be carried out when he had rejected the recommended contractor. The works were obviously required. Although Mr Greeno suggested that a more reasonable rate was \$55m² inclusive of GST, there is no evidence that a contractor willing and able to carry out the works for that price was, or could have been, available at the appropriate time. An estimate of a reasonable cost to carry out works is one thing, actually being able to arrange to have the works done for that price is an entirely different matter. This claim is therefore disallowed.

Errors in relation to kitchens

(i) Amount paid to Norka Cabinets - \$2,140.00

- 142 These works were necessitated by BHB Plumbing not installing the sewer in accordance with the amended working drawings. Dustin Wu conceded BHB had the amended working drawings and that all other plumbing works had been carried out in accordance with them. He agreed under cross examination that it was not Mr Xhilaga's fault BHB had installed the sewer stack in the wrong place, and that Mr Xhilaga had suggested a solution to the joiner to correct the problem. However Dustin Wu did not consider Mr Xhilaga's suggestion to be an acceptable solution and he therefore devised, and directed the trade contractor in the carrying out of an alternative method of rectification after the works were complete. This is an example of Hyber acting without regard to its obligations under the PMA not to interfere with or direct the contractors. It seemed to me, in listening to, and considering the evidence, that MX Projects was 'damned if it did and damned if it didn't'. Whenever it fulfilled its obligations under the PMA and CMC (to suggest a solution to problems that arose during construction), Dustin Wu was likely to make significant changes if he disagreed with the

steps taken by MX Projects and then expect it to pay for those changes. This claim is disallowed.

(b) Amount paid to BHB Plumbing Pty Ltd - \$2,057.00

- 143 This relates to the installation of isolation valves. Although in the Counterclaim it is noted that these had to be relocated and the cost of such relocation is included in the amount otherwise paid to BHB Plumbing, Mr Bell's evidence as set out in his witness statement is that these were relocated at Mr Aggelidis' request. I cannot determine on the evidence before me that MX Projects has any responsibility for this item and it is therefore disallowed.

Timber wall panels to conceal exposed bolts - \$1,122.00

- 144 Even if I were satisfied it is MX Projects' responsibility, and I am not on the evidence before me, the evidence in relation to the cost of the works is entirely unsatisfactory. In his witness statement Dustin Wu states the cost was \$1,093.00 although no invoices to support this evidence have been tendered. The claim has subsequently been amended to \$1,122.00 – the estimate of the cost as prepared by John Greeno. It is incumbent, in my view, for a party, claiming damages for work it says it carried out unnecessarily, to prove the claim by providing the original applicable invoice/s. Hyber has failed to do so and this claim is disallowed.

Winders in relation to the staircases in apartments 2, 3 & 4

(i) Rectification works - \$34,390.00

(ii) Cost of alternative accommodation - \$8,316.00

- 145 Hyber claims the replacement cost of the stairs in apartments 2, 3 and 4, and the cost of alternative accommodation for the tenants of those apartments whilst the works are being carried out.
- 146 The winders are very narrow and I accept that they do not comply with the Building Code of Australia. The relevant building surveyor issued an occupancy permit in relation to these properties and there is no evidence that he raised any concerns about the narrowness of the winders. On inspection it was apparent that the winders are narrow. Dustin Wu confirmed that no complaints had been received from the tenants and that he was unaware of any incidents.
- 147 Perhaps, surprisingly Hyber has not made application to the Building Appeals Board for dispensation in relation to the winders. Although Mr Martin gave evidence that he considered it unlikely that dispensation would be granted, I do not consider his evidence to be determinative of the issue. I cannot be satisfied on the evidence before me that MX Projects has any responsibility for the stairs. As discussed elsewhere in these Reasons, MX Projects is not responsible for the works carried out by trade contractors.

- 148 The stairs were set out by the stair contractor who apparently identified some problems resulting from the installation of the beams closer to the north wall than as shown on the approved plans. Mr Martin expressed the opinion that he would not have expected a stair manufacturer to have constructed the stairs as constructed, or for the building surveyor to have approved them. Interestingly, Mr Martin's explanation about the position of the beams differed significantly from Dustin Wu's evidence as set out in his witness statement.
- 149 In any event, even if I were satisfied that MX Projects had any responsibility for the stairs, I am not persuaded that Hyber has any intention of replacing them. Dustin Wu indicated under cross-examination that, he would consider whether to rectify the problem depending on the Tribunal's decision, but that it was a risk that Hyber was taking at the moment and that whether they were replaced or rectified would depend on who was paying for the works. Although he later revised his evidence to say he did intend to rectify them I am not persuaded on balance this is Hyber's intention. This claim is disallowed.

Glazing channels - \$990.00

- 150 The glazing channels as initially manufactured were too long by 100mm. The measurements had been provided to the glazing contractor by MX Projects, as requested by Dustin Wu who, in discussion with a representative from the glazing contractor, had agreed that Hyber would provide them. Dustin Wu conceded under cross examination that this was a mistake made by the glazing contractor who had refused to attend site for the purposes of carrying out a check measure. Mr Xhilaga had taken the measurements from the working drawings which I accept was a reasonable course for him to adopt. Again, any claim in relation to this item should be made against the glazing contractor and it is disallowed.

Alternative fixing system for canopy beams

(i) Amount paid to All Purpose Steel - \$6,336.00

- 151 This claim arises from the failure of Formpro to install cast-in ferrules during construction of the slab. Hyber alleges that MX Projects had an obligation to ensure that the ferrules were installed at the correct time. It was conceded by Dustin Wu under cross examination that it was Formpro's responsibility to install the ferrules. Whilst MX Projects was engaged as the project manager and the construction manager with an overall responsibility for the works, it was not its role to supervise the day to day works. MX Projects is not responsible for the construction of the works neither as the project manager (clause 6(c), PMA) nor the performance of a trade contractor under a trade contract (clause 7(a)(i) and (ii), CMC). This claim is therefore disallowed.

(ii) Amount paid to BHB Plumbing for refitting floor wastes

152 This claim arises directly from Formpro's failure to install the ferrules for which I have found MX Projects bears no responsibility. This claim is therefore disallowed.

Additional costs in relation to steel works to canopy

(i) All Purpose Steel - \$2,513.50

(ii) Legal costs incurred re dispute with Lube Engineering - \$8,914.31

153 This claim is related to Formpro's failure to install the cast-in ferrules at the appropriate time for which I have found MX Projects bears no responsibility. A dispute arose with Lube Engineering as to the appropriate method of fixing the canopy and the works were subsequently carried out by All Purpose Steel. MX Projects is not responsible for Lube Engineering's refusal to complete the works. This claim is disallowed as is the claim for legal costs.

Reduction in width of canopy beams - \$4,092.00

154 Hyber claims the cost of reducing the width of the canopy when it was discovered after installation that the canopy beams were too close to the overhead high voltage cables. The canopy was designed by Peter Sgourakis and I refer to my earlier comments. MX Projects is not responsible for design issues. In any event, I note that the problems with the width of the canopy beams did not become apparent to anyone until 18 August 2004 - after they had been installed. In such circumstances even if MX Projects has any liability for design, which I am satisfied it does not, it would have been entirely unreasonable and unrealistic to have expected it to identify these issues at an earlier stage. This claim is therefore disallowed.

Intercom - \$1,144.00

155 It is common ground that the wiring for the intercom was installed in the wrong location. There is no evidence that this was caused by anything other than a mistake by the security company. MX Projects is not responsible as project manager nor as construction manager for works carried out by trade contractors. It is submitted by Hyber that MX Projects should have ensured the rectification costs were back-charged to the security company. Whilst that may well have been appropriate, MX Projects would have no standing to claim reimbursement from the security company if it were required to make payment to Hyber. This is a matter between Hyber and the security company. This claim is therefore disallowed.

Additional costs re demolition and bulk excavation works

(i) *removal of old footings and rubble - \$3,427.50*

(ii) *blinding concrete - \$4,140.00*

156 In December 2003, when Formpro was carrying out its works, it discovered the demolition works were incomplete. Parts of the old footings had not been demolished, and removed from site, and rubble had apparently been buried on site. Bulk excavation works had also not been properly carried out. Formpro carried out the necessary works for which it charged Hyber an additional \$3,427.50. In addition, Formpro charged \$4,140.00 for blinding concrete. Hyber sought leave during examination in chief of Dustin Wu to amend its counterclaim to include the claim for blinding concrete. This claim is a prime example of the unrealistic obligations Hyber seeks to impose on MX Projects to closely supervise the carrying out of works by a contractor, although, as discussed above, it was not liable to do so under either the PMA or the CMC.

157 The demolition works were carried out by Dafco in October 2003. It was not until December 2003, when Formpro was carrying out its works, that it discovered that sections of the old footing had not been removed and there was buried rubble on site. As I understand it, this was not obvious, and did not become apparent until Formpro began its excavation works. Any requirement for blinding concrete arising out of Dafcos' alleged failure to properly perform its obligations under its contract are similarly not the responsibility of MX Projects. I observe in passing that it may well be that had the old footings and buried rubble been removed by Dafco blinding concrete would have been required and that Hyber would have been required to pay for it. These are matters which were clearly beyond the control of MX Projects and the claim is disallowed.

Additional costs of waterproofing works - \$825.00

158 Hyber claims the cost of temporary waterproofing works which were carried out to the balconies to enable plastering works on the underside of the balconies. Peter Aggelidis' evidence, although seemingly inconsistent with Dustin Wu's evidence, is uncontested. In his witness statement he states that these works were necessitated by the failure of MX Projects to provide the balcony fixing details for apartment 5 until 16 August 2004, despite Peter Aggelidis having requested these from MX Projects in March or April 2004 when he identified they were not provided for in the project documentation. There is some dispute as to who arranged these waterproofing works. Whilst Hyber alleges they were arranged by MX Projects, consistent with Peter Aggelidis' evidence as set out in his witness statement, MX Projects asserts they were co-ordinated by Peter Aggelidis. However, this is irrelevant. I am satisfied these works were necessitated by MX Projects' failure to address this issue in a timely manner, and that it was appropriate for the temporary waterproofing works to be carried out in

the interests of progressing the project. I will therefore allow the amount claimed of \$825.00.

Unauthorised works – \$1,200.00

159 Hyber claims that additional shelves in the kitchen in apartment 5 were included in the kitchen at the direction of MX Projects. There is simply no evidence to support this. Hyber did not raise any concerns about the invoice for the installation of the shelving. It simply paid the invoice, which is inconsistent with what appears to be Hyber's practice to query invoices about which it had concerns. The claim is therefore disallowed.

Inadequate handrail height - \$5,280.00

160 It is common ground that the height of the handrails as designed and initially constructed did not comply with the *Building Code of Australia*. However, I am not persuaded that this is something for which MX Projects can be held responsible. The handrail detail was included in the drawings prepared by Peter Sgourakis. Peter Sgourakis had been engaged by Hyber to prepare the working drawings. These drawings were approved by the relevant building surveyor when the building permit was issued. The problem with the handrails did not become apparent to anyone until the pre-final inspection (in October 2004) when it was discovered that there had been no allowance (presumably by Peter Sgourakis) for the impact of the screeding on the height of the handrail. As noted above the project manager and construction manager are not responsible for design issues.

161 Further, Hyber made its own arrangements for the installation of the handrails having rejected the quotation obtained by MX Projects. This is another example of Hyber's close involvement with this project and interference in MX Project's performance of its obligations under one or other of the contracts. This claim is disallowed.

Windows - \$10,450.00

162 The drawings and specifications, which were approved by the relevant building surveyor when the building permit was issued, were prepared by Peter Sgourakis. They do not show opening windows. The windows were manufactured in accordance with those drawings and specifications. This is clearly a design issue in respect of which MX Projects has no liability under the terms of the PMA and the CMC. Further, I am not satisfied, on balance, that Dustin Wu specifically requested MX Projects to review the drawings prior to tendering to ensure that all windows complied with the BCA for light and ventilation. Dustin Wu's architecture qualifications are also relevant, and it is unreasonable to expect MX Projects to have done so, particularly where the drawings had been prepared by an architect, and approved by the building surveyor. This claim is therefore disallowed.

Deficiencies in relation to the wiring of the hot water units - \$20,589.40

- 163 Hyber claims that because of the failure by MX Projects to advise the electrician that there had been a change to solar hot water storage units which operate using off peak power, the units operate continuously, and that it will be necessary to rewire the hot water storage units so that they operate using off peak power as intended. Although it may be that there are significant savings to be had if off peak power is utilised, there is no evidence that Hyber has any intention of rewiring the hot water units, or that it is suffering any damage as a result of, what it alleges, is the incorrect wiring. There is no evidence as to the differential in operating costs between using off peak power, and the continuous operation of the units. I am not satisfied that Hyber has any intention of rewiring the units, or that it has, is or will suffer any loss or damage, and therefore this claim is disallowed.
- 164 Even had I been satisfied that this claim should succeed, Hyber has failed to prove the actual cost of rewiring the hot water units. John Greeno's evidence was of little assistance, as he said he had no expertise in the area and had asked Mr Cass for an estimate. Mr Cass was not called to give evidence.

Additional costs incurred in relation to party walls - \$3,795.00

- 165 Hyber seeks a refund of the balance of the deposit paid for pre-cast panels which was retained by Shepparton Terrazzo when its contract was cancelled in late February 2004. Hyber alleges the decision to substitute block work for the pre-cast panels in the erection of the party walls was to avoid further delay, which could have been avoided had MX Projects sought quotations for the manufacture, supply and reinstallation of pre-cast panels in late 2003, rather than in February 2004. However, I find on the evidence before me, that the primary delay in the obtaining of quotations for precast panels was caused by Hyber's inability to decide on the preferred method of construction for the party walls – whether it was to be precast panels, block work or rapid wall about which there were a number of 'changes of mind'. This claim is therefore disallowed.

CONCLUSION

- 166 Despite the extensive material before me, I have not found it necessary to discuss the evidence of each of the witnesses. Unfortunately, their evidence did little to assist in determining the impact of those delays about which they were able to give evidence, on the total period of delay to the project. Similarly many of the authorities to which I was referred are not directly relevant. Whilst I have considered them all, I have only discussed those which I found to be of particular assistance.
- 167 Therefore on the claim I allow \$7,040.00 and on the counterclaim I allow \$35,308.38 calculated as follows:

Extra Wages:

Bruce Cadman	\$13,120.29
Peter Aggelidis	\$21,363.09
Temporary waterproofing works	<u>\$ 825.00</u>
	\$35,308.38

168 I consider it appropriate that the damages I have allowed to MX Projects be set-off against the amount I have allowed Hyber. I will therefore order that MX Projects pay Hyber the sum of \$28,268.38. I will reserve the question of costs with liberty to apply.

DEPUTY PRESIDENT C. AIRD