

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING & PROPERTY LIST**

VCAT REFERENCE NO. BP1027/2017

**CATCHWORDS**

Domestic building work – house renovation – subcontract for steelwork – claim for delay by contractor against subcontractor – whether time was a term of the contract – whether on the facts any delay was proven

<b>APPLICANT</b>	JCM Builders Pty Ltd (ACN: 115 843 984)
<b>RESPONDENT</b>	Hicks General Construction Pty Ltd (ACN: 607 499 598) t/as Dowcon Steel
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member S. Kirton
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	5, 6 April, 5 June 2018
<b>DATE OF ORDER</b>	22 October 2018
<b>CITATION</b>	JCM Builders Pty Ltd v Hicks General Construction Pty Ltd [2018] VCAT 1595

**ORDERS**

1. The claim is dismissed.
2. Liberty to apply on the question of costs. If the parties consent, they may make any application for costs by way of written submissions (limited to 10 pages) and affidavits, to be decided in chambers. Alternatively, a party may request the principal registrar to list the matter for a one hour hearing before Senior Member Kirton.

**SENIOR MEMBER S. KIRTON**

**APPEARANCES:**

For the Applicant

Mr M. White of counsel

For the Respondent

Mr P. and Mr J. Downing, directors

## REASONS

### BACKGROUND

1. The applicant (“JCM”) is a builder who was engaged by the owner of a house in Vermont South to extensively renovate and partly rebuild the house. In general terms, the existing building was to be divided lengthways into three sections, with the middle section being extensively gutted, including having its roof removed, a new steel frame installed and a new roof fitted. There was also a steel frame porch and lift shaft required. The respondent (“Dowcon”) was engaged as a subcontractor by JCM to carry out the steelwork subcontract, which required it to measure, document, fabricate and install the steel in accordance with the drawings provided by JCM.
2. Dowcon performed the subcontract works, however JCM alleges that the works were not completed within an agreed time-frame. JCM says that this delay caused it to suffer losses, made up of:
  - a. extra on-site costs as a result of Dowcon’s delay; and
  - b. water damage to the house caused by the roof being off for longer than estimated.
3. The matter was originally listed for a two-day hearing. At the commencement of the hearing it was apparent to me and to the parties’ representatives that the hearing on liability and quantum could not be concluded within the two days allocated. Counsel for JCM suggested that the hearing ought be ‘split’, so that the two days would be used to hear the evidence on liability, and if it were found that Dowcon has a liability to JCM, then the matter would be listed for a second hearing on the quantum of JCM’s loss and damage. Dowcon consented to this approach and orders were made by me on 5 April 2018 confirming this agreement.
4. Accordingly, this decision addresses only the question of Dowcon’s liability to JCM (if any). Counsel for JCM described the scope of the enquiry as:

“As a result of the interlocutory orders made on the first day, all we have attempted to address here is issues of liability and it comes down to whether or not the respondent caused a delay on the critical path of construction over stages 1, 2 and 3... If the Tribunal finds there was no attributable delay (attributable to the respondent) then there will be no further process in this hearing.”<sup>1</sup>
5. For the reasons set out below, I find that there was no term of the contract which required Dowcon to either complete the works by a certain date, or to ensure that the roof was only off for five weeks. Further, while I accept that

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<sup>1</sup> Closing argument 5 June 2018

there was a contractual term that Dowcon would carry out its work within a reasonable time, I am satisfied that it did so. As a result, I dismiss the applicant's claim.

## **THE HEARING**

6. JCM was represented at the hearing by Mr Marcel White of Counsel. Dowcon was represented by its directors, Mr Philip Downing and Mr Jason Downing. I commend all the representatives for their sensible collaboration during the hearing. For example, the items of loss and damage claimed by JCM were not well particularised, and Dowcon provided a Table which was its interpretation of the nature of the claims. Counsel for JCM agreed to adopt the Table, as it "helpfully categorises the damages sought by the applicant"<sup>2</sup>.
7. Evidence was given for JCM by its director Mr Brendan Borg, by the owner of the property, Mr Alan Saunders, and by Mr Dean Raymond, the site carpenter. Witnesses for Dowcon were Mr Timothy Downing and Mr Samuel Downing.
8. Following the hearing, the parties provided written submissions and a further hearing was held at which the parties made their closing submissions.

## **THE ISSUES IN DISPUTE**

9. As stated above, JCM alleges that Dowcon caused a delay in the project of five weeks. It acknowledges that the roof was always going to be off the house for a period of five weeks, however says that due to Dowcon's delays, the roof was off for a total of ten weeks, which is five weeks longer than was either agreed or was reasonably anticipated during the critical path. This has led to physical damage to the property, with heavy rainfalls damaging the existing building internally.
10. JCM says that the delays occurred both at the time of manufacturing and installation of the steelwork, and then were compounded by time lost completing and rectifying defects in the welds<sup>3</sup>.
11. It was common ground that the parties entered into a contract which was made up of a quotation provided by Dowcon<sup>4</sup> and a Subcontract Purchase Order, sent under cover of an email dated 24 January 2017.
12. JCM contends that it was a term of the agreement that there was either:

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<sup>2</sup> JCM's closing submissions paragraph 1

<sup>3</sup> JCM conceded that defects in the lift shaft did not cause any delay in replacing the roof

<sup>4</sup> Dowcon provided two quotations for the subcontract works. The first, no. 34206, was superseded by the second, no. 34208 dated 24 January 2017. There is no relevant difference between the two.

- a. an express term of the contract which required Dowcon to meet the Construction Schedule held by JCM; or
  - b. an implied term of the contract that the works would be carried out within a reasonable time-frame; or
  - c. a variation to the contract as evidenced by subsequent email communications, which provided the agreed completion dates.
13. On the other hand, Dowcon’s position is that it had no obligation under the contract to provide the steelwork by a particular date. It says that no construction schedule was provided to it either before or during the carrying out of the subcontract works. Dowcon did not provide any specific time-frame for its work, other than that it would complete the works within a reasonable time, which it did.
14. I will therefore consider whether there was a contractual term in relation to time, and if so what it was, and then consider whether or not any such term had been breached by Dowcon.

**THE TERMS OF THE CONTRACT**

**A. Was the Construction Schedule an express term of the contract?**

15. As for the first contention, JCM relies on clauses 9(a) and (f) of the Subcontract Order which provide:

9.0 COMMENCEMENT AND COMPLETION

(a) [Dowcon shall employ] sufficient men ... to complete the work generally in accordance with the construction schedule and within any time and dates stated on the Subcontract Order... A copy of the current construction schedule can be viewed at The Contractor’s office.

.....

(f) [Dowcon] must bring the Works to Completion by the Date for Completion stated in the Construction Schedule.

16. JCM conceded that there was no time and date stated on the Subcontract Order. Instead, it provided “COMMENCEMENT DATE: TBA”. However, it relies on the ‘Construction Schedule’, which was a document held by Mr Borg and updated from time to time.
17. JCM conceded that the Construction Schedule was not provided to Dowcon either before or during the works, but says that it was open to Dowcon to request a copy. It submits that “it was not a contractual obligation falling to [JCM] to annex the A3 Construction Schedule, or constituent parts of it, to

[Dowcon]. [Dowcon] did not elicit any evidence from [JCM] that the Original ... Construction Schedule was either unavailable or non-existent”<sup>5</sup>.

18. Dowcon’s defence is that no construction schedule was provided to it either prior to or during the works. Nor was it referred to in any of the correspondence sent by Mr Borg, including the three Notices of Delay. The construction schedule which he produced during this proceeding was not current at the time the works were carried out and is not valid.
19. Mr Borg’s evidence was that he had originally prepared the Construction Schedule and then continuously updated it as the works progressed, to take into account any changes in the program. He said that his original schedule anticipated full destruction/removal of the existing roof by 10 March 2017 and full cover by 13 April 2017, which is a period of five weeks.
20. For the following reasons, I am not satisfied that JCM treated the Construction Schedule as a contract document. Further, I am not satisfied that the documents produced by Mr Borg during the hearing, which purported to constitute the Construction Schedule, were sufficiently certain to form a term of the contract.
21. JCM discovered three versions of the Construction Schedule. The first was a handwritten schedule, provided on 13 February 2018, which related only to part of the building works. On 28 March 2018, at the request of Dowcon, JCM provided two further schedules, printed from a computer program. Mr Borg said that the first one was the version current at the time the subcontract was agreed, and the second one was the later version, updated for delays. He said that he kept the handwritten schedule in his car, so he could update it as he was travelling.
22. In cross examination, he was asked why JCM had only discovered the handwritten schedule initially. He replied that the printed schedules were not relevant, because they had not been provided during the job, and instead, JCM had told Dowcon the required dates in emails.
23. Based on Mr Borg’s evidence, I am satisfied that the Construction Schedule was not a part of the contract, and that if JCM provided Dowcon with dates for commencement and completion, this was done by email.
24. Further, I note Dowcon’s submission that the adjusted version of the Construction Schedule records dates which were not accurate<sup>6</sup> and agree that there appears to be inconsistencies between the dates set out in the contemporaneous documents, the evidence of Mr Borg and the dates noted in the schedule. As I have already found that the dates set out in the Construction Schedule are not a term of the contract, I am not required to

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<sup>5</sup> JCM Closing Submission paragraph 27

<sup>6</sup> Dowcon Closing Submission paragraph 27

make any findings as to whether the schedule itself was accurate. However if I were to do so, based on the inaccuracies demonstrated in the adjusted Schedule, I would find it difficult to conclude that the original version of the Schedule was sufficiently certain as to constitute a term of the contract.

### **B. Was there an implied term as to time?**

25. As for the second contention, that there was an implied term that the works would be carried out in a reasonable time, both parties agree that there was such a term. JCM submits that because it allowed five weeks in the Construction Schedule as the time for the steelwork subcontract, this is the reasonable period of time that Dowcon should have met. Dowcon agrees that five weeks is a reasonable period for the works described in the Construction Schedule, but that the Schedule fails to allow for the period of lead-in time required for the measure and manufacture of the Stage 3 works. A period of approximately two weeks needs to be added to the five weeks in the Schedule.
26. I accept the parties' agreement that the works were to be carried out within a reasonable time. However, for the reasons discussed below, I am not satisfied that this was five weeks (as contained in the Construction Schedule) or less (as contained in the Quotation). Instead, I accept Dowcon's version that a reasonable time-frame was approximately seven weeks, for the reasons discussed below in the context of whether there was any delay at all.

### The Construction Schedule

27. As discussed above, I am not satisfied that the Construction Schedule was a certain enough document to form any basis for concluding that five weeks was a reasonable period of time. It does not include the lead-in time for Stage 3, which was conceded by Mr Borg (his evidence is discussed further below in the context of whether there was any delay at all). Further, it was prepared by JCM with no input from Dowcon and was not even discussed with Dowcon until after the event.

### The Quotation

28. The quotation provided that Dowcon would supply and install structural steel in accordance with a schedule of pieces set out therein. The works identified three stages, being

STAGE 1 – FOOTING PLAN

STAGE 2 – FIRST FLOOR

STAGE 3 – UPPER ROOF.

29. At page 2 of the quotation, it stated:

This quote is offered on the basis that the items set out in each stage of this quotation will be installed as one complete stage in one visit

(possibly over multiple days). Dividing the stages set out in the quotation into smaller installs may create extra costs that would be passed on to the builder. If you would like the staging changed to suit your program, please advise your Dowcon representative and a new quote will be offered if necessary.

30. Although the quotation spoke of three separate stages, the parties agreed that the steel subcontract works were in fact carried out in two stages. The first stage included the works described in the quotation as Stages 1 and 2 (footing and first-floor) (henceforth referred to as “Stage 1-2”) and the second stage was the quotation’s Stage 3 (upper roof).
31. JCM said that at the time of accepting the quotation, it understood that all three stages could be carried out in one go, within a period of one week. However during cross-examination, Mr Borg conceded that he had not expected Dowcon to carry out all three stages in one go within one week. He agreed that Stage 3 (the upper roof) could not have been done until after JCM provided the set out, and this necessarily followed the completion of Stages 1 and 2.
32. It is not clear whether JCM maintains its position that the meaning of the quotation was that all three stages would be completed in one go. In its Closing Submission, JCM contends that this was a representation of “an availability to complete that which was quoted”<sup>7</sup>. However, given the concession made by Mr White during his closing address that five weeks with the roof off was the reasonable period, and Mr Borg’s evidence referred to in the previous paragraph, it seems this contention is no longer put. However, in case I am wrong about that, I am satisfied based on the plain and natural meaning of the words in the clause set out above, that Dowcon’s interpretation of this clause is correct, namely that the items of work for each stage would be completed in one go, but that as there were three stages nominated, this meant at three separate periods of time.

### **C. Was there a variation as to time?**

33. The third alternative submission made by JCM was that after the subcontract was entered into in January 2017, either the agreed time period was varied, or a time period was agreed by way of variation. This came about through the correspondence that passed between the parties in February and March 2017. The correspondence relied on by JCM included the following:

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<sup>7</sup> JCM Closing Submission paragraph 17



### The correspondence

34. On 14 February 2017 Mr Borg provided the dimensions for the Stage 1 works and asked Dowcon to “confirm a lead time, on site – as everything revolves around yourself”<sup>8</sup>.
35. On 24 February Tim Downing advised:
- “We have issued your steel for fabrication and have a preliminary install date of 13/3. Your job is scheduled to run for 2 days.
- This install date is considered preliminary and is subject to change.
- As per our project managers advice we need you to complete the following before we can come to install...
- We often have to push jobs back by a number of days due to a range of factors including whether, install times at other jobs going longer than expected, changing programs in our customers etc...
- Either way, we will call you the day before we are planning to begin install to check that you are expecting us and that you are ready...”<sup>9</sup>
36. Mr Borg replied on 6 March, saying “13 is Monday and a public holiday I presume it will be Tuesday 14<sup>th</sup>”<sup>10</sup>.
37. On 7 March, Tim replied:
- “Hey Brendan, we had a problem in our system and booked a bunch of jobs for that day which can’t go ahead. We then had trouble rebooking cranes and have had to push your job to begin on Wed 15<sup>th</sup>. Everything from the original email still applies. Sorry for the stuff around.”<sup>11</sup>
38. Mr Borg replied on 8 March “Thanks time [sic], as discussed we do have multiple tasks booked around Dowcon, I will call Tuesday to confirm.”
39. On Tuesday 14 March Mr Borg asked, “Please confirm for ... installation tomorrow ...”.
40. Dowcon attended at the site on 15 March and commenced installing the steelwork (which it had already manufactured off site).
41. By email on 21 March Mr Borg notified Dowcon that it was delaying JCM from progressing with the construction program and requested it “at no further delay” to provide a site welder and required staff and to rectify an identified defect in a beam connection (among other things).
42. On 24 March JCM served a Notice of Delay.

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<sup>8</sup> Exhibit A3

<sup>9</sup> Exhibit A4

<sup>10</sup> Exhibit A5

<sup>11</sup> Exhibit A6

43. By email on 27 March Mr Borg requested Dowcon to rectify defects in the lift shaft installation.
44. On 29 March JCM served a Notice of Delay.
45. Mr Sam Downing sent a text message to Mr Borg on 11 April in which he said “I’m still working on moving your job forward, I told you I’d call you back but I still haven’t got a resolution one way or the other, I need a bit more time to try to move things around etc. But I wanted you to know we’re working on it and will get back to you as soon as we have something definite”.
46. On 12 April Mr Tim Downing emailed JCM saying “we have issued your steel for fabrication and have a preliminary install date of 13/4. Your job is scheduled to run for two days...”
47. JCM also relies on correspondence sent following completion of the subcontract works (which was on 3 May 2017) including emails 18 and 22 May.

Does the correspondence constitute a variation?

48. The Subcontract Order contains a clause relating to variations, clause 10. This provides that the subcontractor shall vary the works as required by the contractor and that the subcontractor may not add or omit any works or claim payment for any extra works unless it has been authorised in writing. Further, subclause (d) provides:

The subcontractor must comply with the contractor’s instruction within the time stated by the contractor or, if no time is stated, within a reasonable time.
49. There is no express provision relating to a variation to do with time, and no method by which any such variation should be made.
50. I must consider whether the correspondence constitutes an agreement to vary the terms of the original contract. Having regard to the contents of each of the emails, I am not satisfied that there was any such agreement. It is trite law that a contract cannot be varied unilaterally, but only by a further contract. As is summarised by *Cheshire & Fifoot, Law of Contract*<sup>12</sup>:

The existence of a contract of variation must be clearly demonstrated by reference to the usual rules of formation. A definite agreement, going beyond discussion or negotiation, must be established, but as with any contract such an agreement may be inferred from conduct. Consideration must also be established...

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<sup>12</sup> 10<sup>th</sup> ed, at [22.3]

An intention to create a legally binding agreement, as well as sufficient certainty of the varied terms, must also be established; unless this is achieved the original contract continues in undiminished operation.

51. The correspondence passing between the parties was not intended to create a new legally binding agreement. Instead, prior to 3 May 2017, it is merely a discussion about the method of implementing the existing agreement. After 3 May 2017 it is a retrospective conversation about what has already happened. There is no consideration for any change in dates. However more significantly, for the reasons discussed above, I have found that there was no certainty by way of specified dates agreed between the parties.
52. Accordingly, I find that the contract was not varied to include specific dates for completion.

### **WAS THERE IN FACT A DELAY?**

53. It is not contentious that the roof was off the house for a period of 10 weeks. As a result of my finding that the parties agreed that the subcontract works would be carried out in a reasonable time, the concession of JCM that a reasonable time was five weeks, and Dowcon's position that approximately seven weeks is the reasonable period once lead-in time is taken into consideration, I now turn to consider whether there was in fact any period of delay caused by Dowcon.

#### **A. The Stage 1-2 Works**

54. Installation of the Stage 1-2 works commenced on site on 15 March 2017. This was one day later than the start date shown on the original version of the Construction Schedule. The same schedule shows that the sheet floor and upper walls would finish on 28 March. The sheet floor installation had to be installed before Dowcon could take measurements for the Stage 3 steel.
55. JCM contends that time for the subcontract works ballooned because of Dowcon's haphazard project management, failure to ensure continuity of work, poor planning, inadequacy of staffing and particularly for Stages 2 and 3, the requirement to repeatedly attend to rectify defects in the installation (particularly poor welding and the removal of an extraneous beam).
56. Dowcon conceded that there were some problems with completing the steelwork in Stage 1-2, but Mr Borg stated in an email that the upper floor was ready for measure by 27 March 2017. Although some parts of the welding of the lift shaft was outstanding as at that date, this did not affect the critical path for the replacement of the roof, being the measuring for the upper steelwork. JCM did not give any evidence of any actual delay to the project that was caused by any incomplete or defective work in Stage 1-2 after 27 March 2017.

57. I accept the submission of Dowcon that as the property was ready for the measuring of the Stage 3 steel on 27 March 2017, there was no delay to the project on the critical path in respect of the Stage 1-2 works. I agree that there were defects in the work carried out by it, but these did not lead to the works being delayed beyond JCM's original time-frame for the Stage 1-2 works.

### **B. The Stage 3 Works – lead time**

58. Dowcon concedes that it did not meet the time-frame set out in the Construction Schedule for the Stage 3 works. However, it says that that time-frame was unreasonable, because it failed to factor in the lead-in time required between measuring the site and installing the frame. The lead-in time includes the notice required to be given for Dowcon to attend site to take the measurements (2-4 days), time for all information to be provided (a further 2-3 days), and then, most importantly, for Dowcon to design and draw up the frame work and then to actually manufacture the steel.
59. Mr Borg conceded in cross examination that he had not allowed a lead-in time for manufacturing in the Schedule. He also agreed that Dowcon had been engaged by JCM previously and on each of those jobs, Dowcon had required a lead-in time between site measure and installation. He said he could not recall how long those periods were, but Mr Phillip Downing said it was 1 to 2 weeks. Mr Borg also agreed that JCM was providing the set-out work at the house, that the set out works required a floor to be in place before measurements could be taken, and that it was Dowcon that would take the measurements.
60. In his evidence, Mr Borg agreed that he had changed this process in March 2017 (including by email 23 March), by providing Dowcon with sketches of the upper steelwork, rather than waiting for the floor to be in place and for Dowcon to take measurements. He said he did this so that the drawing and CAD work could proceed while the floor was still incomplete. Dowcon contends that there were problems with the sketches and relies on a series of emails in which Dowcon has requested further information and further instructions. Mr Borg accepted that there were some issues that needed to be clarified, but said that some of the questions were raised by Dowcon's employee (Joel) because of his incompetence.
61. Mr Downing took Mr Borg to a series of emails and drawings which recorded the questions raised by Joel concerning measurement discrepancies, a change to the columns caused by the truss manufacturer, and further design changes<sup>13</sup>, and suggested that it was not until 4 April 2017 that Mr Borg satisfactorily resolved these questions. Dowcon then carried out the measure for the Stage 3 works on 6 April 2017.

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<sup>13</sup> Including Exhibits A13, A18, R2

62. Dowcon commenced installation on 13 April 2017. This was two weeks and one day from being notified that the site was ready for measure (which Mr Borg did on 29 March). Dowcon submits that this is a reasonable period of time, given it is only one day longer than their usual practice and it included having to resolve difficulties with the design and CAD work.
63. Based on the correspondence passing between the parties and the evidence of Mr Borg, I accept that any delay in the lead-in time required to measure the site, to design and document the upper roof, and then to manufacture the steel, was not the fault of Dowcon. Further, I am not satisfied that there was in fact any delay, as I find that the time-frame of two weeks and one day between being notified by JCM that the site was ready for measure and commencing installation, is reasonable given the works required.

### **C. The Stage 3 Works – installation**

64. Installation of the Stage 3 works took place on two days, being 13 and 18 April 2017. The days in between were the Easter public holidays. The site welder attended on 19 April and reported the job to be fully welded at the end of that day. Dowcon accepts that there were some defective and incomplete welds at that time, but contends that these did not prevent the roof from being installed immediately after 19 April.
65. On the other hand, JCM says that it was unable to measure for the roof until 28 April, nor to install it until early May 2017. Mr Borg, Mr Raymond and Mr Saunders provided detailed evidence, including photographs, of the problems they saw with the welds and the frustration they felt at not being able to progress their works.
66. I accept their evidence that parts of the installation by Dowcon was not carried out to an acceptable standard, and that some of the welders sent by Dowcon did not carry out their work competently. However, my task in this proceeding is to ascertain whether this defective work caused a delay on the critical path of the project, not simply to assess whether there were defects or not.
67. Mr Downing cross-examined Mr Borg as to why the roof could not be installed immediately after 19 April. His answers included the following:
  - a. The welds were not completed as at 19 April, and he followed up Sam Downing and Joel on 20 April to demand that they be completed. However he was he was not able to identify which welds were defective and which were incomplete. When asked “On 20 April what was the status of our welds?”, he replied “I don’t know”.
  - b. He was unable to distinguish between defective welds and incomplete welds. He explained the process was that the joins were tacked together when the steel was installed and then finish welded sometime

later. He said that as at 19 April, “I can’t say if they were or were not finish welded, but they were not satisfactory as far as I was concerned”.

- c. He agreed that Dowcon sent another welder on 24 April and said that there were still defective welds. However when asked if there were areas with no welding or incomplete welds, he said “I don’t know”.
  - d. Mr Borg said that to him it was immaterial whether the welds were defective or incomplete as both types of problem prevented him from installing the roof.
  - e. He disagreed that he could have been carrying out other work at the property between 20 and 24 April, saying that the welds were so poor, and connections were incomplete, that he could not cover the roof.
  - f. He said that he had the engineer come to the site on 28 April to check the welds. No evidence from the engineer was produced to indicate whether in their opinion the work was incomplete.
  - g. He agreed that Sam Downing came on 3 May and completed rectifying the welds.
  - h. He conceded, when shown photographs taken on 28 April, that the roof beams had already been installed as at that date and were ready to be covered. However, he said that he could not apply the roof sheets until after 3 May, because he had to install insulation under the roof sheets and that he could not do that until all welding was completed, for risk of fire.
  - i. He could not identify any areas of incomplete welding in the photographs taken on 28 April. Instead he identified several defective welds.
  - j. He said that he thought the joins in the RB1 beams were unfinished, but had no photographs or other evidence of that. Dowcon put to him that those joins had been completed on 19 April and Mr Borg was unable to contradict that date.
  - k. The roof sheets were installed within three days of 3 May 2017.
68. Dowcon correctly submits that JCM bears the onus of proof to satisfy me on the balance of probabilities that the actions of Dowcon delayed the installation of the roof beyond a reasonable time-frame.
69. Based on the evidence, including the contemporaneous photographs and documents, I am not satisfied that Mr Borg was able to demonstrate any significant failings on the part of Dowcon in respect of the installation of the Stage 3 works. I do not accept that defective welds would prevent the

roof from being installed. If there were a number of incomplete welds, JCM may have had grounds to delay installing the roof. However Mr Borg could not identify any incomplete welds, after 19 April 2017, apart from, he thought, the joins in the RB1 members. Mr Downing suggested that these joins were complete as at 19 April 2017 and I prefer his version, for the following reasons:

- a. Mr Borg was unable to provide any proof of these joins, and there were no photographs,
- b. Mr Borg's evidence was that he did not distinguish between incomplete works and defective works and did not know what was incomplete and what was defective,
- c. the engineer who attended on 28 April apparently did not identify the joins as being outstanding, and
- d. most significantly, JCM served three Notices of Delay during the project, but during the welding issues with the Stage 3 installation it did not serve any notices at all. This indicates that there was no delay caused by Dowcon at that time, or if there was, JCM did not consider it significant. As Mr Borg said in his evidence, "We did carry on with lots of work working around you" in April and May 2017.

70. Accordingly, I find that there was no delay on the critical path caused by Dowcon.

### **OBLIGATION TO PROTECT THE WORKS**

71. As a result of the above findings, I do not need to consider whether or not JCM failed to mitigate its loss by protecting the house during the steelworks. Mr Borg admitted in his evidence that that responsibility to protect the house was JCM's and did not suggest that the responsibility had passed to Dowcon. I heard evidence about JCM's alleged failure to put adequate coverings over the house, including photographs, and heard JCM's reasons as to why it was impossible to protect the whole work area. However, I make no findings about these matters.

### **ORDERS**

72. As a result of the above findings I will make the following orders:

1. The claim is dismissed.

2. Liberty to apply on the question of costs and reimbursement of fees. If the parties' consent, they may make any application for costs by way of written submissions to be decided in chambers. Alternatively, a party may request the principal registrar to list the matter for a one hour hearing before Senior Member Kirton.

**SENIOR MEMBER S. KIRTON**