CITATION:	*Halikos Hospitality Pty Ltd & Ors v INPEX Operations Australia Pty Ltd* [2020] NTCA 4
PARTIES:	HALIKOS HOSPITALITY PTY LTD (ACN 143 433 998) and HALIKOS PTY LTD (ACN 092 987 463) and HALIKOS INVESTMENTS PTY LTD (ACN 009 639 221) and HALIKOS NT PTY LTD (ACN 159 722 620) v INPEX OPERATIONS AUSTRALIA PTY LTD (ACN 150 217 262)
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	AP 4 of 2019 (21611352)
DELIVERED:	20 March 2020
HEARING DATES:	4, 5 September, 20, 21, 22 November 2019

JUDGMENT OF: Southwood and Hiley JJ, and Riley AJ

CATCHWORDS:

APPEALS – general principles – functions of appellate court – appellate court to conduct a "real review" of the evidence and trial judge's reasons to determine whether the trial judge has erred – appellate restraint before interfering with trial judge's findings of fact – appellant not required to show that the trial judge's findings are "glaringly improbable" or "contrary to compelling inferences" unless the findings are partly based upon the trial judge's observations of the witness

APPEALS – Courts and Judges – delay before announcing judgement – delay between announcing judgment and publishing reasons for judgment – relevant principles – appellate intervention flows from the error, or the infirmity of the decision, not the delay itself – lengthy delay may weaken a trial judge's advantage of having seen the oral and documentary evidence unfold in a coherent manner – No error or infirmity established – trial judge gave careful and detailed consideration to the whole of the evidence – appeal dismissed

AGENCY – No actual authority of officers of the respondent to bind respondent – No ostensible authority – knowledge by both parties of detailed decision-making process required by the respondent – appeal dismissed

CONTRACT – Formation – Single contract – Not two contracts – No intention to enter into binding contractual relations – negotiations incomplete – parties still negotiating a single agreement broader than that alleged second agreement – appeal dismissed

EQUITY – Estoppel by convention – failure to establish mutual assumption – No error by the trial judge – appeal dismissed

EQUITY – Estoppel by representation – failure to establish representation – failure to establish reliance – no error by the trial judge – appeal dismissed

AUSTRALIAN COMPETITION LAW – Misleading and deceptive conduct – failure to establish misrepresentation – no error by the trial judge – appeal dismissed

Competition and Consumer Act 2010 (Cth) s 128, s 236

Camden v McKenzie [2008] 1 Qd R 39, *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95, *Expectation Pty Ltd v PRD Realty*

Pty Ltd (2004) 140 FCR 17, *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd* (2001) 4 VR 28, *Fox v Percy* [2003] 214 CLR 118, *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451, *Lee v Lee* (2019) 93 ALJR 993, *Lemongrove Services Pty Ltd v Rilroll Pty Ltd* [2019] NSWCA 174, *Nais and Others v Minister for Immigration and Multicultural and Indigenous Affairs and Another* (2005) 228 CLR 470, *Re Kit Digital Australia Pty Ltd (in liq)* [2014] NSWSC 1547, *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679, *Watson v Foxman* (1995) 49 NSWLR 315, applied

Palmer v Clarke (1989) 19 NSWLR 158, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, distinguished

Aldi Foods Pty Ltd v Moroccanoil Israel Ltd [2018] FCAFC 93, *Aneve Pty Ltd v Bank of Western Australia Ltd* [2005] NSWCA 441, *Australian Red Cross Society v Queensland Nurses' Union of Employees* [2019] FCAFC 215, *Briginshaw v Briginshaw* (1938) 60 CLR 336, *Briginshaw v Briginshaw* (1938) 60 CLR 336, *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458, *Dearman v Dearman* (1908) 7 CLR 549, *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603, *Fuge v Commonwealth Bank of Australia* [2019] FCA 1621, *Gardenisle Pty Ltd v Johnson* [2019] WASC 271, *Grandulovic v Borg Warner (Australia) Pty Ltd* (Unreported, NSWCA, 1 December 1987), *Ingot Capital Investments v Macquarie Equity Capital Markets (No. 6)* [2007] NSWSC 124, *Julstar Pty Ltd v Hart Trading Pty Ltd* [2014] FCAFC 151, *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, *King & Ors v Australian Securities and Investments Commission* [2018] QCA 352, *Masters v Cameron* (1954) 91 CLR 353, *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541, *Moukhayber v Cambden Timber and Hardware Co Pty Ltd* [2002] NSWCA 58, *New South Wales v Hunt* (2014) 86 NSWLR 226, *Northside Developments Pty Ltd v Registrar General* (1989) 170 CLR 146, *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, *Poulet Frais Pty Ltd v The Silver Fox Company Pty Ltd* (2005) 220 ALR 211, *Re Hillsea Pty Ltd* [2019] NSWSC 1152, *Re Sundell* [2019] NSWSC 1108, *Rollings v Rollings* (2009) 230 FLR 396, *S W Hart & Co Pty Ltd v Edwards Hot Water Systems* (1985) 159 CLR 466, *State Rail Authority of NSW v Earthline Constructions Pty Ltd (In liq)* (1999) 73 ALJR 306, *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* [2013] VSCA 237, *Szeto v Situ* [2017] NSWCA 135, *Thorne v Kennedy* (2017) 263 CLR 85, *Warren v Coombes* (1979) 142 CLR 531, *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816, *White v Philips Electronics Australia Ltd t/as Philips Healthcare* [2019] NSWCA 115, referred to

REPRESENTATION:

Counsel:

Appellants:	RJ Whitington QC with RD Williams
Respondent:	PE Cahill SC with N Christrup SC

Solicitors:

Appellants:	Finlaysons
Respondent:	Corrs Chambers Westgarth

Judgment category classification:	B
Number of pages:	178

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Halikos Hospitality Pty Ltd & Ors v INPEX Operations Australia Pty Ltd [2020] NTCA 4
No. AP 4 of 2019 (21611352)

HALIKOS HOSPITALITY PTY LTD
(ACN 143 433 998)
First Appellant

HALIKOS PTY LTD
(ACN 092 987 463)
Second Appellant

HALIKOS INVESTMENTS PTY LTD
(ACN 009 639 221)
Third Appellant

HALIKOS NT PTY LTD
(ACN 159 722 620)
Fourth Appellant

AND:

INPEX OPERATIONS AUSTRALIA PTY LTD
(ACN 150 217 262)
Respondent

CORAM: SOUTHWOOD and HILEY JJ, and RILEY AJ

REASONS FOR JUDGMENT

(Delivered 20 March 2020)

Contents

INTRODUCTION

[1] This is an appeal against a decision of the Supreme Court dismissing the appellants' (**Halikos**) claims against the respondent (**INPEX**) in contract, estoppel, and misleading and deceptive conduct arising out of certain protracted negotiations which, if successful, would have resulted in Halikos becoming the primary accommodation provider for INPEX for employees and contractors engaged in the construction and operation of the Ichthys LNG Project (the **Project**) at Bladin Point near Darwin.

[2] **INPEX** is the agent and operator appointed by joint venturers to construct and operate the onshore and offshore processing facilities for the Project. On 15 February 2012 Halikos Hospitality Pty Ltd and INPEX entered into a contract for Halikos Hospitality Pty Ltd to provide accommodation for the Project. The contract was titled "INPEX Accommodation – Darwin, contract number 800575" (the **2012 Accommodation Agreement**).

[3] **Halikos** alleges that:

(i) on 13 February 2014 Halikos Hospitality Pty Ltd and INPEX entered into an agreement to vary the Accommodation Agreement (**Additional Accommodation Variation**[1] or **AAV**);

(ii) the terms of the AAV are contained in a document titled "Variation of Contract Number 800575" (**Variation Document**[2]);

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1 Amended Statement of Claim (**ASOC**) [16].

(iii) pursuant to the AAV, INPEX agreed to take from Halikos not less than 225 (later reducing to not less than 150) apartments and hotel rooms for a 15-year period; and

(iv) the AAV was repudiated by INPEX on either 15 October or 20 November 2014.

[4] Halikos contended that in order to provide the accommodation specified in the AAV, and in reliance on the parties' entry into the AAV, Halikos demolished its existing properties at 105 Mitchell Street, Darwin and undertook a $46.75 million development of that site, which primarily involved the construction of a 180 room apartment complex (**H105**).

[5] Halikos contended that after 13 February 2014, INPEX, particularly through its director and company secretary Hitoshi Okawa and its senior executives Christopher Wheeldon (General Manager – Construction) and Sean Kildare (General Manager, INPEX Darwin office), among other things, assured Halikos that an agreement had been entered into and that INPEX would take all the accommodation in H105 once its construction was completed, and required Halikos to hurry up and complete the build of H105. Without the assurance from INPEX, Halikos would not have proceeded. But on 15 October 2014, Okawa san informed Halikos for the first time that INPEX considered that there was no binding agreement and it did not require the

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2 This document includes the AAV, but also includes two recitals, Recitals A and C, which are not pleaded as being part of the AAV. See ASOC [16] Particulars and [19]. See too [79] below.

additional accommodation. By this time, the development of H105 had proceeded to such a stage that Halikos had no alternative but to carry it to completion. As a result Halikos commenced an action for breach of contract against INPEX in the court below.

[6] Alternatively to its claim for breach of contract, Halikos claimed that, by reason of INPEX failing to correct any mistaken belief of Halikos that there was or would be an agreement in the form of the AAV and/or by reason of INPEX's conduct in the period between 13 February 2014 and 15 October 2014, INPEX was estopped from denying there was an agreement in the form of the AAV.

[7] In the event that: (i) there was no AAV agreement, and (ii) the principles of estoppel did not apply, Halikos claimed the same conduct of INPEX which was said to ground the estoppel constituted misleading and deceptive conduct contrary to s 128 of the *Competition and Consumer Act 2010* (Cth) sch 2 (**Australian Consumer Law**) and INPEX was thereby liable under s 236 to compensate Halikos on the basis that, but for the misleading and deceptive conduct, Halikos would not have demolished the existing building at 105 Mitchell Street, undertaken the development of H105, and foregone three other profitable development opportunities.

[8] On the basis of its contract and estoppel claims, Halikos claimed losses as at 31 December 2016 of $144,814,326. On the basis of its misleading and deceptive conduct claim, Halikos claimed losses as at 31 December 2016 of

$57,487,000. Halikos prosecuted claims for loss of anticipated profits on the development by way of expectation damages and, in the alternative, the loss occasioned by foregone alternative investment opportunities by way of reliance damages for misleading or deceptive conduct in contravention of the Australian Consumer Law.

[9] INPEX denied the existence of the alleged AAV contract and denied that it made the alleged promises or representations that form the basis of Halikos' other claims.

[10] The trial judge delivered her Reasons for Decision on 13 February 2019 (**Reasons** or **R**). Her Honour accepted the evidence of INPEX's witnesses, largely rejected the evidence of Halikos' witnesses, and dismissed Halikos' claims. Her Honour also held that:

(a) Halikos' contract claims failed because:

(i) Halikos did not establish that Mr Kildare and Mr Wheeldon had any authority (ostensible or otherwise) to enter into the AAV with Halikos;[3] and

(ii) in any event, the parties had no intention to enter into legal relations by participating in the events of 13 February 2014;[4]

(b) Halikos' estoppel claims failed because:

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3 R [246] – [253].

4 R [254] – [257].

(i) for the claim of conventional estoppel – Halikos failed to establish the parties adopted a mutual assumption that they had entered into a binding agreement;[5]

(ii) for the claim of estoppel by representation – Halikos failed to establish that the pleaded representation was made;[6]

(c) Halikos' misleading or deceptive conduct claims failed because:

(i) her Honour did not accept that the Halikos witnesses, Mr Dignan and Mr Halikos, had decided that they would only go ahead with the development of H105 if they received some binding pre-commitment from INPEX, or even if they did have such an intention, they did not communicate this to INPEX;[7] and

(ii) in any event, her Honour did not accept that INPEX had made the pleaded misrepresentation.[8]

GROUNDS OF APPEAL

[11] The Supplementary Notice of Appeal pleads the grounds of appeal as follows:

> **Ground 1.** By reason of the 21 month delay between the conclusion of the evidence and the giving of reasons for judgment, the 18 month delay between closing submissions and the giving of reasons for

5 R [258] – [268].

6 R [269] – [270].

7 R [273].

8 R [274] – [275].

judgment, and the more than 5 month delay between the pronouncement of judgment and the giving of reasons for judgment, the judgment is unsafe.

Ground 2. Having committed herself to judgment without mature reasons, the trial judge erred by binding herself to prepare reasons that supported that judgment, irrespective of any further consideration of the evidence and issues.

Ground 3. By reason of the delay between the conclusion of evidence and the giving of reasons for judgment, the trial judge was required, but failed, to provide a comprehensive consideration of the evidence, including the oral evidence, in her reasons.

Ground 4. In resolving a contest on the evidence as to the meaning and purpose of documents or communications, or the circumstances of the occurrence of an event, the trial judge erred in resolving the conflict by failing to have any, or any sufficient, regard to significant aspects of the evidence of the plaintiffs' (appellants') (together Halikos) witnesses called in explanation of documents or circumstances involved in the event, concessions in the evidence of the defendant's (respondent's) (INPEX) witnesses called and/or other documents.

Particulars

The relevant findings made without any, or any sufficient, regard to evidence are substantial and the appellants have particularised them, together with the evidence not adverted to by the trial judge, in **Schedule A** hereto.

Ground 5. The trial judge erred in failing to have any, or any sufficient, regard to the evidence of the Halikos witnesses and of Mr Wheeldon (of INPEX) that from at least the meeting on 29 January 2014, two separate agreements (one specific to rooms in H105, and the other being a broader accommodation services agreement), each with their own separate timelines and processes, were discussed.

Ground 6. The trial judge erred in finding at Reasons for Judgment (R) [246], [255], [265], [270], [274] that Halikos failed to establish the factual basis of its claims.

Ground 7. The trial judge erred in finding at R [243] that the High Court has not more recently applied a wider basis for the conferral of authority for a corporation to enter into a contract than the earlier cases.

Ground 8. The trial judge erred in finding at R [246] to [252] that there was no authority in Mr Wheeldon and/or Mr Kildare and/or Mr Wheeldon's proxy (Mr Davies) to commit INPEX to a binding agreement or understanding.

> **Ground 9.** The trial judge erred in finding at R [264] to [257] that there was no intention by those participating in the events of 13 February 2014 to enter into binding legal relations as a result of what occurred on that date.
>
> **Ground 10.** The trial judge erred in holding at R [264] that the principles applicable to estoppel by convention are those set out in *Waltons Stores (Interstate) Ltd* V *Maher* [1998] HCA 7; (1988) 164 CLR 387, [34] per Brennan J.
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> **Ground 11.** In respect of the claim in conventional estoppel, the trial judge erred in finding at R [265] that the parties did not adopt a mutual assumption that they had entered into a binding agreement.
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> **Ground 12.** In respect of the claim in estoppel by representation, the trial judge erred in finding at R [270] that Halikos did not establish that the representation it relies on was ever made.
>
> **Ground 13.** In respect of the claim for misleading or deceptive conduct, the trial judge erred in finding at R [274] that INPEX did not make the representations relied upon by Halikos.

[12] Schedule A is attached to these reasons.

[13] For convenience Halikos has referred to grounds 1 to 3 as the **Reasons Grounds**, grounds 4, 5, 6, 9, 11, 12 and 13 as "**Evidence Grounds",** grounds 7 and 8 under the heading "**Authority**" and ground 10 under the heading "**Estoppel by convention**".

[14] As the trial judge pointed out in her Reasons there were several "key events in this case": the first being the 17 January 2014 meeting; the second being the 13 February 2014 meeting after which the 13 February 2014 letter was signed by Mr Davies purportedly on behalf of INPEX. Most of the evidence, and consequently the trial judge's main focus and findings about Halikos' claims, involved the affidavit and oral testimony of the various witnesses who were participants in the numerous discussions and

communications before, during and after the meeting on 13 February 2014. Much of the oral evidence was conflicting and her Honour carefully assessed the evidence of each of the witnesses in determining what she accepted and what she did not. As we have stated above, by and large her Honour preferred the evidence of the main INPEX witnesses, Messrs Kildare and Wheeldon, to that of the main Halikos witnesses, Messrs Dignan and Weeks.

[15] For the most part the Evidence Grounds contend that her Honour erred in her assessment of the oral evidence. Senior counsel for Halikos said that in broad terms the Evidence Grounds were based upon alleged failures by the trial judge to take certain evidence into account or in rejecting "important" evidence on a flawed basis. Of particular importance to Halikos were her Honour's allegedly erroneous:

(a) "foundational finding" at [63] of the Reasons where her Honour accepted the INPEX version of what happened during the meeting in Perth on 17 January 2014; and

(b) over reliance on documents and her failure to place and construe them in their proper context in light of things said and other circumstances leading up to the making of such documents.

GROUNDS 1 – 3

[16] It is convenient to deal with the Reasons Grounds, grounds 1 to 3, first.

[17] The hearing in the Supreme Court took most of May 2017 and was followed by detailed and voluminous oral and written submissions, the last of which was a 297 page electronic summary of the evidence with hyperlinks to witness affidavits, expert reports and transcripts (entitled **Communications Summary**) provided by the parties on 26 September 2017. The trial judge pronounced judgment in favour of INPEX on 31 August 2018 and delivered Reasons on 13 February 2019.

[18] When the trial judge pronounced judgment in favour of INPEX her Honour stated that: (i) the Reasons would be delivered at a later date; (ii) she was unable to finalise her [written] Reasons due to the state of her court list and would be unable to do so before December 2018; and (iii) "in fairness to the parties [her Honour believed] the appropriate course of action would be to pronounce judgment [on 31 August 2018] with reasons to be delivered at a later date."

[19] When her Honour delivered the Reasons on 13 February 2019 she ensured that all rights of appeal were preserved notwithstanding the delay in the delivery of those reasons.

[20] Halikos submitted that, by reason of the 21 month delay between the conclusion of the evidence and the giving of the Reasons, the judgment is unsafe. They further submitted that her Honour, having committed herself to judgment "without mature reasons", erred by binding herself to prepare reasons that supported the judgment which her Honour pronounced,

irrespective of any further consideration of the evidence and issues. Further, Halikos said that by reason of the delay the trial judge was required, but failed, to provide a comprehensive consideration of the evidence, including the oral evidence, in her reasons.

[21] While Halikos referred to a period of 21 months between the completion of the evidence and the date the Reasons were delivered, another measure of the delay is between the delivery of the Communications Summary on 26 September 2017 and the delivery of reasons on 13 February 2019 – a period of some 17 months.

[22] In a case such as this there will inevitably be delay between the completion of evidence and submissions and the delivery of reasons for decision. This was a factually complex civil trial proceeding over a number of weeks and involving the consideration of voluminous documentary evidence. Lengthy and detailed written submissions were provided by the parties and these were supplemented by oral submissions and then the provision of the Communications Summary. Her Honour took time to consider these materials before pronouncing judgment. At the time of pronouncing judgment her Honour made it clear that there would be some delay in delivering the Reasons because of the pressures of other matters before the Court.

Relevant principles

[23] The requirement for a court to deliver adequate reasons for decision is not in dispute. There is an obligation upon the court to explain the determination and conclusions made. The desirability of doing so at the earliest reasonable time is obvious. Halikos however submitted that there was "a requirement that a court deliver reasons in support of a judgment before, at, or virtually immediately after, the time when judgment is pronounced" and, in support of this contention, relied upon the judgment of the Court of Appeal in New South Wales in *Palmer v Clarke*.[9] That case related to a decision of the New South Wales District Court which, as the judgment recorded, is a statutory court of inferior status. The relevant Act and Rules were found to have imposed an obligation of immediacy.

[24] *Palmer v Clarke* was considered in *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd*[10] (***Fletcher***), where it was pointed out that the decision was "confined" to decisions of the District Court and noted this had been recognised in subsequent cases in New South Wales. In *Fletcher* Chernov AJ said the following about superior courts, at [28]:

> (A)lthough ordinarily reasons are given when judgment is pronounced, where the justice of the situation requires it there may be an appreciable gap between the pronouncement of judgment and the delivery of reasons.

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9 (1989) 19 NSWLR 158.

10 (2001) 4 VR 28 at [27] – [28].

[25] In *Nais and Others v Minister for Immigration and Multicultural and Indigenous Affairs and Another*[11] Gleeson CJ observed:

> Undue delay in decision-making, whether by courts or administrative bodies, is always to be deplored. However, that comfortable generalisation does little to advance the task of legal analysis when it becomes necessary to examine the consequences of delay. The circumstances in which delay, of itself, will vitiate proceedings, or a decision, are rare…. A court of appeal, reviewing a decision of a primary judge, may conclude that delay in giving judgment has contributed to error, or made a decision unsafe. Again, the ground of appellate intervention is the error, or the infirmity of the decision, not the delay itself.

[26] The following observations, principally extracted from *Expectation Pty Ltd v PRD Realty Pty Ltd*,[12] are relevant to a consideration of the delay in this matter:

(a) where the interests of justice require it, a court may properly pronounce judgment and give reasons for it later – the gap may be appreciable;[13]

(b) delay between the taking of evidence and the making of a decision is not, of itself, a ground of appeal, unless the judge could no longer produce a proper judgment or the parties are unable to obtain from the decision the benefit which they should;[14]

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11 (2005) 228 CLR 470 at [5].

12 (2004) 140 FCR 17.

13 *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd* (2001) 4 VR 28 at [28]; *Rollings v Rollings* (2009) 230 FLR 396 [110]. See too *Australian Red Cross Society v Queensland Nurses' Union of Employees* [2019] FCAFC 215 at [82].

14 *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17 [69].

(c) delay, of itself, does not indicate that a trial has miscarried or that a verdict is in any manner unsafe – appellate intervention flows from the error, or infirmity of the decision, not the delay itself;[15]

(d) where there is significant delay in giving judgment, it is incumbent upon an appellate court to look with special care at any finding of fact challenged on appeal;[16]

(e) the fact of long delay weakens a trial judge's advantage in having seen the oral and documentary evidence unfold in a coherent manner;[17]

(f) after a significant delay a more comprehensive statement of the relevant evidence than would normally be required should be provided by the trial judge in order to make manifest, to the parties and the public, that the delay has not affected the decision;[18]

(g) where there is significant delay it cannot be favourably assumed that evidence not referred to has not been overlooked and it is incumbent upon the trial judge to make clear why the evidence of a particular witness has been rejected;[19] and

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15 Ibid [69]; *Nais v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] 228 CLR 470 [5].

16 *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17 [69].

17 Ibid [70].

18 Ibid [71].

19 Ibid [72].

(h) on an appeal consideration must be given to the prospect that the delay of the decision will have placed the trial judge under great pressure to complete and publish the judgment.[20]

[27] Appellate courts do not assume that reasons given after undue delay are infected by error simply because of that delay. It was for Halikos to point to aspects of the reasons that are unsatisfactory or suggest error.[21]

Halikos' concerns

[28] In ground 1 of the appeal Halikos asserted that the judgment was unsafe as a consequence of the delay between the conclusion of the evidence and the giving of the Reasons. That, by itself, is not sufficient to provide a ground of appeal.

[29] Halikos asserted that her Honour, having committed herself to judgment without mature reasons, erred by binding herself to prepare reasons that supported the judgment. A review of the history of this matter does not support such a contention. This was not a situation where a trial judge announced an outcome at the time of completion of the evidence and then delayed in providing reasons. In this case the trial judge heard all of the evidence and then received written submissions from the parties and heard their oral submissions. Thereafter her Honour received the Communications Summary and adjourned the hearing. Prior to pronouncing judgment in

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20 Ibid [74].

21 *King & Ors v Australian Securities and Investments Commission* [2018] QCA 352 at [49].

favour of INPEX her Honour had ample time to review all of the materials and to reach considered conclusions. There is nothing in the information drawn to the attention of this Court to suggest that her Honour had any difficulty in dealing with the issues or that there had been a rush to judgment followed by the crafting of reasons to support that judgment. Indeed, the opposite would seem to be the case. At the time of pronouncing judgment her Honour indicated that she had been unable to finalise her [written] Reasons, not that she had insufficient time to consider all the materials.

[30] In both written and oral submissions Halikos contended that the Reasons provided by the trial judge "pay no relevant regard to the oral evidence" and failed to consider "critical aspects of the documentary evidence". It was submitted that most of the lay evidence was not referred to in the Reasons in any substantive way and was "referred to in only three places in the reasons and then in passing". We have addressed those issues elsewhere in these reasons for decision and, for present purposes, it is sufficient to note that we do not accept this submission. The trial judge referred to and dealt with the necessary oral evidence in the context of the relevant documentary evidence and also addressed, separately, the documentary evidence. The Reasons provide a sufficiently detailed consideration of the evidence to clearly understand how the trial judge reached relevant decisions and conclusions. The reasons for her Honour preferring one witness over another or for not

accepting the evidence of an individual witness were spelled-out clearly in the Reasons.

[31] In the circumstances of this matter, it can fairly be observed that the advantage available to the trial judge over this Court of having seen the oral and documentary evidence unfold in a coherent manner, has been weakened. The careful review conducted by this Court of that oral and documentary evidence has led us to the same conclusions as drawn by her Honour. In so doing we have heeded the advice from the relevant authorities to provide careful scrutiny to the challenged findings and to look with special care at the findings of fact made in the court below.

[32] Further, the Reasons do not support the suggestion made by Halikos that her Honour "felt unable to grapple adequately with the issues and has resorted to the decision which has been easiest to make" as contended in Halikos' written submissions. Halikos failed to identify any basis for such a suggestion other than the length of time it took for the Reasons to be delivered. While the issues in this case were complex and the evidence long and convoluted, the Reasons deal appropriately with all of the relevant issues and reach conclusions strongly supported by the evidence.

[33] Halikos did not develop an argument that the trial judge was, in any relevant way, subjected to unusual pressure to complete and publish her Reasons. Her Honour had pronounced the outcome of the proceedings and all that remained was the handing down of reasons. We do not accept that there was

any adverse impact upon the Reasons resulting from the delay or any undue pressure upon her Honour to deliver judgment.

[34] These grounds of appeal are dismissed.

EVIDENCE GROUNDS – general considerations

[35] Grounds 4, 5, 6, 9, 11, 12 and 13 and the particulars pleaded in Schedule A involve, to varying degrees, challenges to over 100 findings made by the trial judge. In the circumstances, and for the reasons given at [55] to [67], it is convenient to deal with ground 4 last. The resolution of the substance of ground 5 (Halikos' contention that there were two variation agreements being considered by the parties), and the resolution of grounds 7 and 8 (Authority), ground 9 (intention to enter a legally binding relationship) and ground 10 (Estoppel) largely resolves this appeal.

[36] However, before dealing with grounds 5, 7, 8, 9 and 10 we shall refer to some fundamental flaws in Halikos' approach to the Evidence Grounds, guiding principles about consideration of evidence in cases such as this, the principles applicable when reviewing alleged errors of fact and INPEX's submissions about four critical issues, and make some additional observations about Schedule A.

Fundamental flaws

[37] In their written submissions Halikos did little more than repeat the text of Schedule A and add transcript references. On the other hand, counsel for INPEX attached to their written submissions a 131 page schedule (**INPEX**

Schedule) which provided comprehensive and detailed responses to each of Halikos' allegations and transcript references in support of those responses. Unfortunately, Halikos did not engage with those detailed responses in their written reply submissions. They only embarked upon that exercise in the course of their oral submissions, and even then only regarding some topics. Our perusal of the material, particularly with the assistance of the INPEX Schedule, indicates that INPEX' contentions are well founded.

[38] Halikos did not demonstrate that the evidence her Honour allegedly disregarded did in fact call into question the integrity of the challenged findings of fact and, if so, how. We consider that the trial judge's approach to the process of fact-finding and her conclusions on key factual issues were correct. This conclusion renders a detailed consideration of each particular in Schedule A unnecessary.

[39] Ground 4 is couched in terms of the trial judge having failed to pay any or sufficient regard to 'significant aspects' of certain parts of the evidence. That allegation is necessarily based on the contents of the Reasons, in particular, the extent to which specific evidence was not referred to or dealt with in the Reasons. This ground effectively involved two distinct aspects.

[40] First, in substance, was a complaint about the adequacy of the Reasons. This is, in effect, a duplication of ground 3, which we have found has not been made out.

[41] Second, was an assertion that the process of fact finding has miscarried.[22] However, it is not enough for an appellant to show that a trial judge has failed to deal with some evidence. That will not establish that the trial judge has failed to deal in a satisfactory way with the substantial amount of evidence necessary to be dealt with before a relevant finding could be made. To establish that, the evidence which an appellant alleges a primary judge failed to deal with must have a particular quality; it must not only be relevant, but the failure must seriously call into question the integrity of a finding of fact. [23]

Guiding principles

[42] In our opinion, the following are the guiding principles to be applied to the consideration of the evidence in a case such as this.

[43] At first instance, a court should generally limit its reliance on the appearance of witnesses and should reason to its conclusions, as far as possible, on the basis of contemporaneous materials, objectively established facts and the apparent logic of events.[24]

[44] The resolution of an issue involving the credibility of witnesses or disputed oral evidence will require reference to, and analysis of, any evidence

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22 *Waterways Authority v Fitzgibbon* [2005] HCA 57; 79 ALJR 1816 [130] – [131] (Hayne J).

23 *Lemongrove Services Pty Ltd v Rilroll Pty Ltd* [2019] NSWCA 174 (***Lemongrove***) at [32] (Payne JA, Bell P & Simpson AJA agreeing).

24 *Fox v Percy* [2003] HCA 22; 214 CLR 118, 129 [31] (***Fox v Percy***) (Gleeson CJ, Gummow & Kirby JJ). See also *Re Hillsea Pty Ltd* [2019] NSWSC 1152 at [18] (Black J) quoting *Fox v Percy*.

independent of the parties which is apt to cast light on the probabilities of the situation.[25] As Black J observed in *Re Kit Digital*:[26]

> …the credibility of a witness and his or her veracity may be tested by reference to the objective facts proved independently of the testimony given, in particular by reference to the documents in the case…

[45] Where a party seeks to rely upon spoken words as a foundation for a cause of action, the conversation must be proved to the reasonable satisfaction of the court, which means that the court must feel an actual persuasion of its occurrence or its existence.[27] In *John Holland Pty Ltd*, in a passage recently cited,[28] Hammerschlag J observed that:

> Where a party seeks to rely upon spoken words as a foundation for a cause of action, including a cause of action based on a contract, the conversation must be proved to the reasonable satisfaction of the court which means that the court must feel an actual persuasion of its occurrence or its existence. Moreover, in the case of contract, the court must be persuaded that any consensus reached was capable of forming a binding contract and was intended by the parties to be legally binding. In the absence of some reliable contemporaneous record or other satisfactory corroboration, a party may face serious difficulties of proof. Such reasonable satisfaction is not a state of mind that is obtained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of an allegation made, inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question of whether

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25 *Camden v McKenzie* [2008] 1 Qd R 39 [34] (Keane JA), cited in *New South Wales v Hunt* (2014) 86 NSWLR 226 [56] (Leeming JA, Barrett JA & Tobias AJA agreeing). See also *Re Kit Digital Australia Pty Ltd (in liq)* [2014] NSWSC 1547 at [7] (Black J); *Re Hillsea Pty Ltd* [2019] NSWSC 1152 at [20] (Black J).

26 *Re Kit Digital Australia Pty Ltd (in liq)* [2014] NSWSC 1547 at [7] (Black J).

27 *Watson v Foxman* (1995) 49 NSWLR 315, 319 (McClelland CJ); *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451 (***John Holland***) [94] (Hammerschlag J). See also *Chou v Awap Sgt 26 Investment Ltd [No 3]* [2018] WASC 383 [133].

28 *Gardenisle Pty Ltd v Johnson* [2019] WASC 271 at [241] (Archer J); *Re Sundell* [2019] NSWSC 1108 at [114] (Sackar J); *Re Hillsea Pty Ltd* [2019] NSWSC 1152 at [21] (Black J).

> the issue has been proved to the reasonable satisfaction of the court. Reasonable satisfaction should not be produced by inexact proofs, indefinite testimony, or indirect inferences …
>
> The sensation of feeling an actual persuasion, after a contest, that an event has happened or that something exists is one which is well known and recognised by experienced trial judges for what it is.
>
> [The plaintiff] has the onus of establishing the agreement for which it contends. This entails proving to the reasonable satisfaction of the court that the words said to give rise to the agreement were actually said, and that the alleged consensus was capable of forming a binding agreement and was intended by the parties to be legally binding." [citations omitted]

[46] In the context of misleading or deceptive conduct claims, where a plaintiff relies on oral statements, particularly where the oral evidence is disputed, they face "serious difficulties of proof" in the absence of some reliable contemporaneous record or other satisfactory corroboration.[29] It is also necessary for the words to be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were misleading in the proved circumstances.[30]

[47] These principles apply equally to contractual and estoppel claims.[31]

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29 *Watson v Foxman* (1995) 49 NSWLR 315 at 318 – 319 (McClelland CJ) applied in *Ingot Capital Investments v Macquarie Equity Capital Markets (No. 6*) [2007] NSWSC 124; 63 ACSR 1 [353] – [355] (McDougall J). See also *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-363; *Julstar Pty Ltd v Hart Trading Pty Ltd* [2014] FCAFC 151 at [73] – [74].

30 *Watson v Foxman* (1995) 49 NSWLR 315 at 318-319 applied in *Aneve Pty Ltd v Bank of Western Australia Ltd* [2005] NSWCA 441 [49] (Hodgson JA, Santow and Bryson JJA agreeing); *Moukhayber v Cambden Timber and Hardware Co Pty Ltd* [2002] NSWCA 58 [28] (Heydon JA, Beazley JA & Santow JJA agreeing); *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* [2013] VSCA 237 [159] (Warren CJ, Osborn JA & Macaulay AJA); *Fuge v Commonwealth Bank of Australia* [2019] FCA 1621 at [184].

31 *Moukhayber v Cambden Timber and Hardware Co Pty Ltd* [29] (Heydon JA, Beazley & Santow JJA agreeing); *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd* [94] (Hammerschlag J).

Reviewing alleged errors of fact

[48] An appellate court is to conduct a real review of the trial and the reasons for decision to determine whether a trial judge erred in fact (or law).[32]

[49] However, the appellate court must, of necessity, observe the natural limitations that exist in proceeding wholly or substantially on the record.[33] That includes limitations occasioned by the resolution of any conflicts at trial about witness credibility based on demeanour or impression; any advantages the trial judge had that derive from considerations not adequately reflected in the transcript; and matters arising from the trial judge's advantage in having the opportunity to consider and reflect upon the entirety of the evidence as it was received, and to draw conclusions from that evidence viewed as a whole.[34] The more prominent these limitations, the more difficult it is for an appellate court to be satisfied that the trial judge was in error.[35]

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32 *Robinson Helicopter Co Inc v McDermott* [2016] HCA 22; 90 ALJR 679 (***Robinson Helicopter***) [43] (French CJ, Bell, Keane, Nettle & Gordon JJ) partly quoting *Fox v Percy* at [25] (Gleeson CJ, Gummow & Kirby JJ). See also *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541 (***SZVFW***) at [32] (Gageler J); *Lee v Lee* [2019] HCA 28; 93 ALJR 993 at [55] (Bell, Gageler, Nettle & Edelman JJ).

33 *Fox v Percy* [23] (Gleeson CJ, Gummow & Kirby JJ); *Dearman v Dearman* [1908] HCA 84; 7 CLR 549, 561 (Isaacs J). See also *SZVFW* at [33] (Gageler J).

34 *Fox v Percy* [23] (Gleeson CJ, Gummow & Kirby JJ). See also *SZVFW* at [33] citing *CSR Ltd v Della Maddalena* [2006] HCA 1; 80 ALJR 458 at 465 [17]; and *Julstar Pty Ltd v Hart Trading Pty Ltd* [2014] FCAFC 151 at [75] citing *Poulet Frais Pty Ltd v The Silver Fox Company Pty Ltd* [2005] FCAFC 131; 220 ALR 211 at 220-221 [46]-[47] per Branson, Nicholson and Jacobson JJ.

35 *SZVFW* at [33] (Gageler J) citing *S W Hart & Co Pty Ltd v Edwards Hot Water Systems* (1985) 159 CLR 466, 478 (Gibbs CJ, Mason J agreeing).

[50] Until recently it had been held that an appellate court should not interfere with a trial judge's findings of primary fact unless those findings are demonstrated to be wrong by 'incontrovertible facts or uncontested testimony', or are 'glaringly improbable' or 'contrary to compelling inferences'.[36] For example in *Robinson Helicopter* the High Court (French CJ, Bell, Keane, Nettle & Gordon JJ) said, at [43]:

> … a court of appeal should not interfere with a judge's findings of fact unless they are demonstrated to be wrong by "incontrovertible facts or uncontested testimony", or they are "glaringly improbable" or "contrary to compelling inferences".

[51] However the application of a 'glaringly improbable' or 'contrary to compelling inferences' test has recently been qualified by the majority of the High Court in *Lee v Lee*[37].

[52] In *Lee v Lee*, Bell, Gageler, Nettle & Edelman JJ, Kiefel CJ agreeing said, at [55]:

> A court of appeal is bound to conduct a "real review" of the evidence given at first instance and of the judge's reasons for judgment to determine whether the trial judge has erred in fact or law[38]. Appellate restraint with respect to interference with a trial judge's findings unless they are "glaringly improbable" or "contrary to compelling inferences"[39] is as to factual findings which are likely to have been

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36 *Robinson Helicopter* at [43]; *Fox v Percy* [28] – [29] (Gleeson CJ, Gummow & Kirby JJ), [48] (McHugh J). See also *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93 at [2] (Allsop CJ); and *White v Philips Electronics Australia Ltd t/as Philips Healthcare* [2019] NSWCA 115 at [36] (Bell J).

37 *Lee v Lee* [2019] HCA 28; 93 ALJR 993 (***Lee v Lee***).

38 *Fox v Percy* at 126-127 [25] per Gleeson CJ, Gummow and Kirby JJ; *Robinson Helicopter* at 686 [43].

39 *Fox v Percy* at 128 [29] per Gleeson CJ, Gummow and Kirby JJ; *Robinson Helicopter* [43].

> affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence. It includes findings of secondary facts which are based on a combination of these impressions and other inferences from primary facts[40]. Thereafter, "in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge".[41]

[53] Referring to the disadvantage of an appellate court when reviewing a trial judge's assessment of a witness' credibility Bathurst CJ observed, in *Szeto v Situ*[42]:

> That disadvantage particularly arises in a case such as the present where the judge based his conclusion, to a significant extent, on the credibility of the principal witnesses. However, if a conclusion based on credit is shown by uncontroversial facts or uncontested testimony to be erroneous, the appellate court is obliged to intervene: *Fox v Percy* … at [28]. One instance where this may occur is where contemporaneous and apparently reliable documentary evidence is contrary to the credibility based finding of the trial judge: *State Rail Authority of NSW v Earthline Constructions Pty Ltd (In liq)* (1999) 73 ALJR 306 at [62] – [63], [93].

[54] That said, these limitations may have less impact on the determination of an appeal from a judgment concluded wholly or substantially by reference to documentary and affidavit evidence. In such a case, an appellate court may be in as good a position to determine the matter as was the primary judge.[43] Additionally, an appellate court is generally in as good a position as the trial

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40 *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 434-435 [144]; [2013] HCA 25; *Thorne v Kennedy* (2017) 263 CLR 85 at 104 [42]; [2017] HCA 49.

41 *Warren v Coombes* [1979] HCA 9; 142 CLR 531 (***Warren v Coombes***) at 551 per Gibbs A-CJ, Jacobs and Murphy JJ ; see also *Fox v Percy* at 127 [25].

42 [2017] NSWCA 135 at [26].

43 *SZVFW* at [34] (Gageler J); *Fox v Percy* [68] (McHugh J).

judge to decide on the proper inferences to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the primary judge.[44]

Four key issues

[55] In its written submissions INPEX advanced four main reasons why, quite apart from descending to the detail involved in Schedule A and the INPEX Schedule, ground 4 should be dismissed. These reasons were said to be fatal to Halikos' claims. For these reasons it was submitted that further consideration of the challenges by Halikos to other factual findings, even if successful, would not alter the outcome of the appeal.

[56] In our opinion those submissions are correct.

[57] First, INPEX submitted that when the Reasons are considered as a whole, it is apparent the trial judge correctly approached the fact-finding process. Her Honour generally based her reasoning on a consideration of contemporaneous materials, objectively established facts and the apparent logic of events. Although her Honour referred to important parts of the oral evidence in the Reasons, her Honour was rightly disinclined to resolve disputed facts by reference exclusively to oral testimony.

[58] The second reason identified by INPEX was the finding made by the trial judge that the parties did not, at any relevant time, discuss the making of

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44 *SZVFW* at [41] (Gageler J); *Warren v Coombes* at 551 (Gibbs ACJ, Jacobs & Murphy JJ); *Fox v Percy* at [87] (McHugh J).

two separate agreements. Her Honour found that it was not until July 2014 that Halikos raised two agreements for the first time. The finding is the subject of challenge in ground 5 of the appeal and we deal with it below. For present purposes it is sufficient to note that the existence of two agreements was a necessary prerequisite to explain the otherwise implausible evidence of Mr Dignan and Mr Weeks that they had concluded the Additional Accommodation Variation agreement on 13 February 2014. Her Honour's rejection of the contention that there were two agreements led to the necessary rejection of that evidence. It placed the documentary evidence in a different context from that urged by Halikos. We accept and adopt the following submission made on behalf of INPEX:

> The plain evidence that Halikos did not at any time believe that there were two agreements, one of which had been concluded and one of which had not, stands comprehensively against a finding that the Additional Accommodation Variation was concluded in February 2014 or that Halikos acted subsequently on the basis that it had been. That is fatal to all of Halikos' claims at first instance.

[59] The third reason related to ground 8 and is dealt with below. In short, it is that neither Mr Wheeldon (nor his proxy Mr Davies) nor Mr Kildare had actual or ostensible authority to enter into the Additional Accommodation Variation and the finding of the trial judge in that regard was plainly correct. That being so, it was submitted that Halikos' contractual claim necessarily failed.

[60] Counsel for INPEX identified the fourth reason as follows:

94. Fourth, the trial judge in the context of her consideration of the consumer law claim did not accept that Mr Dignan and Mr Halikos had, subjectively, decided that they would only go ahead with the development of H105 if they got some kind of binding pre-commitment from INPEX. In substance, that amounted to a finding that there was no relevant reliance upon any alleged representation. Halikos does not mount a separate ground of appeal in relation to that conclusion, although it does contend that the finding was made without sufficient regard to certain evidence.

95. As to the evidence to which Halikos says the trial judge should have had more regard:

(a) the evidence as to Sakamoto san's internal communications with Mr Wheeldon do not bear upon the state of mind of Mr Halikos and Mr Dignan, save to the limited extent that they evidence that a commitment was sought;

(b) the internal email dated 26 February 2014 from Okawa san to his assistant does not contain any relevant evidence on this issue. Further, it is plain from Reasons [55] and fn 3 that her Honour had proper regard to that document; and

(c) the asserted inference that it made no commercial sense for Halikos to build H105 without a pre-commitment was self-evidently an insufficient basis upon which to find on the balance of probabilities that Halikos relied upon a representation or assumption that INPEX had entered into the alleged agreement or would bind itself to the Additional Accommodation Variation.

96. Further, Halikos does not challenge the trial judge's finding at Reasons [153] that 'Halikos went ahead with the construction of H105 in the expectation … that there would be plenty of demand for accommodation of that kind from workers on the Ichthys Project'.

97. There is therefore no merit in the challenge to the trial judge's findings on reliance. That being the case, the claims under the consumer law and also in estoppel necessarily fail. Again, further consideration by the appellate court of Halikos' challenges to other factual findings will not affect that position.

[61] The issue of reliance is addressed elsewhere in these reasons. Again, we have found no reason to interfere with the findings of the trial judge on that topic.

[62] Counsel for INPEX made the following two points about the assertions contained in Schedule A.

> 99. The first is that the INPEX Schedule identifies in column 5 that almost all of the evidence which Halikos asserts the trial judge did not have sufficient regard to was included in the Communications Schedule and/or referred to in written or oral closing submissions. That renders it unlikely that the trial judge did not have regard or proper regard to such evidence.
>
> 100. The second is that there are many flaws in Schedule A and Halikos' appeal submissions in support. Much of the evidence that Halikos says the trial judge failed to have sufficient regard to falls into one or more of the following categories:
>
> > (a) the evidence was in fact expressly referred to in the Reasons and therefore cannot be said to have been given insufficient regard by the trial judge;
> >
> > (b) the evidence is of no or limited relevance to the specific finding(s) challenged;
> >
> > (c) Schedule A and/or Halikos' appeal submissions incorrectly state the effect of the evidence;
> >
> > (d) the evidence is consistent with the documentary and other evidence on which the trial judge relied;
> >
> > (e) the evidence is obviously unreliable;
> >
> > (f) the evidence is referred to only in Halikos' appeal submissions, and not in the Notice of Appeal (which Halikos has not sought leave to amend).
>
> 101. The contents of the INPEX Schedule reveal that Halikos has failed to demonstrate that the trial judge did not have sufficient regard to significant aspects of the evidence or that any such alleged omission on her Honour's part gave rise to relevant factual error.

[63] Counsel for Halikos did not respond to these submissions in their written reply.

[64] We agree with the first point made by INPEX, namely that it is unlikely that the trial judge did not have regard or proper regard for the evidence included in and / or referred to in written or oral closing submissions.

Indeed, it was her Honour who took the approach of requesting the Communications Schedule with the obvious intention of using it in conjunction with the written and oral submissions when considering the evidence and preparing her Reasons.

[65] Further, there is considerable force in the second point, particularly in sub-paragraphs (b) to (e) of [100].

Schedule A

[66] In addition to the four matters discussed above we make some further observations about Schedule A. As we have noted, Schedule A (a copy of which is attached to these reasons) contains 43 paragraphs, each of which identifies factual findings which are challenged. In our opinion many of the challenges, even if made out, are not such as to make any material difference to any important inference or conclusion drawn by the trial judge. We see no reason to address each and every reference contained in Schedule A and the INPEX Schedule. This is particularly so where there has been no challenge by Halikos to the detailed responses found in the INPEX Schedule.

[67] However, later in these reasons we examine in greater detail those challenges which have been identified in the course of submissions as being related to important issues. They include:

(a) whether the parties were discussing two separate agreements by the time the AAV was said to have been made on 13 February – one

providing for the provision of 225 apartments for the next five years, then 150 for the following 10 years; the other a broader accommodation services provider agreement;

(b) whether there was ostensible authority for Mr Wheeldon to agree to the AAV following the meeting in Perth on 17 January 2014;

(c) whether a binding agreement was reached during the meeting on 13 February 2014, and/or after Mr Davies signed the letter bearing that date;

(d) whether Halikos required, and informed INPEX that it required, a binding or written commitment before commencing work on H105. [In oral submissions counsel referred to and relied heavily upon some kind of commitment, in some cases referring to a binding commitment, in others a written commitment. It remains unclear as to precisely what kind of commitment is alleged and a commitment to do what. In paragraph [17](a)(iii) of its Reply Halikos alleged that "on numerous occasions Mr Dignan said to Mr Wheeldon and other representatives of INPEX words to the effect that Halikos would not build a new building without a pre-commitment."];

(e) the content, meaning and effect of discussions on about 24 March 2014 and the draft press releases;

(f) Mr Wheeldon's email of 21 July 2014;

(g) the credibility of important witnesses, Messrs Weeks and Dignan on the one hand, and Messrs Wheeldon, Kildare and Okawa san on the other.

GROUND 5 – Two Agreements

[68] Between the end of 2013 and October 2014 the parties engaged in various negotiations about a variation to the Accommodation Agreement with consideration being given to Halikos becoming the primary accommodation services provider for the project and supplying significantly more accommodation. As we have mentioned, it was critical to Halikos' case on appeal that two variations were negotiated, one of which resulted in a completed agreement on 13 February 2014. According to that alleged contract INPEX was to take from Halikos not less than 225 (later reducing to not less than 150) apartments and hotel rooms for a 15-year period. The other variation being negotiated according to Halikos was a broader arrangement under which Halikos was to become the primary accommodation services provider for the Project and would provide additional accommodation plus a range of allied services such as airport transfers and catering. Halikos accepts that no such broader agreement was ever completed.

[69] Contrary to the case made by Halikos at trial, at R [175] the trial judge found:

> For the reasons which follow, I do not accept the evidence of Mr Dignan and Mr Weeks <u>that there was ever any discussion</u> about anything other than a single accommodation services provider

> agreement before 9 July 2014 when the possibility of two separate agreements was first raised by Mr Dignan.

[70] The trial judge had previously discussed evidence about other events and communications subsequent to 13 February 2014 including draft media releases, the meetings with the Chief Minister on 24 March, the "Darwin Accommodation Proposal" prepared and provided by Halikos soon after that, and other meetings and communications between April and July.

[71] Her Honour proceeded to discuss emails and other communications between the four main participants concerning the preparation of a decision note and associated delays, and the evidence of Messrs Dignan and Weeks about meetings and discussions on 26 May and 20 June and about there being two proposed agreements.[45]

[72] Her Honour discussed the "two agreements" issue in more detail from R [186]. Her Honour quoted from an email which Mr Dignan sent to Mr Wheeldon on 9 July suggesting that "we break down the [Accommodation] Agreement in two separate variations". Her Honour said: "This is the first time that the concept of two different agreements occurs in the documents." Halikos has not challenged this finding.

[73] After discussing subsequent communications including Mr Dignan's email of 11 July, her Honour referred to some exchanges of text messages between Mr Dignan and Mr Wheeldon on 18 July when Mr Dignan said:

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45 R [176] – [185].

> Chris the 225 deal has been agreed as per the Feb 13 letter, am I to understand your text is referring to the Service Provider's Agreement 800575/3?[46]

Her Honour said, at R [193]:

> This is the first mention in any of the documents of there having been an agreement arising out of the letter of 13 February, referred to by the Halikos parties in earlier documents as a "letter of intent".

[74] If the finding at [69] above is correct, it is fatal to Halikos' claims.

[75] In its written submissions about ground 5 Halikos contended:

> [152] In making many of the findings set out in the Reasons, the trial judge appears to have viewed the contemporaneous correspondence on the basis that a single agreement covering the broader accommodation services provider arrangement only was being discussed (see for example, R [67], [73], [75]-[76], [162], [170](f), [186] and [247]).
>
> [153] In so doing, the trial judge failed to have any proper regard to the evidence of the Halikos witnesses and of Mr Wheeldon that from at least the time of the 29 January meeting, two separate agreements (one specific to rooms in H105, and the other being a broader accommodation services provider agreement), each with their own separate timelines and processes, were discussed (see, in particular, T 1485-1486 (Wheeldon XXN); 1 Dignan [277]-[279], [286]; 1 Weeks [190]-[191]; T 346-347 (Dignan XXN); T 737-739 (Weeks XXN) …
>
> [154] Had the trial judge had proper regard to the evidence referred to above, the trial judge ought to have found that, from at least 29 January 2014, the parties were discussing two separate agreements or concepts, something common to them, although not always specifically drawn out in their written communications, at least not prior to July 2014, when the two concepts or agreements came to be explicitly the subject of separate treatment.
>
> [155] That was an important, indeed necessary, finding of fact to be made on the critical path of the trial judge's reasoning as the trial judge

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46 This was the other draft agreement referred to by Mr Dignan in his emails of 9 and 11 July. Mr Dignan emailed that document, Variation 800575-3, which he described as a "Primary Accommodation Services Provider Agreement", to Mr Wheeldon on 15 July 2014. See AB Tab 62.

> frequently relied upon and confused the continued negotiation evident in the parties' written communications of the broader accommodation services provider agreement as evidence that they were still negotiating the agreement for specific rooms (to be provided in H105).

[76] Many of the findings challenged in Schedule A under ground 4 also relate to the point made at [153] in Halikos' written submissions. These include several of those set out in paragraphs 7 (regarding a meeting on 29 January), 8 to 11 (regarding events between 28 January and 13 February), 22 to 30 (regarding events between late March and 21 July), 31 (re Mr Wheeldon's email of 21 July) and 32 to 43 (regarding subsequent events).

[77] Senior counsel for Halikos was also critical of the trial judge for not having sufficiently analysed the evidence about the meeting on 29 January 2014 when, according to Halikos, the parties began discussing the two separate agreements, one being the AAV which was completed on 13 February 2014, the other being a "broader accommodation services provider agreement" which was never completed. In short Halikos contended that, although there were ongoing discussions and negotiations including discussions about a decision note, those discussions related to something different to the AAV.

[78] Despite the pleading of ground 5 – "the trial judge erred in failing to have … regard to the evidence …" – it is clear that Halikos is challenging the trial judge's conclusion that at all material times, particularly on the 13th February 2014, and subsequently at least until early July, the parties

were only discussing a single broad accommodation services provider agreement, not two separate agreements.[47]

[79] In their written submissions, counsel for INPEX noted that the two agreements issue was not pleaded. Halikos pleaded a single agreement, the AAV, the terms of which were included in the Variation Document defined in paragraph [16] of the ASOC. However, the only two parts of the Variation Document which are not said to be part of the AAV are Recitals A and C. At R [230] the trial judge noted that no explanation for this was provided by Halikos, and concluded that it was a necessary part of Halikos' case that it was negotiating with INPEX about two separate agreements.

[80] INPEX contended that the trial judge proceeded properly by determining the facts, as far as possible, on the basis of contemporaneous materials, objectively established facts and the apparent logic of events. Her Honour's considerations and conclusions included the affidavit and oral evidence.

[81] Counsel for INPEX pointed out that Halikos argued at trial that there were two distinct '*aspects*' to the negotiations between the parties capable of separate agreement. The first was a potential agreement with respect to the supply of additional accommodation. The minimum obligation in that regard was to provide (in the case of Halikos) and to take or pay (in the case of INPEX) not less than 225/150 apartments and hotel rooms from a range of properties. We note that this is different to the contention made in [153]

47 See R [175] and Schedule A paragraphs [23.4], [23.5], [23.7], [23.17], [23.19] and [23.20].

of Halikos' written submissions, quoted above, that the first agreement was "specific to rooms in H105". The second aspect was for Halikos to provide, and for INPEX to pay for, a range of allied accommodation services such as airport transfers, catering and the preparation of statistical data as to accommodation usage and demand, and possibly additional accommodation.

[82] Senior counsel for Halikos took the Court to some of Mr Wheeldon's evidence at trial about the meeting of 29 January 2014 which he said contained an important concession which the trial judge failed to address. He later took the Court to the Reasons between [164] and [171] concerning communications about a decision note, tenders and INPEX's internal processes. In particular counsel referred the Court to:

(a) Parts of the "proposal" referred to by her Honour at R [166] – [171], where her Honour discusses some of the evidence about communications concerning the preparation of a decision note. The "proposal" was a 69 page document prepared by Halikos headed "INPEX" "Accommodation Services Provider Agreement" and was dated April 2014. On the front page it was referred to as the "Halikos Hospitality Pty Ltd Darwin Accommodation Proposal" (**Halikos Accommodation Proposal**). The document was given to Mr Wheeldon in late March or early April. It was referred to in some of the documentation as an "Inpex Presentation Portfolio April FINAL".

(b) An "Onshore Decision Note" prepared by Mr Wheeldon (the **Onshore Decision Note**). He sent that document to Mr Baldwin, INPEX Site Contracts Engineer, on 12 June 2014, together with other documents including an "Accommodation Services Provider Agreement Final", an "Inpex Presentation Portfolio April FINAL – reduced", a PowerPoint presentation also entitled "Inpex Presentation Portfolio April FINAL" and a document entitled "Project Forecast Manpower – Presentation – 2014-05-30".

(c) Communications from 9 July 2014 including an email from Mr Dignan to Mr Wheeldon on 11 July 2014 when he stated that he was "separating the variation of Contract 800575 into two parts" and sent him "Variation document 800575-2".

(d) An email from Mr Wheeldon to Mr Dignan on 21 July in which he said, amongst other things: "The original signed letter should suffice for the first agreement until such time all agreements can be again rolled up into one tidy provision which I believe will be more easily executable."

[83] Halikos contended that these documents and discussions, and in particular the requirement for a decision note, only related to what counsel referred to as the "broader accommodation services provider agreement" and not to the AAV which was concluded on 13 February 2014. Halikos also relied heavily upon what counsel contended was an acknowledgement by

Mr Wheeldon during the meeting on 29 January 2014 that the parties would be proceeding with two separate agreements.

[84] Halikos was also critical of the trial judge's general acceptance of the evidence of Mr Kildare over that of Messrs Dignan and Wheeldon, and her Honour's response to Mr Wheeldon's assertion in his email of 21 July 2014 that "[t]he original signed letter should suffice for the first agreement …". Counsel said that this response should have caused the trial judge to reconsider her views about the credibility of witnesses and in particular about the two agreement issue.

29 January 2014 meeting

[85] On 29 January 2014 Messrs Dignan and Weeks met with Messrs Kildare and Wheeldon in INPEX's office in Darwin. Senior counsel for Halikos was critical of the trial judge's failure to expressly deal in any detail with Halikos' contentions at trial and in particular with what counsel contended was a concession by Mr Wheeldon during cross-examination that there were discussions at that meeting about moving towards two agreements, not just a single agreement. This concession is said to have been recorded in the trial transcript.

[86] The part of the transcript of Mr Wheeldon's cross-examination said to contain this "important" concession was as follows:

> Q At this point, the parties were, I suggest discussing, without necessarily distinguishing, two separate concepts or elements of a relationship. One, a specific arrangement for the provision of specific

accommodation, and the other, a more general arrangement involving more general service provision.

A The priority for us was the more … the latter, which is the service provision.

Q Will you attend to my question, though: the parties were discussing both elements, weren't they?

A Both elements, yes.

Q And you agree they are quite separate and distinct concepts, don't you, that is, provision for accommodation of a certain number of apartments in a particular building or buildings on the one hand, and a general service provision arrangement on the other?

A We saw it as one.

Q Right. They were discussed as part and parcel of the same scheme originally, weren't they?

A Yes. Yes.

Q But you agree that, conceptually, they are quite different things?

A Conceptually, they are, yes.

[87] Counsel for INPEX took the Court to some of the re-examination of Mr Wheeldon including the following:

Q When do you recall first mentioning a decision note to either Mr Weeks or Mr Dignan in relation to the proposal under discussion from early January 2014?

A For the accommodation service provision, that would have to be part of a decision note, yes.

Q Alright. When you say "accommodation service provision", what are you referring to there?

A Everything.

Q So when you say "everything", can you please be explicit to her Honour about the content, as you understood it, of the accommodation services provider agreement?

A That would include Halikos providing, at our request, whether it was INPEX or JKC, numbers, rooms, allocated to our manning schedules. Whether it was in C2 or One30 or 105, the Frontier Hotel, anything that Halikos could find as an inventory, that included the whole lot, it encompassed everything. It wasn't specific for certain

buildings. It was everything. And that's what we were looking for from the service provision.

Q What about in terms of amounts of accommodation? What did the accommodation services provider agreement provide in terms of quantity of accommodation?

A We still didn't know. That … Could never be generated until we got the manning curves from JKC.

…

Q But where did the 225 fit in relation to all this?

A 225 was just a base number. That number could have went up or it could have went down.

Q Right.

A It was only something to start calculating the decision note financials from.

[88] We agree with INPEX's contention that Mr Wheeldon's oral evidence was in fact to the opposite effect of that advanced by Halikos — that is, the parties were discussing and negotiating one agreement only. Halikos' submissions misstated the effect of Mr Wheeldon's evidence under cross-examination and ignored his evidence in re-examination.

[89] Halikos was also critical of the fact that her Honour did not say much about the oral evidence about that meeting. As we have said, the trial judge did refer to, and express views about, some of the evidence given by Messrs Dignan and Weeks when discussing the two agreements issue.

[90] Counsel for INPEX took this Court to part of the cross-examination of Mr Dignan. At transcript page 338 he repeated his belief that there were two separate agreements being negotiated, one specifically for 105 Mitchell Street "for minimum numbers" and "then to enter into a separate agreement

for additional apartments and rooms once those numbers were known". He said that only the second agreement required a decision note and a recommendation for award (referred to by parties as an RFA). The first one did not. Mr Dignan was then asked if his evidence was that on 29 January 2014 there were two variation agreements being discussed. He answered: "Two parts of one variation agreement." One of those parts was for Halikos to lease specific apartments in H105 to INPEX, the other a broader accommodation services provider agreement. When asked whether those agreements were to be contained in two separate documents he said: "No … Rolled up into one." He agreed that the single document would combine both aspects and would not be finalised and executed for a few months. He agreed that there were internal approval processes and he "knew, in relation to the broader accommodation agreement that that was going to require the RFA and the decision note."

[91] Counsel for INPEX also submitted that Mr Dignan's email of 9 July 2014 to Mr Wheeldon (in which he proposed for the first time in writing that there be two agreements) stands firmly against the acceptance of the effect of Mr Dignan's affidavit and oral evidence, as now contended by Halikos.

[92] Counsel for INPEX also took the Court to part of the cross examination of Mr Weeks. He too referred to an accommodation services provider agreement that contained two parts: "Part A was to the accommodation. Part B of it was what … additional services they required [sic]". The latter would provide for airport transfers, statistical information and other

ancillary services. He then gave some confusing evidence about the two parts of the accommodation services provider agreement. Then there was the following exchange:

> Q As at 31 January, what is your evidence: did you have two agreements that were going to be finalised at different times, or one?
>
> A The intention was to always try and finalise them as one, but … one was moving faster than the other. I was happy to move the way that INPEX wanted to move.
>
> Q So at 31 January, your intention was to proceed with one agreement that had two aspects?
>
> A If I could, yes.
>
> Q But is your evidence there was the possibility at that time that they would be uncoupled and put into two separate agreements?
>
> A I didn't know. If Sean Kildare and I could work faster and what his requirements were from INPEX, then fine. If they couldn't, we would still move forward with what Chris Wheeldon required.

[93] We accept INPEX's submissions that this evidence does not give rise to an inference that is contrary to the trial judge's findings, even if her Honour had expressly referred to this evidence in greater detail in her Reasons.

[94] The inference that, from 29 January 2014 the discussions were about a single broad accommodation services provider agreement and not two separate agreements, is also consistent with the discussions from 28 January 2019 and Mr Weeks's drafts of 7 and 12 February 2014.

[95] After the meeting in Perth on 17 January 2014 (during which Halikos alleges Messrs Wheeldon and Kildare received their authority to enter the AAV), Mr Weeks sent various drafts of what he referred to as a Variation Document to INPEX.

[96] On 18 January, the day after the Perth meeting, Mr Weeks sent a draft variation agreement to INPEX. That draft contained provision for extra accommodation only being provided by Halikos at a property to be constructed by them at 105 Mitchell Street, Darwin (**H105**). It also differed markedly from the pleaded AAV in several other respects including that it only contemplated the provision of 148 additional rooms (cf 225), was only for an initial term of four years, and only involved INPEX paying for rooms actually "taken" (as distinct from the "take or pay" provisions in the pleaded AAV).

[97] However, after that, the focus of the discussions between the parties changed to a broader-based agreement for the provision of accommodation and services, not confined to H105. Her Honour, at R [71] referred to Mr Weeks' evidence that when he met with Mr Kildare on 28 January "the majority of the time was spent discussing services that Mr Kildare wanted included in the agreement (for example catering services and airport transfers)". Following a further meeting on 29 January 2014 between Messrs Weeks, Dignan, Wheeldon and Kildare, Mr Dignan sent an email to Mr Wheeldon and Mr Kildare reflecting them agreeing in principle "to move to an Accommodation Services Provider Agreement" and that the term would be "a minimum of five years but preferred a period of 15 years plus options."[48]

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48 R [72].

[98] Mr Kildare replied with his email of 31 January set out at R [75] confirming that he wished to renegotiate and agree on "a more robust longer term and broader accommodation services contract, that meets the long term needs of our construction phase and the oncoming operations phase." He proceeded to point out that INPEX's future needs were not clearly defined particularly as INPEX moves beyond its construction phase and into operations.

[99] From that point on the various draft agreements bore the heading Accommodation Services Provider Agreement and differed substantially from the draft provided on 18 January 2014, for example in the respects noted in [96] above.

[100] On 7 February 2014 Mr Weeks sent to Mr Wheeldon a draft Accommodation Services Provider Agreement. It was much the same as the pleaded Variation Document except that:

(a) Recitals B and C referred to the appointment of Halikos as INPEX's "sole and exclusive accommodation services provider" (cf "primary accommodation services provider in Darwin … in support of the Ichthys Project").

(b) it provided for a minimum of 250 additional apartments and hotel rooms and that the take or pay obligation on INPEX would apply to that minimum until 1 September 2029 (cf cl 3.5 and 4 of the AAV).

[101] On 12 February 2014 Mr Weeks sent Mr Wheeldon another draft Accommodation Services Provider Agreement. It was similar to the 7 February draft except that:

(a) it reduced the minimum number of rooms to 225;

(b) it altered the take or pay obligation so that from 1 March 2019 to 28 February 2029 it only applied to a minimum of 150 additional Apartments and rooms; and

(c) the main difference between that and the pleaded Variation Document is that Recitals B and C of the latter document referred to Halikos being appointed as INPEX's *primary* accommodation services provider.

[102] Halikos said that the 12 February 2014 draft was discussed at the meeting between Messrs Dignan, Weeks and Kildare on 13 February 2014 and that Mr Kildare proposed some minor amendments which were made on a computer screen. On 17 February 2014 Mr Weeks sent a copy of that "final draft" to Messrs Wheeldon and Kildare with an email that stated, amongst other things:

> Please find final draft of the Variation which includes the recommended changes from both Chris and Sean. I have left document in Word format just in case.
>
> We will finalise for signing when Chris Wheeldon and myself return from our respective annual leave.

[103] It is that "final draft" of the "Variation Document" which was said to contain the agreement the subject of this litigation, namely what Halikos

described as the "Additional Accommodation Variation" (AAV). Recital B to the Additional Accommodation Agreement stated:

> INPEX has appointed Halikos as INPEX's sole and exclusive accommodation service provider to provide accommodation in various properties in Darwin including 105 Mitchell – [...], C2 Esplanade – [...], One130 Esplanade – [...], H Hotel – [...], H20 Apartments – [...], 100 Esplanade – [...], Frontier Hotel – [...], and H Apartments Parap – [...].

[104] The "final draft" also made provision for payment if INPEX required more than the 225 additional apartment and hotel rooms from time to time.

The Halikos Accommodation Proposal

[105] As the trial judge noted there was disagreement between the parties as to whether Mr Wheeldon told Mr Weeks that he was preparing a decision note about the AAV, and as to the reason why Halikos prepared and provided the Halikos Accommodation Proposal.

[106] Under the sub-heading "Communications re "decision note", tenders and "internal processes" to 9 July 2014, her Honour stated:

> [164] Mr Wheeldon deposed that, before April 2014 he told Mr Weeks what he needed to enable him to work up a decision note for the engagement of an accommodation service provider. He said that he needed:
>
> (a) from Halikos, as much information as they could obtain on the available accommodation inventory in Darwin and accommodation being used by JKC and the subcontractors, knowing as he did that personnel from JKC and the subcontractors were staying in accommodation owned or operated by Halikos;
>
> (b) the Northern Territory government's support for the engagement;

(c) a manning schedule from JKC;

(d) the support of the Operations unit within INPEX; and

(e) an idea of how the accommodation service provider would be engaged.

[165] Mr Weeks deposed that Mr Wheeldon did ask him to find out information about the Darwin accommodation market and the amount of accommodation being occupied by Ichthys Project personnel in Darwin, but that was because INPEX did not have accurate figures about this: Mr Wheeldon did not say he needed this information to prepare a decision note.

[166] I accept Mr Wheeldon's evidence that he asked for this information to enable him to prepare a decision note, and that he said so to Mr Weeks. That is consistent with a proposal prepared by Halikos and given to Mr Wheeldon in late March or April 2014.

(a) The proposal has a front cover on which is written "INPEX" and "Accommodation Service Provider Agreement" along with pictures of the proposed H105 and Halikos Hospitality's logo.

(b) The first page inside the front cover is headed "Halikos Hospitality Pty Ltd Darwin Accommodation Proposal" and contains a Table of Contents.

(c) Following brief biographies of Mr Dignan and Mr Weeks, there is a page headed "Executive Summary". The executive summary provided is as follows:

> On the 17th January 2014 INPEX and Halikos Hospitality met at INPEX Perth offices to discuss project accommodation in Darwin, in particular securing additional accommodation that is required for the Ichthys project, and to address concerns in the media that Tourism accommodation had been adversely impacted.
>
> INPEX Operations Australia Pty Ltd and Halikos Hospitality Pty Ltd have an existing Accommodation Contract 800575. In those discussions both parties agreed the best way forward was a variation to the existing contract by negotiating and agreeing a more robust, longer-term and broader Accommodation Services Provider contract, that meets the long term needs of our construction phase commissioning phase and the on-coming operations phase, and is much more suitable to both parties' needs, and over a 15 year period would be suitable period. The tasks to be undertaken were:
>
> - Chris Wheeldon to determine numbers and timing of ex-village accommodation requirements in the Darwin area.

This will include INPEX, EPCs and their sub-contractors (as best as can be determined).

- The current accommodation services contract is held with Chris Wheeldon. Chris will take the lead to negotiate a broader, longer term contract and propose that for execution.
- The process from here is for the INPEX – Halikos relationship to full develop into a long-term one of client (INPEX) and accommodation services provider (Halikos).

The Accommodation Services Provider agreement would be a variation of existing contract 800575 and demonstrate the following actions:-

- INPEX management resources are not taken up with administratively working with accommodation issues, nor do we have to be concerned about availability of suitable accommodation.
- Assurances from Halikos Hospitality that the pricing and priority terms and conditions agreed within the current contract 800575 will form the basis of the new variation document.
- Halikos Hospitality to manage the suitability of accommodation required by the Ichthys Project and to monitor and manage project accommodation does not adversely impact Tourism and Major Events.
- Ensure that Government and Industry bodies are informed of and maintain support.
- INPEX acknowledge that Halikos is a local Darwin company, has an international reputation of high standing and already provides excellent service to INPEX and our contractors.
- Halikos Hospitality Pty Ltd demonstrate it has the inventory to provide additional accommodation.

On the 13th February 2014, INPEX Operations Australia Pty Ltd provided to Halikos Hospitality Pty Ltd the minimum number of additional accommodation that project required to be secured and would be read in the preparation of the variation document.

Enclosed in this variation document presentation, Halikos Hospitality demonstrates its ability to provide the additional accommodation and undertake the additional responsibilities and duties as the project Accommodation Services Provider.

Sincerely

Geoff Weeks

Executive General Manager – Halikos Hospitality Pty Ltd

[*spelling and punctuation in original; emphasis by underlining added*]

(d) There follows a section headed "Current Inventory" in which the Halikos Hospitality buildings are listed and described, and mention is made of the number of rooms available "for the Ichthys Project management contractors and sub-contractors".

(e) The next section of the proposal is headed "Future Inventory". That includes the following entry:

105 Mitchell Street Apartments

Due for completion in March 2015 will provide a further 254 hotel suites and apartment rooms specifically for the Ichthys Project management, contractors and sub-contractors.

This property will be the main hub for INPEX Operations Australia Pty accommodation requirements over the 15 years in the variation document for the construction, commissioning and operation phases. As the construction phase accommodation nears completion and its existing accommodation contract periods end, those apartment rooms and hotels will be released back to Halikos Hospitality Pty Ltd and used for additional Tourism accommodation requirements in Darwin.

(f) The section on inventory ends with this sentence:

No other company can provide the quantity and quality of accommodation required for the Ichthys Project. Halikos Hospitality is the "One Stop Shop".

(g) The next section is headed "Document Overview", and reads as follows:

Enclosed is the full set of documents making up 800575. The Contract Variation allows the following variation amendments and agreed by both parties.

- The variation of Accommodation Contract 800575 is to provide additional accommodation for the Ichthys Project and appointing Halikos Hospitality Pty Ltd as the primary Accommodation Services Provider for the Ichthys Project.
- Subject only to these variations contained in the document and the understandings agreed by both parties

in the document overview, the principal contract 800575 remains in force and will read as if terms of this document were inserted in the principal agreement.

- Additional accommodation inventory will be managed and operated by Halikos Hospitality Pty Ltd.
- This variation secures a minimum requirement of additional apartments and rooms for the construction, commissioning, and operational phases of the project.
- It is agreed by both parties that from time to time further accommodation may be required over shorter periods. In this instance Halikos Hospitality Pty Ltd will supply the accommodation on a user pay basis and in this instance the parties would not require variations each time.
- As the Accommodation Services Provider, Halikos Hospitality Pty Ltd will monitor and ensure that the Ichthys project accommodation does not adversely affect accommodation availability for Tourism in Darwin. This "One Stop Shop" approach will ensure INPEX is no longer exposed to public and political criticism for doing uncontrolled harm to other business eg: Tourism. While ensuring reliable continuity of supply of appropriate accommodation services that will meet planned and unplanned project needs.

INPEX Operations Australia Pty Ltd are required to assist in the management of additional project accommodation demands

A. Contractor and Sub Contractor accommodation that is required outside the Howard Springs Village and is reimbursable must be allocated and managed by Halikos Hospitality Pty Ltd under the Accommodation Services Provider Agreement.

B. Contractor and Sub Contractor accommodation that is required outside the Howard Springs Village and is not reimbursable must be reported to the Accommodation Services Provider. This information will be recorded for the purpose of monitoring the impact on Tourism accommodation in the community and made available to Senior Executive INPEX Operations Australia Pty Ltd.

C. Where from time to time the additional accommodation scheduling is disrupted due to unforeseen circumstances, Halikos Hospitality Pty Ltd at its discretion in providing that accommodation may be required to change, alter or

implement tentative accommodation arrangements over the period of time that is affected.

(h) Finally, the proposal annexes three things:

(i) the letter of 13 February 2014 which is described as "INPEX OPERATIONS AUSTRALIA" "LETTER OF INTENT";

(ii) the Variation Document; and

(iii) a full set of contract documents for ACCOMMODATION CONTRACT 800575.

(*emphasis added by the trial judge*)

[167] Mr Wheeldon deposes that the document was given to him in response to his request for the information for a decision note.

[168] Mr Dignan deposes that the document was prepared at the request of Mr Wheeldon. He refers to it as "information" and deposes that "it was not prepared as a presentation or proposal". He deposes, "In particular, it was not prepared to convince INPEX to take accommodation in 105 Mitchell. Instead, I had it prepared simply to help Chris Wheeldon out by giving him the information that he said he needed for his internal processes."

[169] I accept the evidence of Mr Wheeldon that the proposal was given to him in response to his request for information for a decision note (noting that the preparation of a decision note before a decision is made to enter into a contract is one of INPEX's "internal processes".)

[170] The following should be noted about the proposal.

(a) Firstly, it plainly is a proposal and not just "information" as asserted by Mr Dignan.

- It is headed "Halikos Hospitality Pty Ltd Darwin Accommodation Proposal" and describes itself as a "presentation" in the section signed by Mr Weeks: *Enclosed in this variation document presentation, Halikos Hospitality demonstrates its ability to provide the additional accommodation and undertake the additional responsibilities and duties as the project Accommodation Services Provider.*
- It contains a "sales pitch" at the end of the section on the current and future inventory*: No other company can provide the quantity and quality of accommodation required for the Ichthys Project. Halikos Hospitality is the "One Stop Shop".*
- Although the language is hard to understand and, in places, devoid of meaning, it is generally cast in the future tense.

- The section headed "Document Overview" contains proposals about the mutual obligations to be assumed by both INPEX and Halikos under an Accommodation Service Provider Agreement which appear in the documentation for the first time.

(*emphasis added by the trial judge*)

(b) The description in the proposal of what occurred at the meeting on 17 January 2014 supports the evidence of the INPEX witnesses about what occurred at that meeting and does not support the evidence of Mr Dignan and Mr Weeks. (The INPEX personnel gave evidence that at the 17 January meeting, Okawa san asked Mr Wheeldon to determine numbers and timing of ex-village accommodation requirements in the Darwin area – as stated in the Proposal. Mr Dignan and Mr Weeks denied this and deposed that Mr Wheeldon said he already had the numbers.)

(c) The proposal refers to the letter of 13 January [sic][49] 2014, now said to confirm the existence of the pleaded agreement, as a "letter of intent".

(d) The proposal includes the statement: "This variation secures a minimum requirement of additional apartments and rooms for the construction, commissioning, and operational phases of the project," not an assertion that "the minimum requirement of additional apartments and rooms" had already been the subject of a concluded agreement reached some months before.

(e) The proposal refers to the attached draft as "the Variation Document", not an "agreement".

(f) Mr Dignan is correct in saying that the proposal was not prepared to convince INPEX to take accommodation in 105 Mitchell. Like all of the documentation in this case before 9 July 2014, it appears pitched at a proposed "Accommodation Services Provider Agreement". (Presumably, if an agreement was concluded for Halikos to be the primary accommodation services provider for the Ichthys Project, it would preferentially provide that accommodation form its own inventory, including H105.)

[171] This proposal is not consistent with the claim by Halikos that at the date the proposal was made it already had a binding agreement with

49 This is a mistaken reference to the letter of 13 February 2014.

INPEX in terms of the pleaded Additional Accommodation Variation (i.e. to provide INPEX with 225/150 rooms over a 15 year period).

[107] Senior counsel for Halikos challenged a number of her Honour's observations and findings, including that:

(a) the [proposal] was prepared and provided by Halikos in response to Mr Wheeldon's request for information necessary for his preparation of a decision note (R [166] – [169]);

(b) it plainly was a proposal and not just "information" as asserted by Mr Dignan (R [170](a));

(c) the [proposal] was generally cast in the future tense (R [170](a));

(d) the description in the [proposal] of what occurred at the Perth meeting on 17 January 2014 supported the evidence of the INPEX witnesses about what occurred at that meeting and did not support the evidence of Mr Dignan and Mr Weeks (R [170](b));

(e) the proposal was not consistent with [Halikos' claim] that at the date the proposal was presented it already had a binding agreement with INPEX in terms of the pleaded AAV (i.e. to provide INPEX with 225/150 rooms over a 15 year period) (R [171]).

[108] Counsel for INPEX made a number of observations about the Halikos Accommodation Proposal:

(a) It post-dated the Perth meeting on 17 January, the events of 13 February and the meetings with the Chief Minister and discussions about media releases late in March.

(b) The executive summary and other parts referred to the Perth meeting on 17 January when the parties met to discuss project accommodation in Darwin.

(c) Although it expressly referred to INPEX having provided minimum accommodation numbers to Halikos on 13 February, it made no reference to an agreement made then, or for that matter at any other time since the making of Contract 800575 in 2012.

(d) One would expect a reference to such an agreement if, as Halikos contended, it was an agreement extending for some 15 years and involving many tens of millions of dollars, made without a decision note and INPEX's normal approval processes.

(e) Under the heading "Future Inventory" the document expressly states that a further 254 hotel suites and apartment rooms will be provided once the 105 Mitchell Street Apartments are completed in March 2015.

(f) Under the heading "Document Overview" the authors referred to the documents attached as being the full set of documents making up contract 800575, again with no reference to a purported variation of that contract in February 2014.

(g) It referred to the 13 February letter as a "letter of intent".

[109] We agree with her Honour's findings and conclusions concerning this important document, and also accept the reasons advanced by counsel for INPEX. The document was clearly a proposal to enter into a new broad accommodation services provider agreement which would include the provision of additional accommodation over and above that provided under the 2012 Accommodation Agreement. Had Halikos thought that in addition to that agreement, there was another agreement in place (or still being negotiated), whether it be the AAV or something similar, that fact would have been noted and allowed for in this document.

The Onshore Decision Note

[110] The Onshore Decision Note was headed "INPEX Operations Australia Pty Ltd – Ichthys Gas Field Development Project" and bore the title "Project External Accommodation Service Provision."

[111] Under the heading "Description" the document included the following:

> With the imminent increase in manpower to the Project as it moves into the next phase of execution, it is imperative that the provision of suitable accommodation outside both the village and Darwin based accommodation quota is both available and suitable to meet the demands of the Company, Contractor, Subcontractors and Company Operations management and supervisory personnel. It is also imperative that the demands on accommodation does [sic] not affect the already stretched NT tourism industry quota of room demand …
>
> The existing requirements for external accommodation are now managed by individual contractor and subcontractors is no central coordination of room availability, type or whether it is part of the Tourism inventory.

> This has led to criticism backed by government departments and media to Company and Contractor. …

[112] Under the heading "Decision" the document stated:

> To ensure we have a solution in place to combat the threat and risk of undersupply for external accommodation, it is a recommendation of this decision note to nominate the services of a local Darwin based Hospitality provider as the preferred supplier to manage all the projects needs in terms of dedicated project apartments, hotel rooms and leased properties which in turn will remove the need of utilising the already stretched Tourism inventory. …
>
> For the purpose of this DN the proposed nominated preferred Accommodation Services Provider will be Halikos Hospitality who have existing service agreements with both Company (contract 800575) Contractor and multiple subcontractors.
>
> As the Accommodation Services Provider they will both monitor and ensure the project will not adversely affect accommodation availability for Tourism in Darwin. …
>
> The existing service agreement with Halikos Hospitality provides for the needs of Company during the construction phase and by negotiating and agreeing a more robust, longer-term broader contract this will then cater for all project parties alike.

[113] There is no reference in the document to any existing agreement between INPEX and Halikos apart from the 2012 Accommodation Agreement (Contract 800575). Importantly, there is no reference to any other agreement having been negotiated and concluded, in particular the AAV.

[114] As to the Onshore Decision Note senior counsel for Halikos said:

> … that is plainly a decision note about the broader accommodation service provider agreement. It is not seeking a decision for approval to take the 225 or 150 units under the 13 February variation document, and Mr Wheeldon confirmed that in his evidence at the passages referred to at trial transcript pp 1517/30 to 1518/2 and pp 1531/46 to 1532/9.

[115] We do not accept Halikos' contention.

[116] At trial transcript p 1517 counsel for Halikos directed Mr Wheeldon's attention to both parts of the Onshore Decision Note. The exchange at pp 1517/30 to 1518/2 was:

> Q And do you agree, then, that this is a decision in respect of what we've earlier called something like a broader accommodation services provider agreement?
>
> A Correct.

[117] At trial transcript p 1531.9 counsel directed Mr Wheeldon to an email that he sent to Mr Dignan on 7 May 2014. The exchange at pp 1531/46 to 1532/9 was:

> Q That's an email of yours to Mr Dignan of 7 May 2014?
>
> A Yes.
>
> Q That is also in connection with the decision note process?
>
> A Yes.
>
> Q And therefore a decision about the broader accommodation services agreement?
>
> A Correct.

[118] Those exchanges do not support Halikos' contentions that by accepting counsel's references to "a" or "the" "broader accommodation services agreement" and in responding in the way he did, Mr Wheeldon was distinguishing between such an agreement and a "narrower" agreement (for the 225 / 150 units) which Halikos contended was a separate agreement.

[119] As we have already noted about the Halikos Accommodation Proposal, if there already was in existence another agreement, particularly one which purportedly bound INPEX to an obligation to pay for at least 225 apartments over the next five years, and then for at least 150 apartments over the succeeding 10 years, it would be noted and taken into account in the Onshore Decision Note. Further, there is no logical or commercial reason why such a large contract could have been concluded without undergoing the decision note process, particularly when it was clear that the decision note process was to be followed for the broader accommodation services provider agreement.

Two draft agreements referred to in July 2014

[120] In his 9 July 2014 email to Mr Wheeldon, Mr Dignan stated:

> Regarding the Accommodation Agreement is it better and more simplistic that we break down the Agreement in two separate variations as follows:
>
> 1. Commitment for additional number apartments / hotel rooms for INPEX's and/or its stakeholders Construction / Commissioning & Operations.
>
> 2. We acknowledge that there may be a concern with Halikos Hospitality having the title of Official Accommodation Services Provider we are happy to step down from this title, and work with INPEX and JKC on assisting the project with accommodation requirements in addition to item 1.
>
> This could be an option allowing the variation for the 225 / 150 apartments / hotel rooms to be signed.

[121] The trial judge found (at R [186]) that in this email the concept of two different agreements was mentioned in the documents for the first time.

[122] Following a meeting between Mr Wheeldon and Mr Dignan on 11 July 2014 Mr Dignan sent Mr Wheeldon an email which stated:

> As per our discussions today I am separating the variation of Contract 800575 into two parts as you suggested, the first being the 225 / 150 apartment / hotel rooms as per INPEX's letter dated 13 February 2014. This will expediate [sic] the execution of the document prior to the July 23, 2014. Chris in the interim I would really appreciate you sending me a confirmation email as we discussed.
>
> Please find attached the following:
>
> - Variation document 800575-2
> - Signed copy of Contract 800575
> - Signed A letter of Intent[50]
>
> Variation 800575-3 would be the Accommodation Service Provider document which may take some time to finalise. …

[123] Variation 800575-2 is very similar to the AAV. However:

(a) The words "Accommodation Services Provider Agreement" no longer appear on the cover page or the back sheet.

(b) The "Issue date" on the cover sheet is 11 July 2014 and the date is left blank on the first page, instead of "13th … February".

(c) Recital B has been removed.

(d) Recital C became Recital B and says:

> The parties have operated under Contract 800575 and agreed on 13 February 2014 to vary Contract 800575 to record that Halikos will provide not less than 225 additional Apartments and Hotel rooms.

50 This was a copy of the letter of 13 February 2014.

(e) The opening words in clause 3.3 “From the date of this Variation Agreement” have been replaced by the words “From 13 February 2014”.

[124] Variation 800575-3 was headed “Services Provider Agreement” and showed an “Issue date” of 13 August 2014.

(a) The recitals referred to the 2012 Accommodation Agreement (Contract 800575), but not to any other agreement such as the AAV.

(b) The recitals also recorded that “INPEX has appointed Halikos, as a variation to Contract 800575, as INPEX’s Service Provider to undertake various duties as required during the construction, commissioning and operations stages of the Ichthys Project.”

(c) Schedule 1 identified a range of services to be provided under that agreement. These included provision of additional accommodation, office space, relocation services, airport transfers, reporting, conference facilities and catering.

[125] Senior counsel for Halikos explained the removal of Recital B from Variation 800575-2 by saying that it was not in fact part of the agreement reached on 13 February 2014. Counsel referred to *Masters v Cameron*[51] and contended that Variation 800575-2 was effectively a subsequent document

51 (1954) 91 CLR 353; [1954] HCA 72.

which was intended to formally document the agreement already reached on 13 February 2014.

[126] Counsel for INPEX asked the Court to note that Halikos now relied on Variation 800575-2 (which no longer contained Recital B) as reflecting the (narrower) agreement made on 13 February 2014. Counsel for Halikos stated that particular part of the Variation Document was now part of the broader accommodation services provider agreement still being negotiated.

[127] However, it was Recital B of the Variation Document (and not Recitals A and C) which was pleaded as part of the AAV.[52] Further, it was Recital B that acknowledged the appointment of Halikos as INPEX's primary service provider and identified a wide range of properties from which accommodation could be provided. Without Recital B, the variation only contemplated the provision of accommodation from those properties identified in Contract 800575, namely C2 and 130. The original Recital B instead found its way into Variation 800575-3. It is there that H105 is identified as one of many sources of accommodation under that agreement, but not under Variation 800575-2.

[128] Again, there is nothing in those communications which supports Halikos' contention that an agreement in terms of either draft, particularly variation 2, had already been concluded. At best, it appears that Mr Dignan was

52 See our discussions elsewhere about the alleged contract, and the trial judge's observations at R [228] – [230]. Relevant to referring to recitals when construing a contract is *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at [29] and [379] to [390].

anxious to have the agreement contemplated in variation 2 executed prior to 23 July 2014, and he believed that splitting the Variation Document into two agreements may be a way of meeting this deadline.

Mr Wheeldon's email of 21 July 2014

[129] At R [192] to [198] the trial judge referred to communications initiated by Mr Dignan from 15 July 2014. Her Honour stated:

> [192] Further emails from Mr Dignan followed. On 15 July 2014, he sent an email to Mr Wheeldon:
>
> > Chris, as per our telephone conversation earlier today can I ask that you confirm in writing that the documentation forwarded to by email on Friday 11 July at 5.40 pm has been agreed to and accepted, allowing sign off prior to July 23, 2014.
> >
> > (*emphasis added by the trial judge*)
>
> This was followed by a telephone call asking for a meeting with Okawa san.
>
> [193] Also on 15 [sic] July, Mr Dignan and Mr Wheeldon exchanged text messages.
>
> > Mr Dignan: Chris was the confirmation email ok? thanks Shane
> >
> > Mr Wheeldon: Shane, I've been laid up crook for the last couple of days so haven't been in top of anything. I briefly spoke to Okawa who will take over this from Sakamoto. He will discuss the way forward with Sakamoto and revert ASAP. It's had a lot of play Shane but a lot of people to convince and Okawa can do that
> >
> > Mr Dignan: Hope you are feeling better soon. Chris the 225 deal has been agreed as per the Feb 13 letter, am I to understand your text is referring to the Service Providers Agreement 800575/3?
>
> This is the first mention in any of the documents of there having been an agreement arising out of the letter of 13 February, referred to by the Halikos parties in earlier documents as a "letter of intent".
> Mr Wheeldon did not respond to that text and Mr Dignan sent a further text on 20 July 2014.

Mr Dignan:

Chris, I hope you are getting over your tonsillitis. When you are up for it could you please contact me. Thanks Shane

[194] Mr Dignan deposed that when he did not receive a response to that text that day, he arranged to meet Mr Kildare the following day at which time Mr Kildare said, "Shane you are a worrier – you have nothing to worry about! You have your letter. INPEX is an honourable company, but I will chase up Chris for the confirmation. I will see what the delay is!" Mr Weeks deposed that he was at the meeting on 21 July and gave similar evidence about what Mr Kildare said, adding that he also said, "There is no problem with the variation." Mr Kildare deposed that he did not recall meeting with either Mr Dignan or Mr Weeks on 21 July 2014.

[195] Given the content of the email from Mr Wheeldon of 9 July 2014, and his text of 18 July 2014, I do not accept the evidence of Mr Weeks that Mr Kildare said, "There is no problem with the variation." I also have very serious doubts that Mr Kildare said anything about, "You have your letter," given that no-one seems to have attached any significance to the letter of 13 February before Mr Dignan's text to Mr Wheeldon on 18 July which Mr Kildare presumably knew nothing about; and given that (as I have found) Mr Weeks and Mr Dignan had told Mr Kildare on 13 February that the purpose of the letter was to have something to show other developers so that they could negotiate with them on INPEX's behalf.

[196] On 21 July 2014, Mr Wheeldon sent an email to Mr Dignan in the following terms:

Shane,

Just to confirm our discussion and your subsequent adjustment of documents provided by yourself is correct and based upon our assumption.

Further work is required on the service provision to encompass our main contractor which may need some addition information from yourselves to secure the agreement which I will be in touch for shortly.

The original signed letter should suffice for the first agreement until such time all agreements can be again rolled up into one tidy provision which I believe will be more easily executable.

My apologise for the delay but you must try and understand there are many players and processes associated with this type of agreement that need to be considered and we appreciate your moving forward in good faith.

> [197] It is difficult to know what to make of this email, given its vagueness, particularly the enigmatic opening sentence. Halikos relies on the sentence: "*The original signed letter should suffice for the first agreement until such time all agreements can be again rolled up into one tidy provision which I believe will be more easily executable*," as an acknowledgment that the letter of 13 February 2014 evidenced a binding agreement, and on one view of the email, it could amount to an expression of opinion by Mr Wheeldon that he considered there had been a "done deal" in terms of that letter. However, it could also be consistent with the email meaning that Halikos would have to be content with that letter (previously referred to by Halikos as a letter of intent) until such time as a binding agreement could be reached following INPEX's compendious procedures for making such agreements. That would be consistent with the following sentence: "*My apologise for the delay but you must try and understand there are many players and processes associated with this type of agreement that need to be considered and we appreciate your moving forward in good faith.*"
>
> (*emphasis added by the trial judge*)
>
> [198] The evidence is that Mr Wheeldon and Mr Weeks were on very friendly terms. They took a holiday together in Bali with their families, for example, and Mr Wheeldon seems to have been advocating for Halikos within INPEX. The legal implication of assuming the construction of this email most favourable to Halikos is discussed in footnote 35, at [236](k) below.

[130] In footnote 35 at R [236](k) her Honour said:

> The letter is ambiguous and to the extent that it can be construed as Mr Wheeldon's pressing a view that there had been a concluded agreement on 13 February, Mr Wheeldon had no authority to make any such representation on behalf of INPEX.

[131] Counsel for INPEX made the point that despite the confusion as to what the email conveyed [or perhaps because of it], her Honour did not make a finding as to its meaning. INPEX also advanced alternative constructions. One of them may be that posited by her Honour in footnote 35. Another

may be that Mr Wheeldon was in effect saying something like: "that is all you can get at this stage" pending the outcome of the approvals process.

[132] It may also be that Mr Wheeldon was: (i) referring to the information yet to be obtained and negotiations yet to be completed for the purposes of variation 3, and (ii) noting that nothing further had to be obtained or negotiated for variation 2, until such time as both variations could "be again rolled up into one tidy provision which would be more easily executable". The quantity of accommodation required under variation 2 had already been specified in the letter of 13 February 2014.

INPEX's additional contentions

[133] Counsel for INPEX also pointed to other evidence which supported her Honour's conclusion that there was a single agreement being discussed, not two agreements. This included:

(a) The fact that the 13 February 2014 letter makes no reference to there being two agreements. Rather it referred to the preparation of the Variation Document and what was required to be done by Halikos pending execution of that document. The objective intent to refer to a single, undivided, proposed agreement encompassed within the Variation Document was further reinforced by the reference in the letter to the Variation Document calling on Halikos as its Accommodation Services Provider to provide the additional apartments and hotels.

(b) Numerous discussions and communications referred to the proposed appointment by INPEX of Halikos as its "accommodation services provider" and the alleged agreement discussed as being a "services agreement".

(c) Mr Kildare's email of 16 April 2014 advising that "we have not yet completed our project internal processes to assess, and review the Variation to the accommodation services contract" and that "the internal due diligence processes are not complete at this time and until they are, INPEX will not be in a position to make any public announcements regarding accommodation services."

(d) Mr Wheeldon's email to Mr Dignan on 7 May 2014 referring to submission of the decision note for approval.

(e) Mr Week's minutes of the meeting on 26 May 2014 when there was discussion about delays with the media releases and the "variation document being returned with signatures" and Mr Dignan saying that Mr Wheeldon had told him that "he received the supporting information from JKC and the decision note was done and sent to Perth."

(f) The Onshore Decision Note.

(g) Halikos' detailed Expression of Interest to provide accommodation services for fly-in-fly-out personnel (**FIFO**). The document promoted H105 as "brand new purpose built accommodation" and stated that

"105 Mitchell will be a purpose built development dedicated to the Ichthys Project …" It stated that there would be "no cost pre-commitment for the build to INPEX."

Conclusions and consequences

[134] As counsel for INPEX pointed out, it is not sufficient for Halikos to point to factual findings which are merely inconsistent with some of the evidence. This Court must be persuaded on the balance of probabilities that a different conclusion on a relevant issue should have been reached, having regard to the whole of the evidence which included a substantial body of contemporaneous objective evidence in the form of documents.

[135] There is no basis for this Court to interfere with the conclusions and findings of the trial judge on the important question of whether one or two agreements were being negotiated. Whatever meaning might be attributed to Mr Wheeldon's email of 21 July, her Honour's findings are consistent with and supported by the bulk of contemporaneous evidence including the oral testimony, both before and after 29 January 2014. This is particularly clear when one considers the Halikos Accommodation Proposal, the Onshore Decision Note, the Halikos Expression of Interest and the attempts in early July 2014 by Halikos to split the negotiations into two separate variation agreements.

[136] It was only then, in early July 2014, that the draft agreements prepared and presented by Messrs Weeks and Dignan ceased to be referred to as

"Accommodation Services Provider Agreement[s]", a description the drafts had borne ever since Mr Weeks' first draft of 18 January 2018.

[137] If there had been discussions about two separate agreements before July 2014, the outcomes of those discussions, including the agreement said to be made on 13 February 2014, would have been referred to in the various detailed documents prepared by the parties during the course of their negotiations. As her Honour noted, there was no such suggestion in any document prior to the email of 18 July 2014. All of the documents referred to one existing agreement only, namely the 2012 Accommodation Agreement.

[138] The ongoing communications about INPEX's internal approvals processes and preparation of a decision note were clearly related to the process of the parties completing a single accommodation services provider agreement. Halikos did not suggest that at the meeting in Perth on 17 January 2014 Messrs Wheeldon and Kildare were authorised to negotiate two agreements. The thrust of the evidence about that meeting was that Messrs Wheeldon and Kildare were to enter into negotiations for one agreement. The suggestion that the parties concluded a binding agreement on 13 February 2014, but continued to negotiate a second broader accommodation services provider agreement without obtaining any further authorisation does not make sense. Further, the suggestions that INPEX's approvals process could be avoided and a variation contract of this magnitude be concluded in about four weeks is fanciful. Not only was Halikos well aware of INPEX's

approval requirements after its involvement in the 2012 Accommodation Agreement (which involved the provision of far fewer apartments); but Messrs Dignan and Weeks were well aware of Mr Wheeldon's intentions, according to Halikos' case, to prepare a decision note so that an agreement involving far less expenditure by INPEX than the AAV entailed, could be authorised and duly entered into.

[139] Accordingly, ground 5 must be dismissed.

[140] Our consideration and rejection of the two agreements contention has important consequences for Halikos. The most critical consequence is that whatever was being discussed and documented on and after 13 February 2014 did not reflect a concluded and binding agreement of the kind pleaded by Halikos. Halikos accepted that negotiations about the broader accommodation service provider aspects of the variations being negotiated had not been concluded. Moreover, the fact of ongoing discussions and negotiations negates the existence of an intention on the part of the parties to enter into binding legal relations on 13 February 2014 – cf ground 9.

[141] Other consequences concern some of the other grounds of appeal. Even if, contrary to the trial judge's conclusions, there was some kind of ostensible authority held by Mr Wheeldon and/or Mr Kildare, a contrary finding is of no consequence if no concluded agreement was reached by the parties. Questions must also arise as to the uncertain scope of that authority. In particular was that authority an authority to bind INPEX: (i) to one or both

of the separate agreements being negotiated, neither of which was pleaded; (ii) to the AAV which initially applied to a wide range of accommodation possibilities or which, after removal of Recital B, only related to those properties the subject of the 2012 Accommodation Agreement; or (iii) only to the abandoned draft of 18th January which only related to H105 and involved less rooms and a significantly shorter term?

[142] Another consequence concerns the estoppel and misrepresentation contentions and whether there was any reliance by Halikos on the alleged representations when it commenced and continued to construct H105. Contrary to Halikos' written submissions at [153] quoted at [75] above, any potential agreement specific to rooms in H105 was abandoned before 7 February when the "Variation of Contract Number 800575" of 18 January 2014 was replaced by the first draft "Accommodation Services Provider Agreement". Further, some of the post 13 February 2014 documentary evidence, such as the Halikos Accommodation Proposal, and the propounding of two separate agreements in July 2014 lead to no conclusion other than that Halikos was *not* relying on the commitment it said it obtained from INPEX on 13 February 2014 when Halikos decided to proceed with construction of H105.

GROUND 6

[143] In substance ground 6 duplicates other grounds of appeal and does not require separate consideration as those findings are also challenged elsewhere, in grounds 8, 9, 11, 12, and 13.

GROUND 7

[144] Halikos claims that Messrs Wheeldon and Kildare had ostensible authority to negotiate and complete the AAV with Halikos on behalf of INPEX. Halikos' case on ostensible authority involved three primary contentions: (i) since the decision of the High Court in *Pacific Carriers Ltd v BNP Paribas*[53] there has been a wide basis upon which ostensible authority may be conferred by a corporation; (ii) at the meeting in Perth on 17 January 2014 INPEX's four representatives engaged in conduct which fell within the wide basis upon which ostensible authority may be conferred; and (iii) by their conduct on 17 January 2014 and subsequently INPEX's representatives conferred ostensible authority on Messrs Wheeldon and Kildare to negotiate and complete the AAV with Halikos.

[145] At R [243] the trial judge found:

> I do not understand these authorities[54] to be applying any wider basis for ostensible authority than the earlier cases, *but whether they do or not is immaterial for present purposes*: Halikos has failed to establish the factual basis on which it relies for its contention that Messrs Kildare and Wheelan had ostensible authority to bind [INPEX] to the Additional Accommodation Variation.

[146] In ground 7 Halikos claims that her Honour erred in finding that in *Pacific Carriers Ltd v BNP Paribas* the High Court had not applied a wider basis for the conferral of authority for a corporation to enter into a contract than

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53 [2004] HCA 35; 218 CLR 451 (***Pacific Carriers Ltd v BNP Paribas***)..

54 *Northside Developments Pty Ltd v Registrar General* [1990] HCA 32; 170 CLR 146 at pp 200 and 212; *Pacific Carriers Ltd v BNP Paribas* at [38].

was recognised in earlier cases. In support of this ground Halikos did no more than assert that the trial judge: (i) took an unnecessarily narrow view of the question of a holding out of authority in the context of a large modern corporation; and (ii) failed to correctly apply the approach of the High Court in *Pacific Carriers Ltd v BNP Paribas*. The pleaded error was not the subject of elaboration nor were any adverse consequences of her Honour's approach identified.

[147] Ground 7 misconceives her Honour's finding at R [243]. In her Reasons her Honour did not draw any conclusion about Halikos' suggested wider basis for finding ostensible authority existed. While expressing some doubt about the contention, her Honour made it clear that "whether they do or not is immaterial for present purposes".[55] The Reasons referred to *Pacific Carriers Ltd v BNP Paribas* and the authorities referred to therein; and made it clear that the rejection of Halikos' case on ostensible authority did not turn upon there being an acceptance or rejection of the suggested "wider basis" for grounding ostensible authority. Rather, her Honour found Halikos failed to establish the factual basis on which it relied for its contention that Messrs Kildare and Wheeldon had ostensible authority to bind INPEX to the Additional Accommodation Variation.

[148] This ground of appeal is otiose and therefore must fail.

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55 R [243].

GROUND 8

[149] Ground 8 is pleaded in support of ground 7 and Halikos' second primary contention on ostensible authority.

[150] At trial Halikos submitted that the following facts established that Mr Wheeldon and Mr Kildare had ostensible authority to bind INPEX to the AAV.[56]

(a) At a meeting in Perth on 17 January 2014 Okawa san (in the presence of Sakamoto san) directed that Mr Wheeldon (with Mr Kildare's assistance) finalise the amount of accommodation needed, and then negotiate or finalise an agreement with Halikos.

(b) Mr Wheeldon, and subsequently Mr Kildare, negotiated and finalised that agreement and confirmed that INPEX's internal processes had been satisfied, "including because the agreement was proceeding by way of clause 3 of the Accommodation Agreement".

(c) INPEX equipped Mr Wheeldon and Mr Kildare with the positions and titles of senior executives.

(d) INPEX armed Mr Kildare and Mr Wheeldon with the ability to send the 13 February 2014 letter which, it was alleged, "confirmed the

56 *Halikos Hospitality Pty Ltd v Inpex Operations Australia Pty Ltd* [2019] NTSC 10 at [240], [244].

finalisation of the Additional Accommodation Variation" agreement.

(No particulars of how INPEX did this were provided.)

[151] The trial judge found that neither Mr Kildare nor Mr Wheeldon had ostensible authority to enter the AAV for the following reasons.

> [246] First, the pleaded factual basis for the existence of ostensible authority in Mr Wheeldon and Mr Kildare has not been established. I have rejected the evidence of Mr Weeks and Mr Dignan that at the 17 January meeting in Perth:
>
> (a) Mr Wheeldon said that he had already run the numbers and that INPEX needed the accommodation that Halikos was proposing, or that he said INPEX needs every bit of accommodation it can get for the project;
>
> (b) Mr Kildare or Okawa san said, "I am happy," "I agree with what is proposed," "This is what INPEX wants," or, "Halikos and INPEX should move forward on this basis;"
>
> (c) Okawa san said, "I want the 148 rooms in 105 Mitchell but also need more;"
>
> (d) Okawa san said that Mr Wheeldon or Mr Kildare should finalise how many more rooms were needed over and above the 148 in H105 and get back to Halikos;
>
> (e) Okawa san said, "The agreement should be for longer than 4 years so it covers construction, Commissioning and Operations. It should be for 15 years;"
>
> (f) Okawa san said, "Chris, you are responsible for finalising the amount of accommodation we need. I then want you to finalise the agreement and get things moving."
>
> [247] I have accepted the evidence of the INPEX witnesses that the discussion at the 17 January meeting centred around the accommodation needs of the Ichthys Project (which included workers for the head contractor JKC and sub-contractors); and that Okawa san asked Mr Wheeldon to check the Project accommodation requirements (referring to INPEX, JKC and the subcontractors) and to begin negotiating a broader accommodation services agreement with Halikos, not limited to the provision of accommodation in a single building. No such agreement was ever concluded.
>
> [248] Second, Okawa san did not have actual authority to bind INPEX to the alleged agreement and neither did Sakamoto san. They therefore

had no authority to hold out Mr Kildare or Mr Wheeldon as having that authority – even if they had purported to do so, which they did not.

[249] Third, both Mr Dignan and Mr Weeks were well aware, at least in broad outline, of the processes that needed to be followed before anyone in INPEX was authorised to bind INPEX to any agreement. They were familiar with the decision note and RFA procedures as a result of the procedures followed before the making of the original Accommodation Agreement in 2012.

[250] I have rejected the evidence of Mr Weeks and Mr Dignan that either Mr Wheeldon or Mr Kildare said that there was no need for a decision note or an RFA or that the internal processes of INPEX had already been satisfied because the agreement was proceeding by way of a variation of the Accommodation Agreement, relying on clause 3 of that agreement. It is probable that Mr Weeks and Mr Dignan initially thought that they could circumvent INPEX's ponderous processes and go straight to an agreement made with a known individual (probably Okawa san given who they were always keen to refer things to) by casting the new agreement as a variation of the existing Accommodation Agreement. However, the evidence is that they were disabused of this well before 13 February 2014. There is abundant evidence that the proposal put by Halikos was to be the subject of a decision note prepared by Mr Wheeldon; that INPEX's other internal processes needed to be adhered to; that this would take time and involve a number of senior people within INPEX and that Mr Weeks and Mr Dignan were told this, both orally and in writing a number of times. I have rejected the evidence of Mr Dignan and Mr Weeks that they believed all such references in the documents were to the need for a decision note in relation to the "broader" accommodation services agreement (or "the over and above") and did not apply to the proposal for INPEX to take 225/150 rooms over a 15 year period which was the main (indeed the only) subject matter of the draft variation agreements which Halikos kept sending to INPEX.

[251] Fourth, I reject the contention by Halikos that INPEX equipped Mr Wheeldon and Mr Kildare with the positions and titles of senior executives and armed Mr Kildare and Mr Wheeldon with the ability to send the 13 February letter. Mr Wheeldon was Project Manager – Construction. Mr Kildare was the General Manager of the Darwin office. I agree with the contention by INPEX that these are not positions which would ordinarily carry with them the authority to bind the company to a multi-million dollar contract to be performed over 15 years.

[252] No particulars have been provided about how INPEX is said to have armed Mr Davies with the ability to sign the 13 February letter. If it is nothing more than providing him with a work station and the ability to access a pen and some company letterhead, that would not

> suffice to equip him with ostensible authority to sign a multi-million dollar 15 year term agreement. Otherwise every junior clerk in every company would have such ostensible authority.

[152] In summary, the trial judge rejected the factual basis upon which Halikos relied for the existence of ostensible authority in Mr Wheeldon and/or Mr Kildare. Her Honour rejected the evidence of Mr Dignan and Mr Weeks about the meeting of 17 January 2014. In particular, she rejected the claims that: (a) either Okawa san or Sakamoto san in fact held out that Mr Kildare or Mr Wheeldon had authority to bind INPEX to an agreement of the kind alleged; (b) either Mr Wheeldon or Mr Kildare said there was no need for a decision note or an RFA or that the internal processes of INPEX had already been satisfied because the agreement was proceeding by way of a variation of the Accommodation Agreement; (c) that the positions and titles of Mr Wheeldon and Mr Kildare equipped them with the ability to commit INPEX to a multi-million dollar contract to be performed over 15 years; or (d) that INPEX somehow relevantly "armed" Mr Kildare, Mr Wheeldon or Mr Davies with the ability to sign a binding agreement. We have concluded that her Honour did not err in making those findings. They are fatal to the suggestion that Mr Wheeldon and/or Mr Kildare had ostensible authority to enter into the pleaded agreement.

[153] Her Honour's findings were plainly correct. Apart from anything else, compelling reasons for rejecting Halikos' case on ostensible authority are found in the context and surrounding circumstances in which the

negotiations about the variations to the Accommodation Agreement took place.

[154] It was not in dispute at the trial nor before this Court that neither Okawa san nor Sakamoto san had actual authority to enter into the AAV without going through INPEX's approval process. While each had authority to approve and execute certain contracts they could only do so after obtaining the necessary approvals which involved a decision note, recommendations for approval by certain personnel, approval by a Contracts Committee, further approval by other senior INPEX personnel, approval by joint-venture partners and a formal contractual instrument.

[155] It was also not disputed that Mr Dignan and Mr Weeks, were aware, "at least in broad outline", of the relevant decision-making processes that existed within INPEX.[57] That knowledge came from Halikos' entry into the Accommodation Agreement on 15 February 2012 and from the fact that Halikos maintained that INPEX's decision-making process was being applied to the broader accommodation service provider agreement.

[156] As we have noted above, and is recorded in the Reasons,[58] and not challenged on appeal, the processes involved the preparation of a decision note for key decisions, followed by a recommendation for award (**RFA**), or a recommendation for variation (**RFV**). These recommendations then had to

57 R [249].

58 R [8].

be assessed by senior officers who, in turn, made a further recommendation. Depending upon the monetary value involved there followed a need for approval by a Contract Committee and then the formulation of a document executed by a director or directors of INPEX. For contracts or variations over US $10 million the approval of joint venture partners was required and for contracts over US $40 million approval of the parent company, INPEX Corporation, was also necessary. Save for a limited set of circumstances a tender process was required for contracts over US $10 million.

[157] The 2012 Accommodation Agreement related to 40 apartments for a five year period only, and required the detailed approval process which we have described and, of which, Halikos was aware. In negotiating and finalising the 2012 Accommodation Agreement Halikos was provided with a document which included a detailed analysis of the proposal and was signed by eight different INPEX personnel and had provision for signing by the Contracts Committee and four senior management people including the President Director.[59]

[158] In the circumstances, to suggest that a much larger agreement (with a value exceeding $100 million on one view) relating to many more apartments and extending over a period of 15 years, could be the subject of a variation to the Accommodation Agreement, without undergoing at least a similar approval process, is implausible. To suggest that such an agreement could

59 R [11] at f/n 1.

be entered into in such an informal way and "confirmed" by a two paragraph letter drafted and amended on the spot by officers of INPEX at the low level of Mr Kildare (who was in the Corporate Coordination division with the title of General Manager of that Division) and/or Mr Wheeldon (whose title was Project Manager – Construction) is, as we have said, fanciful.

[159] Even if Mr Weeks' evidence about the discussions on 17 January 2014 had been accepted (which was not the case) the evidence was simply to the effect that Okawa san in the presence of Sakamoto san directed Mr Wheeldon (with Mr Kildare's assistance) to finalise the amount of accommodation needed and then "negotiate or finalise" an agreement with Halikos. There is no suggestion in that evidence that Mr Wheeldon or Mr Kildare could enter into any binding agreement or sign any documentation binding INPEX. The evidence was limited to negotiating and the negotiators reaching an agreement. It does not suggest that once agreement had been reached the known normal processes for INPEX completing an agreement before it became legally binding were not required.

[160] Of course, and in addition, the claimed direction came from Okawa san to Mr Wheeldon who was to be assisted by Mr Kildare. Mr Kildare was to be no more than an assistant to the person the subject of the direction and, therefore, if ostensible authority was conferred, it could only have been upon Mr Wheeldon. Mr Wheeldon was not present on 13 February 2014

when Halikos claimed the contract was entered into and could not be said to have exercised any ostensible authority vested in him on that occasion.

[161] This ground of appeal is not made out and is dismissed.

GROUND 9 – Intention to enter into legal relations

[162] Halikos asserts that the trial judge erred in finding that there was no intention by those participating in the events of 13 February 2014 to enter into binding legal relations as a result of what occurred on that date.

[163] In the Reasons the trial judge noted, correctly, that it was strictly unnecessary to consider this ground in light of her Honour's findings about Mr Wheeldon's and/or Mr Kildare's lack of authority to contract on behalf of INPEX. As we have determined that ground 8 should be dismissed it is also unnecessary for this Court to consider this ground. Our discussion and conclusions about ground 5 also demonstrate that neither party had formed the necessary intention at that time. Nor could such an intention be objectively inferred[60] from the conduct of the parties and the events and circumstances of 13 February 2014.

[164] This ground of appeal must also fail because we have accepted the conclusions of the trial judge at R [77] that, given the general consistency of the evidence of Mr Wheeldon and Mr Kildare with the objective documentary evidence, and the relative inconsistency of the evidence of

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60 *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; 209 CLR 95 at [25].

Mr Dignan and Mr Weeks with that evidence, the evidence of Mr Kildare and Mr Wheeldon is to be preferred where there is a conflict; and the evidence of Mr Weeks and Mr Dignan as to what transpired at the meeting on 13 February 2014 is to rejected.

[165] However, we make the following brief observations about her Honour's finding that there was no intention to enter binding legal relations on the part of those present at the meeting on 13 February 2014.

[166] The trial judge rejected the evidence of Mr Weeks and Mr Dignan about what occurred on 13 February 2014 and, in so doing, rejected Halikos' claim that there was an intention to enter into binding relations at that time. In addition, her Honour observed that, even if the evidence of those witnesses was accepted, it would not have assisted Halikos' claim in contract. Her Honour considered the surrounding circumstances and observed, correctly in our opinion:[61]

> [256] … that it is inherently unlikely that INPEX, a subsidiary of a large, multinational corporation and operator of a commercial joint venture, objectively intended to bind itself legally to a long-term contract supposedly worth (on Halikos' case) hundreds of millions of dollars by one of its employees telling Halikos that he was "*happy with that agreement"* and "*happy with*" and arranged for the signing of the 13 February letter, the contents of which letter were conspicuous for the absence of any language to suggest that a legally binding agreement had been made.
>
> [257] The subjective belief or intention of a particular party is irrelevant, but it is equally unlikely that Mr Dignan and Mr Weeks would have entertained any belief that such statements would have had

61 at R [256] – [257].

> the effect of binding INPEX to a 15 year multi-million dollar agreement.[62] More to the point, reasonable people knowing the background dealings between Halikos and INPEX, and the scope and terms of the proposed agreement as set out in the Variation Document, would not have understood those statements (had they been made) as evincing an objective intention to enter into a multi-million dollar contract over a period of 15 years. This is particularly so given that the surrounding circumstances known to the parties included that Mr Wheeldon had not yet ascertained the numbers of accommodation units that would be required by the participants in the project, that it had not yet been ascertained whether JCK and its sub-contractors would be interested in participating in the proposed arrangement.

[167] INPEX submitted that in light of the surrounding circumstances, it would require very cogent evidence to displace the obvious conclusion of a lack of contractual intention. In our opinion, not only is such cogent evidence lacking but the evidence referred to in Schedule A and the INPEX Schedule about this issue points the other way. This reinforces the conclusion that what was said and done by the parties did not objectively convey a mutual intent to enter binding legal relations on 13 February 2014.

[168] This ground of appeal is dismissed.

GROUND 10 – Estoppel by convention principles

[169] At R [264] the trial judge stated:

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62 Counsel for Halikos placed great emphasis on the fact that, in cross-examination, Mr Wheeler was referred to the words, "We will finalise for signing when Chris Wheeldon and myself return from our respective annual leave," in an email from Mr Weeks, was asked what he thought that "contemplated", and said, "They thought they had an agreement in place." It is hard to see why he would have construed the email that way, but in any event, the evidence is that both Mr Wheeldon and Mr Kildare told Mr Weeks and Mr Dignan orally and in writing many times, from shortly after 17 February that INPEX's normal internal procedures would need to be followed. What is more, they were advised this before 13 February in the meeting on 17 January, in Perth.

> [264] The applicable principles are set out in *Waltons Stores (Interstate) Ltd v Maher*:
>
> > [T]o establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs.[63]
>
> [265] For the same general reason that the contract claim fails, Halikos' claim based on conventional estoppel must fail. Halikos has failed to establish the factual basis of its claim. The correspondence makes it abundantly clear that the parties did not adopt a mutual assumption that they had entered into a binding agreement.

[170] Halikos complained, and INPEX accepted, that in the above paragraphs her Honour incorrectly stated that the passage she quoted from *Waltons Stores (Interstate) Ltd v Maher* set out the legal principles applicable to establishing a conventional estoppel. As is plain on its face the passage from *Waltons Stores (Interstate) Ltd v Maher* is a reference to equitable estoppel.

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63 [1988] HCA 7; 164 CLR 387 per Brennan J at [34].

[171] INPEX contended that this was an error of form rather than substance noting that despite an incorrect test being set out, the correct test was applied by her Honour, and there was no error requiring correction.[64] The trial judge applied the correct test at R [265] – [268].

[172] Halikos accepted that to apply the right test with the wrong label does not amount to an error of law. However, Halikos did not concede "that the trial judge necessarily proceeded to apply the correct test" submitting that "this Court can have no confidence that the trial judge correctly directed herself as to the relevant enquiry on the evidence". In particular, Halikos contended that the trial judge "failed to have any *proper* regard to the evidence of" the parties' conduct subsequent to 13 February 2014, much of which is referred to in Schedule A and is the subject of grounds 11, 12 and 13.

[173] However, Halikos failed to identify any relevant error resulting from the mistaken reference to *Waltons Stores (Interstate) Ltd v Maher*, for example, that her Honour failed to have *any regard* to relevant conduct. Her Honour did refer to and consider the conduct relied upon in the course of determining the estoppel by convention claim. Her Honour's mistaken reference to *Waltons Stores (Interstate) Ltd v Maher* did not amount to a vitiating error of law.

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64 *Grandulovic v Borg Warner (Australia) Pty Ltd* (Unreported, NSWCA, 1 December 1987) 10 (Kirby P).

[174] This ground of appeal is dismissed.

GROUNDS 11 – 13 – estoppels and representations

[175] Ground 11 contends that when considering the claim for conventional estoppel the trial judge erred in finding that the parties did not adopt a mutual assumption that they had entered into a binding agreement on 13 February 2014. Halikos pleaded that on or about 13 February 2014 Halikos and INPEX "adopted the assumption that [Halikos] had entered into a legal relationship with INPEX in terms of the Additional Accommodation Variation and that it and INPEX would be bound by those terms", and that the parties continued their relationship until about 15 October 2014 on the basis that that assumption was a mutual assumption.[65]

[176] Ground 12 contends that when considering the claim for estoppel by representation, the trial judge erred in finding that Halikos did not establish that the representation it relied upon was ever made.

[177] The representation relied on was that "INPEX made a promise and/or gave an assurance to [Halikos] that the parties had entered into the Additional Accommodation Variation, or that it would execute the Variation Document, and would be bound by its terms".[66] Halikos claimed that "induced by that promise or assurance, Halikos assumed that the Variation Document would be executed, and in reliance on that representation Halikos acted to their

65 ASOC [32] – [34].

66 ASOC [40]; R [269].

detriment in terminating existing leases at 105 Mitchell Street, demolishing the existing buildings and constructing H105, entering into a new lease over H105, borrowing funds and forgoing other developments and investments."[67] Halikos asserted that if the trial judge "had regard, or sufficient regard, to the evidence" referred to in ground 4, her Honour ought to have found that the representation said to have been relied upon by Halikos was made by INPEX.

[178] Ground 13 contends that when considering the claim for misleading or deceptive conduct the trial judge erred in finding that INPEX did not make the representations relied upon by Halikos. Halikos had pleaded that on or about 13 February 2014 INPEX represented to Halikos that it (INPEX) required an additional 225 apartments and hotel rooms, required Halikos to provide that accommodation until 28 February 2029, would pay Halikos for providing that accommodation until 28 February 2029 at the rates and on the terms set out in the Additional Accommodation Variation, and if Halikos undertook the development of H105, INPEX would take and pay for such additional accommodation, and that INPEX made the representation pleaded to in the estoppel by representation claim.[68]

[179] Counsel for Halikos referred to this commitment during the hearing, and during the trial as a "binding commitment", but did not particularise the

67 R [269]. See ASOC [40] – [57].

68 ASOC [58].

nature or form of the commitment alleged. The trial judge stated that the essence of the claim was an allegation that Messrs Dignan and Weeks made known to INPEX that Halikos was proposing to build H105 as a purpose built building for INPEX and that it would only go ahead with the development if INPEX made a binding commitment "either to 'take H105' or in terms of the pleaded Additional Accommodation Variation" and that "in reliance on those representations and conduct by INPEX Halikos terminated existing leases" and did the other things referred to in ground 12.[69] Again, Halikos asserted that had the trial judge had "proper regard to the evidence", the trial judge ought to have found that the representations relied upon by Halikos were made by INPEX.

[180] By and large all three claims were based upon the same alleged conduct, which consisted of discussions, phone calls, meetings and correspondence, prior to and after 13 February 2014. The trial judge identified the post contractual conduct that Halikos relied on at R [236] and indicated, by way of footnote, where she had already dealt with those matters in some detail earlier in the Reasons.

[181] For each ground Halikos asserted that the trial judge "failed to have any regard to" and "failed to have any proper regard to" much of the evidence about conduct on and after 12 February 2014. Halikos contended that had the trial judge had "proper regard to that evidence" (in terms of the estoppel

69 R [272]. Her Honour noted that the precise nature of the alleged commitment was unclear both on the pleadings and the evidence.

by convention and misleading or deceptive conduct claims) or "regard to, or sufficient regard" (in terms of the estoppel by representation claim) her Honour ought to have found in favour of Halikos for those claims.

[182] Essentially, Halikos relied upon the expansive attack on the trial judge's fact-finding, the subject of ground 4, to support these grounds. We have dealt with those attacks elsewhere and concluded that there is ample cogent evidence, particularly documentary evidence, to support the conclusions of her Honour.

[183] As to ground 11, the trial judge dealt with this matter in some detail in R [258] to [268]. At R [265] and [266] the trial judge summarised the findings of fact she had made relevant to this ground. It is not necessary to repeat those findings here. Her Honour then went on to conclude at R [267] that:

> Rather, in email correspondence and conversations, Mr Wheeldon, Mr Kildare and Okawa san made it clear that there was, as yet, no binding agreement and that there would not be unless and until INPEX's "due diligence" and internal procedures led to the proposal being accepted and a written agreement signed. Further in the email of 17 February, in the proposal provided to Mr Wheeldon in late March/early April 2017, and in other emails and correspondence, Mr Weeks and Mr Dignan indicated that they understood that there was no binding agreement in place.

[184] Those conclusions were supported by contemporaneous relevant documentation. This included the documents referred to by her Honour in R [267]:

(a) the email from Mr Weeks to Mr Wheeldon and Mr Kildare on 17 February 2014, in the immediate aftermath of the 13 February 2014 meeting, which enclosed a copy of the Variation Document in Word format and described it as a 'final draft of the Variation'; and

(b) the Halikos Accommodation Proposal which Halikos prepared and gave to Mr Wheeldon in late March or early April 2014, the contents of which were, in substance, a proposal to enter into an agreement to provide accommodation services to INPEX, with the 13 February 2014 letter being described in this context only as a 'letter of intent'. The Halikos Accommodation Proposal was therefore inconsistent with there being a binding agreement already in existence, Halikos assuming that to be the case, or INPEX having represented that to be the position.

[185] As INPEX pointed out, her Honour also referenced other emails and correspondence[70] more generically to the effect that Mr Wheeldon, Mr Kildare and Okawa san made clear, and Mr Weeks and Mr Dignan understood, that there was no binding agreement in place. INPEX identified the following (amongst other relevant emails and correspondence) which were expressly addressed elsewhere in the Reasons:

(a) an email from Mr Weeks to Mr Kildare dated 18 March 2014 attaching a further draft of the Variation Document and seeking a meeting with Okawa san to 'finalise the discussions and proceed'. That email was

70 R [267].

inconsistent with an agreement having been concluded on 13 February 2014;[71]

(b) an email from Mr Kildare to Mr Weeks dated 16 April 2014 which unequivocally conveyed to Halikos that INPEX was yet to decide whether to agree to the Variation Document;[72]

(c) Halikos' submission to INPEX on 28 July 2014 of an expression of interest to provide accommodation for the operations phase of the Project which included a proposal to provide accommodation in H105.[73] The obvious inference from that expression of interest was that Halikos did not consider itself already bound to provide that accommodation and INPEX already bound to accept it; and

(d) a letter from Mr Dignan to Okawa san dated 20 August 2014 which, in terms, suggested that the parties had been involved in negotiating a document for over six months which was only at that point ready to be signed. That letter was inconsistent with an agreement having been reached and finalised on 13 February 2014.[74]

[186] We accept INPEX's submission that the contemporaneous documentary evidence, particularly that to which the trial judge expressly referred and

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71 R [127] – [130].

72 R [174] – [175].

73 R [201] – [204].

74 R [209] – [211].

relied upon, was cogent evidence which plainly supported the correctness of her Honour's conclusion that the alleged representations were not made.[75] Accordingly, both estoppel claims necessarily failed.

[187] Further, as counsel for INPEX added, our rejection of the two agreements issue (raised by ground 5) and the reasoning underlying that rejection, makes it clear that both parties were continuing to negotiate a single broader accommodation services provider agreement on the assumption that there was no binding agreement in place or that the parties were or would be bound by the alleged AAV.

[188] Grounds 10, 11 and 12 are not made out.

[189] To the extent that the misleading or deceptive conduct claim depends upon the same representations as those relied upon for the estoppel by representation claim (ASOC [58](e)), ground 13 must fail for the same reasons as ground 12. However, this ground was directed at the trial judge's conclusions at R [274].

[190] Her Honour had rejected Halikos' contentions that Mr Dignan and Mr Halikos had, subjectively, decided that they would only go ahead with the development of H105 if they got some kind of binding pre-commitment from INPEX, and found that even if they did have such a subjective intention, they did not communicate it to INPEX. Her Honour added that:

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75 See R [265] – [266] and [270].

> In the presentation that Mr Dignan and Mr Weeks made to Okawa san and Sakamoto san on 17 January 2014 they unequivocally stated that they were going ahead with the development. They made similar representations in other documents referred to above.

[191] Although Halikos challenged these findings in paragraph 43 of Schedule A their only submissions on appeal related to the trial judge's findings at [274] of the Reasons:

> Nor do I accept that INPEX made any representations by way of oral representations, correspondence or conduct that it would lease all of the rooms in H105 or that it considered itself bound by any agreement to take 225 or 150 rooms and apartments as set out in the Variation Document. I do not accept that INPEX personnel made the oral representations pleaded to the effect that INPEX would take H105 or was committed to H105, and Halikos cannot point to any written representations to that effect.

[192] As the trial judge pointed out at R [275] the meeting of 17 January 2014 formed a key plank in this claim too. We have discussed elsewhere her Honour's findings about what was said at that meeting, and also at other meetings at about that time, and found no error in her Honour's approach or conclusions. On the subject of the commitment issue see [142] above and [227], [240], [247] – [248], [266] – [269], [279], [283], [288], and [298] below.

[193] In our opinion no error in the trial judge's factual findings has been identified and grounds 11 to 13 must be dismissed.

GROUND 4

[194] Our rejection of ground 5 makes it unnecessary for us to give further detailed consideration to many of the challenges to the trial judge's findings

set out in Schedule A. However, we discuss some of the main challenges of possible relevance to the other grounds, primarily those relating to the authority issue and the commitment and reliance issues.

[195] Some of the findings challenged were based upon the trial judge's acceptance of some of the evidence from INPEX witnesses over that of Messrs Dignan and Weeks. Not a great deal turns on most of that evidence because there was extensive contemporaneous documentary evidence about the relevant events. However, her Honour was entitled to have doubts about the reliability of Mr Weeks' memory of relevant events, notwithstanding that he had made some contemporaneous notes, following his testimony about his email of 22 April 2013, and doubts about the reliability of Mr Dignan's evidence following his testimony about his letter of 6 December 2013. That evidence was very important because it goes to the critical issue as to what discussions, if any, were had about Halikos requiring a binding commitment from INPEX before proceeding with the construction of H105.

[196] Concerns might also follow from what Mr Kildare is alleged to have said particularly at the meetings with the Chief Minister in late March, and Mr Wheeldon's comment in his email of 21 July. However, even if those versions are construed in Halikos' favour, there would be no relevant difference to the final result.

Dealings in 2012-2013

[197] In order to better appreciate the background and consider many of the points raised in Schedule A it is appropriate to refer back to previous dealings between the parties. From about August 2012 Mr Dignan and/or Mr Weeks had dealings with various representatives of INPEX about the possible provision of accommodation for INPEX's employed and contracted personnel who would be engaged in the operation of the onshore and offshore facilities once construction was completed and operations had begun.[76]

[198] On 3 August 2012, a meeting took place between Mr Dignan and Mr Weeks, and Mr Walker, Mr Bajars and Mr Wheeldon.[77] On 8 October 2012, a further meeting took place between Mr Dignan and Mr Weeks, and Mr Bajars who provided the Halikos representatives with an INPEX document entitled 'General Requirements Operations Accommodation in Darwin'.[78] Further meetings took place in 2012 and 2013 mainly involving Mr Dignan and Mr Weeks on behalf of Halikos and Mr Wheeldon and Mr Davies on behalf of INPEX.

[199] The trial judge was confronted with significant volumes of evidence concerning discussions about Halikos providing such accommodation and

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76 Defence [5](b); Reply [5](c).

77 ASOC [14](a); Defence [19](a).

78 ASOC [14](b); Defence [19](a).

embarking upon what was sometimes referred to as "the Mitchell Street Project". There was a lot of conflicting evidence about who said what.

[200] Her Honour noted that "much of the dispute revolves around whether Halikos was put on notice that there would be a tender process for any accommodation contract for the operational phase of the Ichthys Project and also whether Halikos told INPEX that it would not be proceeding with the development of H105 unless it had a commitment from INPEX."[79]

[201] The trial judge said:

> [20] Mr Dignan and Mr Weeks depose that Mr Dignan told Mr Wheeldon (and Mr Davies) that Halikos wanted to build a hotel on 105 Mitchell Street, but that it needed a commitment from INPEX before doing so. Mr Wheeldon and Mr Davies deny this.
>
> [21] Mr Wheeldon and Mr Davies both say that in discussions in September or October 2013 they told Mr Dignan and Mr Weeks that any contract for accommodation for the operations phase of the Ichthys Project would be put out to tender, and also that Mr Dignan told them that Halikos was going to build a hotel at 105 Mitchell Street. Messrs Dignan and Weeks deny this.
>
> [22] I accept the evidence of Mr Wheeldon and Mr Davies that Halikos was told that any contract for accommodation for the operations phase would be put out to tender and that Mr Dignan told them that Halikos <u>was</u> going to build a hotel at 105 Mitchell Street and did <u>not</u> say that Halikos would only do so if it got a commitment from INPEX. Their evidence is consistent with the following documentary evidence that preceded and followed these discussions.
>
> (*emphasis added by the trial judge*)

[202] Her Honour's findings at R [22] and elsewhere about what Messrs Dignan and Weeks did and did not say about Halikos building the hotel at

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79 R [19].

105 Mitchell Street are important to the "commitment" issues, particularly the representation grounds. Her Honour referred to various written communications including:

(a) Mr Weeks's email to Mr Walker sent on 22 April 2013;[80]

(b) Mr Weeks's email to Mr Bajars sent on 9 May 2013;[81]

(c) Mr Weeks's letter to INPEX on 24 May 2013;[82]

(d) requests from Mr Weeks to Mr Wheeldon throughout 2013 and the early part of 2014, and Mr Wheeldon's responses;[83]

(e) Mr Weeks's email to Mr Wheeldon sent on 7 October 2013 and its attachments;[84]

(f) Mr Dignan's letter of 6 December 2013;[85] and

(g) the PowerPoint presentation on 10 January 2014.[86]

[203] On 22 April 2013, Mr Weeks sent an email to Mr Walker, in which Mr Weeks' said:

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80 R [23]; Defence [19](b); Reply [17](a)(i).

81 R [25].

82 R [26].

83 R [27].

84 R [28].

85 R [38].

86 R [42] – [45].

> Our Managing Director and myself are here in Perth and politely request to catch up with you tomorrow to discuss the Inpex Operations project ahead. Unfortunately Glen is away and we have some queries we would like to just touch base with as we are underway with the development of a new building.
>
> We [sic] going ahead with our build, however at the same time we want to make sure it meets the requirements in your tender as we are a little confused with the latest numbers. The build is around $60 Million and if the numbers of apartments required in the build are less – then this is vital information to planning and development, as well as reducing costs by $5 million. If the numbers you require are higher than our design then we could miss the opportunity to deliver what is required in the tender. If you could understand we don't want to waste any opportunity to find out later, after we commence, that it does not fit your needs.
>
> (*emphasis added by the trial judge*)

[204] The trial judge said:

> [24] Mr Weeks deposed that Mr Dignan told him at this time that Halikos was not going ahead with any build unless he had a contract with INPEX. In his affidavit, Mr Weeks explained away this email by saying: "I wrote that statement in order to put Halikos' best foot forward for the purposes of the discussions, including to try and bring matters to a head." [He did not explain what there was to "bring to a head" when the email refers to a contemplated tender process.]

[205] On 9 May 2013, Mr Weeks sent an email to Mr Bajars, in which Mr Weeks said:

> I trust your trip to the USA was pleasing, but as well tend to say it's good to be back home.
>
> I just wanted to follow up on the tender for your project when it will possibly available to review.
>
> I would also ask are you intending to visit Darwin soon so that we can catch up regarding numbers and other queries so we can establish we are on the right track with our development that is moving ahead.
>
> (*emphasis added by the trial judge*)

[206] By letter dated 14 May 2013, INPEX invited Halikos to participate in an expression of interest by which some parties would be short-listed as potential suppliers for approximately 20-30 x 2-bedroom apartments to accommodate 40-60 FIFO personnel to be engaged in the Project's operations phase.[87] On 24 May 2013, Mr Weeks responded by letter containing an "expression of interest" in providing accommodation services.[88] Mr Weeks received no reply to that letter.[89]

[207] The trial judge said:

> [27] Throughout 2013 and the early part of 2014, there were requests from Mr Weeks to Mr Wheeldon to be advised of "numbers" – referring to the number of people from INPEX, its head contractor JKC and sub-contractors who would need to be accommodated during particular periods of time. (The above are some examples.) When he responded, Mr Wheeldon said he was unable to provide numbers as he had not received them.

[208] On 7 October 2013 Mr Weeks sent an email to Mr Wheeldon attaching two draft agreements. In his email Mr Weeks said:[90]

> One document is as a stand-alone agreement and the 2nd is a variation agreement taken from the C2 Agreement which may make more sense. <u>It is based on a clause in that agreement if INPEX requests additional apartments</u>. They are Word format documents should you need to discuss tracking changes.
>
> (*emphasis added by the trial judge*)

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87 Defence [69]; Reply [53].

88 R [26]; Defence [5](b); Reply [5](c)(iii).

89 R [26].

90 The reference to the 'C2 Agreement' in that email was a reference to the original Accommodation Agreement.

[209] The trial judge said:

> [28] On 7 October 2013, Mr Weeks sent Mr Wheeldon two draft agreements for Halikos to provide accommodation for INPEX. Neither was the same as the pleaded Additional Accommodation Variation. Each was expressed to be for four years; each stated that Halikos agreed to provide 130 apartments for the rates set out, and that if INPEX required additional apartments Halikos would use its best endeavours to make the additional apartments available. Each was silent as to whether the obligation on INPEX would be to pay for the apartments whether or not they were occupied. The difference between the two was that one was expressed to be a variation of the original Accommodation Agreement and the other was a stand-alone agreement.
> …
>
> [29] Mr Weeks deposed that Mr Wheeldon "raised clause 3" – ie that it was Mr Wheeldon's suggestion to draft an agreement which was expressed to be a variation of the original Accommodation Agreement utilising clause 3 of that agreement (set out above). Mr Wheeldon denied that this idea came from him. The underlined words in the covering email from Mr Weeks suggest that the idea came from Mr Weeks. (Further, in an email dated 29 January 2014 to Mr Kildare and Mr Wheeldon, Mr Weeks explained why he said the use of a variation to the original contract would benefit INPEX.)

[210] Halikos did not receive a positive response (or indeed an acknowledgement) from INPEX to either of the two draft agreements.[91]

[211] In about October 2013, Mr Dignan and Mr Weeks enquired of Mr Wheeldon as to the current estimated future accommodation requirements for the Project and expressed interest in Halikos supplying accommodation to meet those requirements.[92] On 24 October 2013, Mr Wheeldon sent an email

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91 R [30].

92 Defence [20](c); Reply [18](a).

informing Mr Dignan and Mr Weeks, in effect, that he was the unable to provide an estimate of future accommodation requirements for the Project.[93]

[212] On 20 November 2013, Mr Dignan sent an email to Mr Wheeldon which contained the following:[94]

> I wanted to follow up if your people have come back to you with the updated numbers for INPEX's future apartment requirements at our 105 Mitchell Street project to share with me.
>
> Chris, if current numbers are still not available to you, could I suggest an option that we can both still move forward, whilst waiting for final numbers, that ensures Halikos meeting the completion date for occupancy. If you could send me an email requesting (what you thought were your original numbers) 126 apartments, I would be happy to respond confirming back to you that should those numbers reduce you could release back apartments without any commitment, and alternatively should your numbers increase that we would supply the extra apartments.
>
> *In essence, what I am proposing is that based on our good working relationship that we give each other a gentleman's agreement by email that assists both our businesses till the final numbers are known and we move to formal documentation* (emphasis added).

[213] Mr Wheeldon responded that he was in Perth packing up his house and would get back to him.[95] Mr Dignan's proposal was not followed up.[96]

[214] The trial judge also noted that in early 2014 the then Chief Minister of the Northern Territory, Mr Adam Giles, made representations to INPEX about the perceived negative effects the Ichthys Project was having on tourism in

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93 Defence [20](d); Reply [18](b).

94 R [30].

95 R [30].

96 R [30].

the Territory as a result of upward pressure on accommodation prices and that there had been publicity about this in the press.[97]

[215] In paragraph 1 of Schedule A Halikos challenges the trial judge's findings at R [22] that Mr Dignan told Messrs Wheeldon and Davies that Halikos was going to build a hotel at 105 Mitchell Street, and did not say that Halikos would only do so if it got a commitment from INPEX. Halikos asserted the trial judge failed to have any regard to:

1.3 Mr Weeks' oral evidence that he wrote his email of 22 April 2013 in order to put Halikos' best foot forward in order that Mr Walker (of INPEX) would meet with him;

1.4 Mr Weeks' oral evidence that the development moving ahead did not mean that Halikos was in the process of building anything; and

1.5 Mr Dignan's and Mr Halikos' evidence that Halikos does not undertake speculative developments and therefore requires an agreement, a pre-commitment, pre-sales or the like before starting.

[216] Paragraph 2 of Schedule A challenges the finding at R [27] that when Mr Wheeldon responded in respect of "numbers" he said he was unable to provide numbers because he had not received them.

97 R [31].

[217] Paragraph 3 challenges the trial judge's conclusion that the idea of utilising clause 3 of the original Accommodation Agreement came from Mr Weeks and not from Mr Wheeldon.

[218] In their written submissions counsel for Halikos referred to these paragraphs under the heading "Need for accommodation for the Project". They said:

> 60. It is not controversial that the parties' discussions in late 2013 and early 2014 occurred in the context of limited accommodation and high accommodation prices in Darwin. It is also not controversial that there were statements by the Government, including by the Chief Minister to INPEX, expressing concern about the Darwin accommodation situation. So much was noted by the trial judge at R [31], as well as in the evidence of the witnesses of both parties. …
>
> 61. Notwithstanding that, the trial judge found at R [27] that, throughout this period, Mr Wheeldon was unable to provide "numbers", referring to the amount of additional accommodation required by INPEX. However, in reaching that finding, her Honour failed to take into regard:
>
> > 61.1 that throughout this period, Mr Wheeldon conveyed to Mr Weeks that INPEX needed additional accommodation, and the issues concerned only the specific amount of extra accommodation required and the time from which that accommodation would be required …;
> >
> > 61.2 Mr Wheeldon's oral evidence that he probably discussed the number of 126 apartments, contained in Mr Dignan's email of 20 November 2013 … with Mr Dignan …; and
> >
> > 61.3 Mr Wheeldon's email correspondence by which he kept Messrs Dignan and Weeks updated as to the progress of finalising accommodation numbers, including by his email of 24 October 2013 ….[98]
>
> 62. It was in the context of INPEX requiring additional accommodation, and INPEX facing pressure from the Government to resolve the accommodation situation in Darwin, that Mr Wheeldon engaged in discussions with Mr Dignan and Mr Weeks about obtaining

98 At R [27] the trial judge made reference to requests from Mr Weeks to Mr Wheeldon for "*numbers*" throughout 2013 and the early part of 2014 and to Mr Wheeldon's responses, although it is not clear precisely what correspondence her Honour considered.

additional accommodation through Halikos. During those discussions, Mr Wheeldon raised the possibility that clause 3 in the original Accommodation Agreement could be used as a convenient mechanism for INPEX to secure its accommodation requirements without needing to go through a protracted tendering process. The trial judge found at R [29] that the suggestion of using clause 3 came from Mr Weeks and not Mr Wheeldon. That finding fails to have regard to:

> 62.1 Mr Wheeldon's oral evidence that he told Messrs Dignan and Weeks that clause 3 of the original Accommodation Agreement could be used to obtain additional accommodation …; and
>
> 62.2 the plain meaning of Mr Weeks' email of 7 October 2013 ….[99] Indeed, it was Mr Wheeldon who requested that Mr Weeks send him that email attaching the two versions of the draft agreement, including one based on clause 3, and who provided the number of 130 in those drafts ….

63. It was also in this context that Mr Dignan discussed with Mr Wheeldon the possibility of Halikos building accommodation at 105 Mitchell Street, Darwin, specifically for INPEX's purposes. Contrary to the findings at R [22], it was Mr Dignan's position throughout that Halikos would only undertake such a development if it received a commitment from INPEX. Specific instances of Mr Dignan making statements to this effect to INPEX representatives are set out below. As a general proposition, however, there was a large body of evidence from both Mr Dignan and Mr Halikos, to which the trial judge made no specific reference, that Halikos does not undertake speculative developments, but instead requires an agreement, a pre-commitment, pre-sales or the like before starting …

64. Moreover, the trial judge's reliance on the contents of Mr Weeks' email of 22 April 2013 (R [23]-[25]) overlooks Mr Weeks' evidence that he wrote that email to put Halikos' best foot forward to obtain a meeting with Mr Walker … and Mr Dignan's evidence that, merely because a proposed development was moving ahead that did not mean that Halikos was, in fact, building anything ….

[219] As is pointed out in the INPEX Schedule, the evidence referred to in paragraphs 1.3 to 1.5 was referred to in the Communications Schedule items 58, 58 and 87 respectively, in Halikos' Written Closing Submissions at

99 This email was considered, at least in part, by the trial judge at R [28].

paragraphs 33, 34, 43 and 370, and the evidence referred to in paragraph 1.5 was referred to in INPEX's Written Closing Submissions at paragraph 60. Indeed, Mr Weeks' email of 22 April 2013 was quoted by her Honour at [23] of the Reasons and discussed by her at [24] in support of the finding challenged.

[220] Moreover, in R [24] the trial judge quoted Mr Weeks' explanation referred to in [215] above. Clearly her Honour did refer to that explanation and rejected it, as do we.

[221] When it was put to counsel for Halikos during the hearing of the appeal that on Halikos' case Mr Weeks must have been telling a blatant lie to Mr Walker when saying that Halikos was proceeding with the building, counsel conceded that "it wasn't true". It was also put to counsel that the lie continued in the course of further communications through to December. Counsel responded by saying that "the statement in the critical presentation says that Halikos will not proceed without a commitment from INPEX." Presumably this is a reference to a "prompt commitment" in the Booklet presented at the 17 January meeting in Perth. If that is so, counsel's response is erroneous. See discussion in [279] below.

[222] This sheds considerable doubt on the reliability of Mr Weeks's testimony, not only about Halikos' intentions to proceed with the construction of H105 irrespective of any commitment by INPEX, but also his credibility as a witness.

[223] As counsel pointed out in the INPEX Schedule, and we accept, the trial judge adopted the required approach of making factual findings primarily by reference to contemporaneous materials, objectively established facts, and the apparent logic of events. We accept what is stated at [3] of the INPEX Schedule:

> The trial judge adopted this approach in the Reasons and properly had regard to the express terms of the documents that preceded and followed the September and October 2013 discussions (see, for example at R [23] – [33] and [66]), namely:
>
> (a) Mr Weeks' 22 April 2013 email to Mr Walker, which included the statements that 'we are underway with the development of a new building' and 'We [sic] going ahead with our build, however, at the same time we want to make sure it meets the requirements in your tender';
>
> (b) Mr Weeks' 9 May 2013 email to Mr Bajars, which included the statement 'so we can establish we are on the right track with our development that is moving ahead';
>
> (c) Mr Weeks' 24 May 2013 letter to Mr Taylor, which enclosed an expression of interest in which Mr Weeks referred to 'a further development the Halikos Group is undertaking, the Mitchell Street Apartments [that is, H105]';
>
> (d) Mr Weeks' 7 October 2013 email to Mr Wheeldon which enclosed two draft agreements, each of which was silent as to whether the obligation on INPEX would be to pay for the apartments whether or not they were occupied; and
>
> (e) Mr Dignan's 20 November 2013 email to Mr Wheeldon referring to Halikos' '105 Mitchell Street project' and that if Mr Wheeldon 'could send [Mr Dignan] an email requesting … 126 apartment', then Mr Dignan would 'respond confirming … that should those numbers reduce [INPEX] could release back apartments without any commitment'.

[224] We also accept the following further submission at [4] of the INPEX Schedule:

> The evidence referred to in particulars 1.3 – 1.5 relates to the intended meaning of Mr Weeks' 22 April 2013 email, and Mr Halikos and Mr Dignan's subjective views of Halikos' business practices. It is undocumented, subjective and not contemporaneous. Further, it is inconsistent with the contemporaneous objective evidence referred to above. Being subjective evidence of the witnesses' beliefs, it could not rationally affect the findings challenged, which concern the objective meaning of what was communicated between INPEX and Halikos.
>
> Accordingly, it lacks relevance to the findings challenged, and could not rationally affect the correctness of those findings.

[225] We reject Halikos' contention that the trial judge erred in making these findings.

[226] We do not regard the assertions in paragraphs 2 and 3 of Schedule A as material to any important issues in the case. What Mr Wheeldon said at various times about "numbers" is not particularly relevant. Nor is the question as to whether it was he who first suggested utilising clause 3 of the original Accommodation Agreement. By 13 February 2014 such a suggestion was not being seriously considered. As early as 7 February Mr Wheeldon had spoken to Mr Weeks about preparing a decision note. This is apparent from his statement to Mr Weeks referred to at R [82].

[227] We are satisfied that the trial judge's findings that Halikos did not inform INPEX it would not demolish its existing buildings and construct an apartment/hotel at 105 Mitchell Street unless INPEX provided a commitment of the kind asserted – i.e. "binding" and or "written" – were correct. Those findings were not demonstrated to be wrong by 'incontrovertible facts or uncontested testimony', or to be 'glaringly improbable' or 'contrary to compelling inferences'. The trial judge was

entitled to conclude that Halikos had not proven that important part of its case "to the reasonable satisfaction of the Court."

Lead up to the Perth meeting of 17 January 2014

6 December 2013 meeting and letter

[228] The trial judge said:

> [32] Towards the end of 2013, Mr Weeks, Mr Dignan and Mr Wheeldon had discussions about the prospect of Messrs Weeks and Dignan meeting Okawa san and Sakamoto san. Mr Wheeldon says that Messrs Weeks and Dignan asked to meet Okawa san. Messrs Weeks and Dignan both say that it was Mr Wheeldon's suggestion. It is of no real importance but, given that the initiative (indeed pressure) to "get things moving" had been coming from Halikos, I consider it likely that it was Messrs Weeks and Dignan who requested the meeting. This is also consistent with later correspondence referred to below.
>
> [33] On 6 December 2013, Mr Weeks, Mr Dignan and Mr Wheeldon met at Ducks Nuts. Again, the parties have different accounts of that meeting. Mr Wheeldon deposed that Mr Dignan asked him to provide him with an email confirming that INPEX needed additional rooms. Mr Wheeldon replied that he couldn't do that because the onshore construction unit of INPEX (his area of responsibility) did not need the rooms. He said he was still struggling to get numbers from the major contractor JKC. He told Mr Dignan that there was a process to be followed and that without JKC involvement there would be no need for rooms for the construction phase. He said that operations might be interested in the proposed development at 105 Mitchell Street. He also said that the project (ie the Ichthys Project, not necessarily INPEX) would always need rooms.
>
> [34] Mr Dignan gave a very different version of this meeting. He said that Mr Wheeldon asked him to put together a letter – to be sent to Perth that day – setting out Halikos' proposal regarding developing 105 Mitchell Street, and "to put in that letter a reference to the fact that Halikos was going to start the project" because it would "assist him internally". He also said that, at some stage during the meeting, when Mr Weeks was out of the room, he asked Mr Wheeldon "if the purpose built building for INPEX at 105 Mitchell Street was something that INPEX still wanted," and that Mr Wheeldon shook his hand and said, "Yes, we will definitely be taking it." He said that Mr Wheeldon told him to keep progressing with designing and planning the development at 105 Mitchell Street.

> [35] I consider that Mr Dignan's account of the meeting is highly improbable. It is not consistent with any of the objective evidence of communications between the parties before and after 6 December. No plausible reason has been suggested as to why Mr Dignan would ask Mr Wheeldon if INPEX still wanted the building. (He had not had a response to the draft agreements he had sent and Mr Wheeldon had still not given him information about projected numbers.) There is even less reason to suppose, given the state of play evident from the email correspondence, that Mr Wheeldon would respond to such a question by shaking Mr Dignan's hand and saying, "We'll definitely be taking it." Nor is there any plausible suggested reason why Mr Wheeldon would have "internal" reasons to want Mr Dignan to say Halikos was going to start the development – particularly if (as Mr Dignan deposed) Mr Dignan had told him that was not going to happen without a commitment from INPEX. It simply doesn't make sense and I find that it did not occur.
>
> [36] Mr Wheeldon's account of the conversation is consistent with the state of play revealed by the email correspondence. Halikos was pushing for an agreement with INPEX for the provision of additional accommodation, or failing that a non-binding "gentlemen's agreement" or, failing that, for a letter stating that INPEX would require 65 apartments (see [39] and [40] below). I find that Mr Dignan and Mr Weeks asked Mr Wheeldon to arrange a meeting with Okawa san.

[229] Shortly after the meeting, Mr Dignan sent an email to Mr Wheeldon (blind copied to Mr Weeks) attaching a letter. In his email, Mr Dignan wrote:

> Thanks for taking the time to meet this morning, I have drafted a letter regarding our conversation please find attached.
>
> Happy to chat about the proposal at any time.

[230] The letter was in the following terms:[100]

> Thank you for the meeting today, we appreciate your time in a very busy environment of the ICTHYSIS project.
>
> In our meeting we discussed the issues impacting on both our companies that being the negative press and at times criticism surrounding availability of accommodation in Darwin, now and into the

100 R [37]; ASOC [15](d), [35](d); Defence [20](f), [83](a); Reply [18](d).

future. It is in both our companies' best interests to provide a solution to this problem and turn this negative situation we currently find ourselves in to a positive outcome.

We respectfully request, and would appreciate, the opportunity to present to yourself and the Directors of the project a solution that we believe would be suitable all stakeholders.

To briefly outline our proposal, Halikos Hospitality Pty Ltd is the largest provider of accommodation in Darwin and therefore in the best position to get the balance correct between available accommodation to satisfy tourism and project or FIFO workers. We are about to commence construction of a dual hotel and apartment complex – 105 Mitchell Street which will consist of approximately 64 Hotel Suites and 68 2 Bedroom Apartments.

The benefits of this complex which would resolve the current negative press of accommodation are: [These are listed.]

From a public relations perspective we believe we can get the "buy in" from the crucial stakeholders such as Tourism, Government and the Local Community that the future for accommodation in Darwin CAN be solved to everyone's satisfaction and best interests.

Chris, we would like the opportunity to formally present to yourself and the Directors, by travelling to Perth for a joint meeting. Given this current situation is escalating we would be happy to present as early as next week.

We look forward to hearing back from your Directors on turning the corner on this current negative situation and delivering a solution for everyone.

Kind regards

Shane Dignan

Managing Director Halikos Pty Ltd

(*emphasis added by her Honour*)

[231] The trial judge said:

> [38] This letter is unambiguous. It communicated to INPEX that Halikos was about to start construction on 105 Mitchell Street and that Mr Dignan wanted a meeting with the Directors to put a proposal to INPEX; not that it would only construct H105 if it had a binding agreement with INPEX to rent 225 (or 150) rooms over 15 years – or indeed any kind of commitment or agreement from INPEX at all.

[232] Mr Wheeldon sent a copy of Mr Dignan's letter to INPEX personnel in Perth.[101] Mr Wheeldon responded to Mr Dignan's email and letter the same day:

> Geoff,
>
> The letter has already gone to the relevant persons in Perth top (sic) review and revert. If we get a positive response from that it may alleviate any other commitments so I would like to see what sort of response I get first to gauge the interest before I commit to 65 rooms.
>
> Cheers

[233] The trial judge said:

> [40] This response too is inconsistent with Mr Dignan's account of the 6 December meeting.[102]

[234] Paragraph 4 of Schedule A challenges the trial judge's findings at R [32], [35], [36], [38] and [40], again on the basis that the trial judge failed to have regard to particular evidence, mainly oral evidence of Messrs Wheeldon, Kildare and Dignan. In their written submissions counsel for Halikos provided transcript references to support their contentions in [4.7] apart from [4.7.6] (which was not further mentioned), [4.8], [4.9], [4.11] and [4.12]. No transcript reference was provided for [4.10] and the reference to the "Construction, Commissioning and Operations phases" was altered to "the Project".

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101 ASOC [35](d)]; Defence [83](a).

102 R [40].

[235] As is pointed out in the INPEX Schedule the evidence referred to in [4.7] to [4.9], [4.11] and [4.12] was referred to in the Communications Schedule, in Halikos' Written Closing Submissions and some of it was referred to in INPEX's Written Closing Submissions. There is no reason to suppose that the trial judge did not have regard to that evidence.

[236] INPEX also contended that some of the summaries of the evidence do not accurately or fairly reflect the effect of the evidence. This criticism was made of each of the seven assertions in [4.7]. Without conducting an unnecessary and exhaustive review we note that perusal of the materials suggests that some, perhaps most, of the INPEX's complaints are justified.

[237] INPEX's criticism about the accuracy of Halikos' summary of evidence is made good for the assertion in [4.7.1] that Mr Wheeldon gave evidence that he confirmed to Mr Weeks in about November 2013 that "INPEX needed additional apartments". In their written submissions Halikos referred to Mr Wheeldon's evidence at page 1452 of the transcript. Perusal of transcript pages 1451-2 shows Mr Wheeldon saying "no" when he was asked "whether on about 4 November 2013 [he was] having discussions with Mr Weeks over the provision of apartments in 105 Mitchell Street." He went on to agree that they did have many discussions about the need for apartments in Darwin. He answered "yes" to the next question: "Did you confirm to him at the time that you needed apartments; yes or no?" and then to the question: "And did you confirm to him at the time that you were still trying to determine the number of apartments that you needed?" When

further pressed concerning the "term – that is for how long you would need those apartments" he said: "Well, it would be – it would be determined by JKC and their manning numbers, not by myself." Hence the trial judge's comment at the end of R [33] that Mr Wheeldon "also said that the project (i.e. the Ichthys Project, not necessarily INPEX) would always need rooms."

[238] INPEX also identified contemporaneous documents which, coupled with the apparent logic of events, support the findings challenged.

[239] In any event, it is not apparent how the evidence referred to by Halikos in the particulars is relevant to, or could rationally affect the correctness of the findings challenged. It really does not matter who requested the meeting with Messrs Okawa and Sakamoto, who was asked to arrange the meeting and who suggested that Halikos write a letter outlining its proposals preparatory to having such a meeting.

[240] As the trial judge said, Mr Dignan's letter of 6 December 2013 was unambiguous. Indeed, the fact that the letter made no reference to seeking a binding or written commitment from INPEX, let alone qualifying the clear statement that: "We are about to commence construction …", justifiably raised concern about the reliability of Mr Dignan's evidence not only about what was said during the meeting of 6 December but also about the important issue as to whether he or anyone else told INPEX that Halikos required such a commitment before commencing construction. Such a

concern justifiably led to the trial judge being sceptical about other evidence of Mr Dignan.

Meeting on 10 January 2014

[241] On 10 January 2014, Mr Weeks and Mr Dignan met with Mr Wheeldon and Mr Kildare in the H Hotel Boardroom to enable Halikos to do a 'test run' PowerPoint presentation of the H105 project.[103] Mr Kildare and Mr Wheeldon made comments and suggestions at the meeting.[104] The parties are in disagreement as to some of what was said.

[242] The PowerPoint presentation included the following:

(a) The first slide was titled "Introduction". The first paragraph stated:

> The Halikos Group is <u>about to commence construction</u> of a dual hotel and residential complex at 105 Mitchell Street which will consist of mix of one and two bedroom suites. We believe this purpose built complex will provide INPEX with a plausible solution to an issue arising of late surrounding suitable accommodation in Darwin now and into the future.

(b) A slide titled "Overview of 105 Mitchell" began as follows:

> 105 Mitchell will be a purpose-built development dedicated to the Ichthys Project …

(c) The next slide, titled "Benefits" included the following points:

> The complex would be accommodation dedicated to the project. Naming rights of the complex will be made available to INPEX.

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103 R [41]; ASOC [15](e); Defence [21].

104 R [41].

…

The complex will also facilitate the "Construction / Commissioning / Operations requirements for accommodation now and beyond construction of the plant.

(d) The last slide, titled "Summary", included the following dot point:

105 Mitchell has a Development Approval to commence immediately and finance approval has been granted allowing us to meet your pending accommodation requirement in 2015 and beyond.

(emphasis added)

[243] The trial judge said:

[42] Mr Dignan deposed that they emphasised that H105 would be "a dedicated purpose built building for INPEX for the project". Mr Kildare agreed that Mr Weeks said the building would be "purpose built" – which he understood to mean for accommodating the construction, FIFO, business and corporate travelling market as opposed to tourists – but did not recall anything being said about "purpose built for INPEX".

- The second sentence on page 1 of the presentation reads: "We believe this purpose built complex will provide INPEX with a plausible solution to an issue arising of late surrounding suitable accommodation in Darwin now and into the future."
- Under the heading "Benefits" it states: "The complex would be accommodation dedicated to the project."

[43] Mr Dignan also deposed, "Whilst the first slide (headed "Introduction") suggested that Halikos was about to commence constructing 105 Mitchell, I clearly stated that Halikos would not start construction without a written commitment from INPEX." Mr Weeks gave evidence to the same effect: he used the words "written contract". I do not accept that evidence. It is at odds with the written material.

- The first page of the presentation begins with the sentence: "The Halikos Group is about to commence construction of a dual hotel and residential complex at 105 Mitchell Street which will consist of mix of one and two bedroom suites."
- The following dot point appears under the heading "Summary": "105 Mitchell has a Development Approval to

> commence immediately and finance approval has been granted allowing us to meet your pending accommodation requirement in 2015 and beyond."
>
> [44] Mr Dignan also deposed, "Chris Wheeldon said that we should, in the presentation, refer to using clause 3 of the Accommodation Agreement as a variation mechanism for the additional accommodation when we presented to INPEX's directors". I do not accept that evidence either. It is fairly clear from the email from Mr Weeks to Mr Wheeldon of 7 October 2013 enclosing the two draft agreements (referred to at [28] above) that the idea of a variation to the Accommodation Agreement purportedly pursuant to clause 3 of that agreement originated with Halikos.
>
> [45] Mr Kildare deposed that he asked about the state of readiness of the project and that Mr Dignan told them Halikos had all the approvals, the financing was all sorted, a construction schedule was ready, pre-commitments were being completed, that Halikos would commence demolition in early April 2014 after the wet season and that they would then start construction, which would take about 15 to 18 months. He deposed that neither Mr Dignan nor Mr Weeks said that construction was conditional upon INPEX making a commitment to take accommodation in H105. I accept that evidence: it is consistent with the general tenor of the written presentation.

[244] Paragraph 5 of Schedule A challenges the trial judge's findings at R [43] to [45], again on the basis that the trial judge failed to have regard to particular evidence and the "commercial logic and sense" of Mr Dignan's evidence about not proceeding to construct H105 without a written commitment. In their written submissions counsel for Halikos provided transcript references to support their contentions in [5.5] – [5.7]. Otherwise no further submissions were made concerning those contentions.

[245] As is pointed out in the INPEX Schedule the evidence referred to in [5.5] – [5.7] was referred to in the Communications Schedule, in Halikos' Written Closing Submissions and in INPEX's Written Closing Submissions. INPEX made extensive submissions about the [5.5] evidence and her Honour

discussed the "commitment" point at various parts of the Reasons.[105] There is no reason to suppose that the trial judge did not have regard to that evidence.

[246] INPEX also contended that Halikos incorrectly stated the effect of the evidence:

> 68. As to particular 5.5 …:
>
> (a) Mr Dignan's affidavit evidence was to the effect that he would not abandon the Top End Hotel business and a third party lease without first having a binding commitment from a client (not INPEX) to any development that was to occur on the site;
>
> (b) Mr Dignan's affidavit evidence was not to the effect described at particular 5.5, as it was evidence of Halikos' operations.
>
> 69. As to particular 5.6, Mr Kildare's oral evidence is not accurately described by Halikos. Mr Kildare's oral evidence was:
>
> Q. And there was discussion [at the 10 January 2014 meeting] about a variation, wasn't there?
>
> A. I recall the subject was briefly touched on.
>
> Q. And Mr Wheeldon spoke on that subject, didn't he?
>
> A. I recall he mentioned it.
>
> …
>
> Q. And didn't Mr Wheeldon speak about a variation in terms of the existing contract?
>
> A. I recall it was mentioned. I don't recall the detailed discussion about it.
>
> Q. He may have mentioned, I suggest, a clause in the existing contract that would permit a variation?
>
> A. I don't recall that sir.
>
> Q. And did not Mr Wheeldon say something to the effect that a variation was the way to go to avoid delays caused by tender?
>
> A. I don't recall that, sir.

105 See for example R [20], [22], [38], [43], [45], [63(a)] and [272] – [273].

That is not the same thing as Mr Kildare's oral evidence being that 'Mr Wheeldon discussed the use of a variation (i.e., clause 3)'. In fact, Mr Kildare expressly could not recall whether a particular clause in the Accommodation Agreement was referred to in the 10 January 2014 meeting.

71. Mr Wheeldon was asked whether he 'told Mr Dignan and Mr Weeks that clause 3 of the accommodation agreement could be used to obtain additional accommodation'. Mr Wheeldon responded 'From my understanding, within C2 and One30'. That is, he understood clause 3 only permitted INPEX and Halikos to increase the number of apartments under the Accommodation Agreement in the C2 and One30 buildings.

72. When then asked 'it might be your understanding, but you did never articulate that to them, did you?' Mr Wheeldon responded: 'There was no need to'. There was no further clarification of what Mr Wheeldon meant by his answers to those questions. It is far from clear that his evidence, by those answers, was 'that he told Messrs Dignan and Weeks that clause 3 of the original Accommodation Agreement could be used to obtain additional accommodation'. Mr Wheeldon then goes on in his oral evidence to disagree with the line of questioning that he suggested using clause 3 to vary the Accommodation Agreement as a means of securing further accommodation.

[247] INPEX also contended that the trial judge adopted a proper approach to fact-finding, and the findings are correct. We agree, at least with the trial judge's rejection of Halikos' assertions that they told anyone at INPEX that they would not proceed with the H105 project without a written commitment by INPEX to take accommodation in that building. Amongst other things her Honour was quite right to place considerable weight upon the PowerPoint presentation referred to at R [41] – [44].

[248] In [5.5] of Schedule A, Halikos contended that the trial judge failed to have any regard to the commercial logic and sense of Mr Dignan's evidence that he would not abandon the existing profitable business and leases over

105 Mitchell Street and take on a large loan facility and outlay substantial capital to build H105 without a written commitment. Similar contentions are made elsewhere in Schedule A, including [4.11], [4.12] and [6.7]. This topic was dealt with in the Communications Schedule and in the written closing submissions of both parties. There is no evidence to support this contention. The trial judge addressed the written commitment contention at many points in the Reasons, and rejected that contention particularly as it was not consistent with the objective contemporaneous evidence. Further, there was no evidence to suggest that the undertaking would be speculative or uncommercial at a time when, as the parties were well aware, there was a significant shortage of accommodation in the Darwin CBD.

[249] As to the clause 3 point, even if Mr Wheeldon had given the impression that clause 3 could be utilised for the purposes of Halikos providing additional accommodation for INPEX, it was clear before 13 February 2014 that a decision note would still have to be prepared as part of the normal INPEX approval process, even if the matter was to proceed by way of variation of the 2012 Accommodation Agreement.

[250] We do not consider that the trial judge erred in making the findings challenged in paragraph 5 of Schedule A.

The meeting in Perth on 17 January 2014

[251] On 17 January 2014 Mr Weeks and Mr Dignan met in Perth with Okawa san and Sakamoto san. Mr Wheeldon and Mr Kildare attended by videoconference from Darwin. Her Honour observed:

> [46] This is the meeting that both parties rely upon on the issue of whether Mr Kildare and Mr Wheeldon had ostensible authority to bind INPEX to the alleged Additional Accommodation Variation. This meeting is also crucial to the estoppel and misleading or deceptive conduct claims.

[252] As senior counsel for Halikos stressed during oral submissions, her Honour's findings about this meeting are foundational to her Reasons.

[253] Mr Weeks and Mr Dignan provided a bound booklet titled "Halikos Hospitality Pty Ltd Darwin Accommodation Proposal" (the **Booklet**) when they made their presentation at the meeting.[106]

[254] There was agreement on the pleadings that Mr Dignan and Mr Weeks said and their written presentation stated, in effect, that:[107]

(a) Halikos was about to commence construction of a new apartment building at Mitchell Street;

(b) Halikos had planning and finance approvals for that construction; and

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106 R [47].

107 Defence [22](a); Reply [19](a).

(c) Halikos proposed that the building be dedicated to meeting future accommodation needs of the Project and that INPEX commit to using all of the accommodation in that building for a definite period; and

(d) the Halikos Group would build the purpose built complex, H105, to provide INPEX with an accommodation solution, and provided detailed information about the proposed development.[108]

[255] However, there was considerable disagreement between the parties as to other things said during the meeting. The trial judge provided a detailed summary of the evidence from R [48] to [61]. Her Honour went on to reach the following conclusions:

> [62] I accept that the meeting happened generally as outlined in the evidence of the INPEX witnesses. Although the recollections of the witnesses differed in matters of detail; some remembered more detail than others; and some recalled details which others did not, those accounts are broadly similar.
>
> [63] I reject the following parts of the evidence of Mr Dignan and Mr Weeks.
>
> (a) I do not accept that Mr Dignan said that Halikos would not go ahead with the redevelopment of 105 Mitchell Street without a binding written agreement from INPEX (or anything to that effect).
>
> (b) I do not accept that either Mr Dignan or Mr Weeks proposed that INPEX enter into a four year lease of the 148 rooms in 105 Mitchell.
>
> (c) I do not accept that Mr Wheeldon said that he had already run the numbers and that INPEX needed the accommodation that Halikos was proposing, or that he said that INPEX needed every bit of accommodation it could get for the project.

108 ASOC [35](e); Defence [81](f).

(d) I do not accept that either Mr Kildare or Okawa san said anything to the effect of, "I am happy," "I agree with what is proposed," "This is what INPEX wants," or, "Halikos and INPEX should move forward on this basis."

(e) I do not accept that Okawa san said, "I want the 148 rooms in 105 Mitchell but also need more."

(f) I do not accept that Okawa san said anything to the effect that Mr Wheeldon or Mr Kildare should finalise how many more rooms were needed over and above the 148 in H105 and get back to Halikos.

(g) I do not accept that Okawa san said, "The agreement should be for longer than 4 years so it covers construction, Commissioning and Operations. It should be for 15 years," or anything to that effect.

(h) I do not accept that Okawa san said, "Chris, you are responsible for finalising the amount of accommodation we need. I then want you to finalise the agreement and get things moving," or anything to that effect.

[64] The statements attributed to Okawa san and Mr Wheeldon are inherently improbable particularly in light of other evidence to the effect that any agreement for accommodation for the operations phase would be put out to tender, and in light of the evidence about the quite complicated internal procedures for entry into contracts required by INPEX of which both Okawa san and Mr Wheeldon were well aware. The evidence I do not accept is also inconsistent with the written presentation and other objective documentary evidence both before and after the meeting.

[65] In the email correspondence before the meeting, Halikos was pressing Mr Wheeldon to provide numbers and Mr Wheeldon did not have them, and in an email on 6 December 2013 to Mr Weeks, Mr Wheeldon declined to commit to taking 65 rooms – or even to provide a letter stating that INPEX required that many.

[256] Her Honour then referred in some detail to the inconsistencies between the information contained in the presentation book and the evidence of Mr Dignan and Mr Weeks and went on to conclude:

[67] I consider it highly likely that the discussion at the 17 January meeting centred around the accommodation needs of the Ichthys Project (which included workers for the head contractor JKC and sub-

> contractors); and that Okawa san asked Mr Wheeldon to check the Project accommodation requirements (referring to INPEX, JKC and the subcontractors) and to begin negotiating a broader accommodation services agreement with Halikos, not limited to the provision of accommodation in a single building. Such a conclusion is supported by events that occurred after the meeting.

[257] Paragraph 6 of Schedule A challenges the trial judge's findings about this important meeting at R [62] to [64] and [67]. In their written submissions counsel for Halikos provided transcript references to support most of their contentions in paragraphs [6.1] – [6.17]. Counsel also made additional submissions pertaining to [6.7], [6.9], [6.15] and [6.16]. Otherwise no further submissions were made concerning those contentions.

[258] As is pointed out in the INPEX Schedule the evidence referred to in [6.6] to [6.9] and some of [6.10], was referred to in the Communications Schedule and all of it was referred to in Halikos' Written Closing Submissions. Moreover, some of the evidence, such as Mr Weeks' email of 18 January 2014 (cf [6.15]) and Mr Dignan's email of 29 January 2014 (cf [6.16]) was expressly referred to and indeed quoted in part and discussed by her Honour in the Reasons (cf R [68] – [73]). There is no reason to suppose that the trial judge did not have regard to all of the evidence concerning this important meeting.

[259] In the course of oral submissions senior counsel for Halikos challenged a large number of the trial judge's findings regarding what was and what was not said at this meeting. In particular counsel challenged her Honour's "foundational finding" at R [62] where her Honour accepted that the

meeting happened generally as outlined in the evidence of the INPEX witnesses.

[260] Counsel challenged the trial judge's findings at [57] that Mr Dignan denied the matters as her Honour set them out in [57](d), (g) and (k). Counsel also spent some time challenging her Honour's rejection of several parts of the evidence of Mr Dignan and Mr Weeks in R [63]. In this context counsel was critical of her Honour's reasoning and conclusions at R [64], [65], [66] and [68].

[261] Counsel for Halikos placed much emphasis upon her Honour's important finding at R [63(a)]. Her Honour said:

> I do not accept that Dignan said that Halikos would not go ahead with the redevelopment of 105 Mitchell Street without a binding written agreement from Inpex (or anything to that effect).

[262] Counsel said this is inconsistent with the evidence of Sakamoto san, referred to by her Honour at R [55]. Counsel took the Court to Sakamoto san's first affidavit and stressed the first sentence in [119], which says: "I do not recall exactly what I said, but I said words to the effect that two weeks was too short for INPEX to make a decision and provide an agreement." Counsel said her Honour did not refer to that. We reject this submission. Her Honour did refer to that sentence in R [55], albeit after she had referred to the second affidavit, and apart from the last four words "and provide an agreement".

[263] Halikos also contended that that statement (at [119] of Sakamoto san's first affidavit) corroborates the Halikos evidence that they were seeking a decision and commitment at that meeting. Counsel then took the Court to [23] of Sakamoto san's second affidavit where he said that what he had previously said in the passage from [119] quoted above was a mistake. He said: "I said words to the effect that two weeks was too short for Inpex to make a decision. I did not say an agreement. I did not know at the time of the 17 January 2014 meeting what Halikos wanted from Inpex." Counsel was critical of her Honour for not referring to this correction by Sakamoto san to what he had said in his first affidavit.

[264] We see no reason why her Honour should have expressly referred to this particular correction made by Sakamoto san. Her Honour noted that he had acknowledged another, more relevant, mistake in [117] of his first affidavit. In [22] of his second affidavit he said:

> In paragraph 117 of my First Affidavit I said that Geoff Weeks or Shane Dignan said words to the effect they wanted an endorsement from INPEX for the proposal in time for the demolition of the building on 31 January 2014. This is a mistake. I cannot recall exact words used, but Geoff Weeks or Shane Dignan said words to the effect that they wanted something from INPEX for the proposal by then. I did not understand at the time of the 17 January 2014 meeting what they wanted.

[265] In our opinion this was the more relevant part of his evidence. We do not consider her Honour's failure to note the removal of the words "and provide an agreement" material.

[266] More importantly, even if her Honour had accepted Sakamoto san's initial evidence that Mr Weeks or Mr Dignan said words to the effect that Halikos "wanted endorsement from Inpex for the proposal by then", or that there was a reference to INPEX providing "an agreement", that would not be inconsistent with her Honour's refusal to accept that Mr Dignan said that Halikos "would not go ahead with the redevelopment" "without" a "binding" "written" agreement from INPEX. There is a big difference between the word "endorsement" and the words "binding" or "written" agreement.

[267] Counsel for Halikos also took the Court to parts of the cross examination of Sakamoto san. Sakamoto san said he did not recall whether or not at the meeting he used the words "provide an agreement" in the context of what INPEX could do within the next two weeks. He said he could have used words like "commitment", "agreement" or any kind of "support". Again, we do not see how this can be said to be evidence inconsistent with her Honour's rejection of Mr Dignan's evidence about this matter, namely that: "Halikos would not go ahead with the redevelopment of 105 Mitchell Street without a binding written agreement from Inpex."

[268] Counsel for Halikos then took the Court to Sakamoto san's email to Mr Wheeldon on 18 February. Counsel drew our attention to the sentence: "The difficult side of the proposal for us is making such a commitment, especially in the short time" and a later sentence: "Also, their request is based on single source procurement using existing contract." Counsel said

that this was a reference to working under clause 3 of the original Accommodation Agreement of 2012 (which related to the provision of 40 apartments over a period of five years).

[269] Counsel for Halikos then took the Court to the Summary at p 38 of the Booklet where there is reference to "a prompt commitment [that] would allow construction to commence" and to the reference at p 33 to "demolition of existing building" on 31 January 2014. Counsel contended that Sakamoto san's reference to two weeks being too short for INPEX to make a commitment was a reference to the two weeks between the date of the meeting and the date when the existing building was to be demolished. While there is some confusion about Sakamoto san's answers about these questions, even if he was referring to that two week period, we do not consider that advances Halikos' criticism of her Honour's important finding at R [63](a).

[270] Halikos then challenged R [63](c) where her Honour rejected Mr Dignan's evidence that "Mr Wheeldon said that he had already run the numbers and that INPEX needed the accommodation that Halikos was proposing, or that he said that INPEX needed every bit of accommodation it could get for the project."

[271] Counsel for Halikos pointed out that Mr Kildare said that: "Wheeldon said that further accommodation was needed because the workforce was going to increase" in response to something Sakamoto san had said. Mr Wheeldon

also said that he had "run the numbers and that he needed additional accommodation". Also, in his evidence, Mr Wheeldon accepted that he said: "Inpex needs every bit of accommodation it can get for the project."

[272] We agree that her Honour's rejection of that evidence on the part of Mr Dignan or Mr Weeks appears inconsistent with the evidence of Mr Kildare and Mr Wheeldon himself. It may be that her Honour's inclusion of the word "already" was intended to convey her understanding that Mr Wheeldon was said to have stated that he had completed his enquiries and estimates as to the number of units likely to be required. In any event, if it be an error, we do not see that as an important or relevant error on her Honour's part.

[273] Halikos then challenged R [63](e) where her Honour did not accept that Okawa san said, "I want the 148 rooms in 105 Mitchell but also need more." Counsel took the Court to a reference to "148 additional Apartments and Hotel suites" at H105 on the second page of a document (a draft "Variation Document") which was 1 of 2 documents attached to an email from Mr Weeks dated 18 January 2014 sent to a number of people including Okawa san headed "105 Mitchell Street Proposal." We fail to see how that can be evidence of Okawa san having said the words alleged.

[274] Halikos then challenged her Honour's findings at R [63](f) and (h) with reference to things allegedly said by Okawa san to Mr Wheeldon or Mr Kildare that they should "finalise" how many rooms were needed over

and above the 148 in H105, and that Mr Wheeldon should "finalise the agreement and get things moving".

[275] Counsel for Halikos directed the Court to Mr Wheeldon's evidence where he accepted the proposition that Okawa san said: "Chris and Sean, you are to finalise the amount of additional accommodation needed as soon as possible." Counsel also referred to Mr Kildare's evidence at page 1606 of the transcript. There occurred the following exchange:

> Q. Mr Okawa asked Mr Wheeldon to find out how much more accommodation was needed over and above that which would be available in the new building, didn't he?
>
> A. He asked Mr Wheeldon to follow up from the meeting with a justification as to why he thought we would need more accommodation.
>
> Q. He asked him to finalise how much more accommodation would be needed, didn't he?
>
> A. I don't recall the word 'finalised' being used, sir.
>
> Q Something to that effect, though, didn't he?
>
> A Words to that effect, sir, yes.

[276] Although he accepted there may not be an exact correspondence between that evidence of Mr Wheeldon and that of Mr Kildare, senior counsel for Halikos contended that "when they're close in the same field, you can't ignore the evidence."

[277] Again, the question for this Court is what difference would it make to a relevant inference even if Okawa san had said the words referred to in R [63](f) and (h)?

[278] Senior counsel for Halikos then referred to R [66]. He said:

> But can I now then pick up at reasons 66, where her Honour suggested that Mr Dignan's letter of 6 December, which I've taken the Court to, and the booklet, were not consistent with the evidence of Messrs Dignan and Weeks, and she cites five propositions or matters from subparagraphs (a) to (f) … that bear upon two propositions: the first being that the Halikos Group was about to commence construction; and the second being that references to the project – there were references to the project, rather than to Inpex.

[279] Counsel for Halikos then took us to the Booklet (referred to in [253] above) and referred to the "two propositions." As to the first proposition counsel referred to the underlined words in the Summary of the Booklet: "A prompt commitment would allow construction to commence and accommodation deadlines to be met." Counsel contended that Halikos was saying that "we can proceed straight away if we get a prompt commitment." Presumably this is the sentence to which senior counsel was referring earlier when he said that "the statement in the critical presentation says that Halikos will not proceed without a commitment from INPEX." We reject counsel's contentions about the meaning and effect of those words. They do not suggest anything like that asserted by counsel, either in the course of oral submissions, or in the various challenges in Schedule A, namely that Halikos would not proceed with the construction of the building at 105 Mitchell Street without a binding or written commitment from INPEX of some kind.

[280] The second proposition concerns the views expressed by the trial judge at R [67] to the effect that it is highly likely that "the discussion … centred around the accommodation needs of the Ichthys Project" (cf Schedule A

[6.4]) and the negotiation of "a broader accommodation services agreement with Halikos, not limited to the provision of accommodation in a single building" (cf Schedule A [6.5]). We see no reason to disagree with those views. Indeed, there were frequent references in the Booklet to the Project and its accommodation needs. Obviously a major part of the discussion involved H105 and the effect that its availability would have on the overall needs of others, particularly others involved in the Ichthys Project. Counsel agreed that the trial judge's views about this do not exclude the possibility that the discussion also involved specific accommodation in H105.

[281] There are detailed responses to the numerous assertions about this topic in the INPEX Schedule. Apart from the matters raised during the oral submissions, there seems to be no challenge by Halikos to those responses. As is the case in respect of all the evidence referred to in Schedule A there is no reason to suppose that the trial judge did not have regard to it, even if she did not expressly refer to it.

[282] INPEX contended that some of Halikos' summaries of the evidence do not accurately or fairly reflect the effect of the evidence. This criticism was made of assertions in [6.7] (re the presentation), [6.10] (re Mr Wheeldon's evidence), [6.11] (re Mr Kildare's evidence), [6.12] and [6.8] (re Sakamoto san's evidence). Counsel for INPEX identified and provided detailed transcript references in support of its contentions, very little of which was challenged by Halikos.

[283] With regards to [6.7] INPEX said (at [86]), and we accept:

> The presentation document states that 'A prompt commitment would allow construction to commence and accommodation deadlines to be met'. It did not *require* a 'prompt commitment' from INPEX to allow that to occur and did not specify the nature of that commitment. Properly stated, the wording of the presentation document does not support the finding that Halikos would not have gone ahead with the development of H105 without a commitment.

[284] INPEX also contended that Mr Wheeldon's oral evidence is not accurately referred to in particulars [6.10.2], [6.10.3], [6.10.5], [6.10.6], [6.10.7] or [6.10.8]. For example, as to [6.10.2], INPEX points out that Mr Wheeldon was referring to things that Mr Kildare had said at the meeting, not things that he (Mr Wheeldon) said. There are other examples where it was the cross examiner who used the particular words quoted – for example "this is going to be great for INPEX" – but the witness did not give a clearly affirmative or unqualified answer.

[285] Further, as to [6.10.2], INPEX contended that evidence is not relevant to the challenged findings – at most it is evidence that Mr Kildare held views about Halikos' or Mr Halikos' ability to assist INPEX in Darwin. We accept that submission. That evidence is not relevant to the findings about what was discussed at the 17 January 2014 meeting or INPEX's willingness to enter into an agreement with Halikos of the kind alleged within such a short time.

[286] The same applies to many of the other findings challenged by Halikos. Even if a number of the findings challenged by Halikos were erroneous,

such error is of no relevance to the issues for which this meeting is important, primarily the authority issue, and also, perhaps, the reliance on a binding commitment issue.

[287] INPEX also contended that Mr Kildare's oral evidence is not accurately recorded in particulars [6.11.2] and [6.11.3]. Although a small point, Mr Weeks' email of 18 January 2014 refers to a discussion of "our proposal" to use clause 3 of the 2012 Accommodation Agreement, rather than such a proposal emanating from an INPEX participant. In any event none of these matters, even if the trial judge failed to expressly refer to them, are such as would be likely to have warranted different findings to those challenged.

[288] Halikos was also critical of the trial judge's failure to expressly refer to and take into account the evidence of Sakamoto san, when he used or acceded to the use of the term "commit" or "commitment".[109] As we have already said there was considerable vagueness about the precise meaning and context of those words. Sakamoto san's evidence about two weeks being "too short to provide commitment, agreement, or any kind of support" was ambiguous and could not be said to render the trial judge's findings wrong.

[289] Halikos also relied on a number of things said and done after the Perth meeting as supporting their contentions as to what was said and agreed at that important meeting. They contended that her Honour failed to have

109 Schedule A [6.8] and [6.10.1].

regard to "the content of the entirety of Mr Weeks's email of 18 January 2014" ([6.15]), "the content and context of Mr Dignan's email of 29 January 2014" ([6.16]), "correspondence on 26 February 2014 between Mr Okawa and his personal assistant" ([6.9]) and "Mr Weeks's contemporaneous handwritten notes (unchallenged) of a meeting with Mr Okawa on 21 March 2014" ([6.17]).

[290] On 18 January 2014 (the day after the meeting), Mr Weeks sent an email, with two documents attached, to Okawa san, Sakamoto san, Mr Dignan, Mr Kildare and Mr Wheeldon. The email stated:

> In our meeting on Friday morning 17 December [sic] 2014, we discussed our proposal to INPEX can be dealt with under the existing accommodation contract 800575 between Halikos and INPEX. The intention of the clause is to deal with the matter should INPEX sometime in the future require additional apartments. Please find attached the relevant document for your perusal and review:
>
> 1. Accommodation Contract 800575 – C2 Esplanade with the relevant clause that allows for INPEX to call on additional apartments. (Please refer to page 3, Clause 3)
>
> 2. Variation Document. Halikos Hospitality has had a document drawn up by its lawyers to include the additional apartments requirements under the existing contract 800575. …
>
> As advised in our meeting, INPEX, in giving considering [sic] to our proposal, would undertake a further review of the forward manning levels and *future accommodation requirements across the whole project*. I respectfully ask at the same time, the attached documents are reviewed and respond back to meet with any notes or commentary regarding the Variation Document being acceptable. (emphasis added)

[291] The trial judge quoted the first sentence of the final paragraph and said:

> [69] This contradicts the assertion by Mr Dignan that Okawa san did not request Mr Wheeldon to obtain such numbers and that Mr Wheeldon said he had already run the numbers. It also supports the

> evidence of the INPEX witnesses that what was being discussed at the meeting was the accommodation requirements for the Ichthys Project as a whole. Further, it demonstrates an understanding by Mr Weeks that INPEX was to complete its review of the Project's accommodation requirements in Darwin before it would commit to any binding agreement with Halikos. This review was not complete by 13 January (sic)[110] 2014.
>
> [70] The draft variation agreement enclosed with that email was a proposal for Halikos to provide to INPEX 148 rooms in 105 Mitchell for four years (with provision for a number of two year extensions at INPEX's option). Halikos received no response from INPEX to this proposal.

[292] Contrary to Halikos' assertion in [6.15] of Schedule A, it is clear that her Honour did have regard to Mr Weeks' email of 18 January 2014. Halikos has not endeavoured to explain how else her Honour should have had regard to it. During oral submissions before this Court counsel agreed that at most, the email shows that Halikos was seeking to enter into an agreement with INPEX along the lines of that referred to in the email.

[293] Moreover, notwithstanding extensive challenges to her Honour's findings Halikos did not challenge the findings in the last two sentences of R [69], namely that the email "demonstrates an understanding by Mr Weeks that INPEX was to complete its review of the Project's accommodation requirements in Darwin before it would commit to any binding agreement with Halikos" and that: "This review was not complete by 13 January (sic) 2014."

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110 On a number of occasions the trial judge incorrectly referred to the 13 February 2014 meeting as the 13 January 2014 meeting.

[294] Similarly, contrary to Halikos' assertion in [6.16] of Schedule A it is clear that the trial judge did have regard to Mr Dignan's email of 29 January 2014. See R [72] to R [73] quoted and referred to in [309] to [311] below. Again, Halikos has not endeavoured to explain how else her Honour should have had regard to that email.

[295] The emails of 26 February 2014, referred to in [6.9] of Schedule A, between Okawa san and his personal assistant related to an article in the Northern Territory News entitled "First look at new luxury tower" published that day. Amongst other things the article announced the imminent construction of "Halikos Hospitality's 18 story luxury apartments" and quoted Mr Weeks saying that: "the hotel would put an extra 180 rooms on to the market, alleviating the pressure on existing CBD hotels and increase their ability to service the tourism and business events market"; "the complex would only be available to Ichthys subcontractors and other major projects contractors in Darwin" and that "D (sic) 105 would incorporate the iconic Lizard's Bar and Grill." It also stated that "Inpex NT general manager Sean Kildare welcomed the project" and quoted him as saying: "INPEX welcomes developments such as this that increase Darwin's available capacity and provide quality accommodation for the corporate and business travelling market."

[296] Using the subject heading "Re: Accommodation in Darwin: HALIKOS" Anri Kitaguchi wrote in her email to Okawa san:

Mr Okawa,

Wow.

After all, this has got permission!

- The NT News is today running with an artist's impression of Halikos Hospitality's 18-story luxury apartments to be built on Mitchell St in Darwin. The complex will only be available to Ichthys subcontractors and other major projects contractors, according to the Halikos spokesperson. INPEX Darwin GM Sean Kildare welcomed the project.

I recall they told us to respond by the end of January?

Now we can get rid of the disrespectful Hilton Darwin.

Anri

[297] Okawa san replied:

INPEX is not committed to anything.

It is necessary to confirm the facts.

Okawa

[298] We accept INPEX's response that the correspondence between Okawa san and his personal assistant does not reveal 'that there was a discussion within INPEX that Halikos sought a commitment from INPEX' at the 17 January 2014 meeting. Rather, it suggests that Okawa san's personal assistant – who did not attend the 17 January 2014 meeting – was aware of Halikos' proposal to build H105, and had drawn the conclusion that INPEX would use H105 instead of other accommodation. Okawa san's express response that INPEX was 'not committed to anything' is consistent with the findings made by the trial judge. In any event, the views of Okawa san's personal assistant at the end of February 2014 cannot rationally affect whether Halikos sought a commitment at the 17 January 2014 meeting.

[299] In [6.17] of Schedule A, Halikos contended that the trial judge failed to have any, or any sufficient, regard to "Mr Weeks's contemporaneous handwritten notes (unchallenged) of a meeting with Mr Okawa on 21 March 2014, which include "*HO thanked us and spoke that this was what INPEX wanted and direction [sic] when we met in January. Longer – broader – construction – oper.*" Counsel for INPEX said that Mr Weeks' notes were challenged during cross examination as to whether they were a contemporaneous record of the meeting held on that day. Moreover, Mr Weeks' notes of the 21 March 2014 meeting were of little, if any, relevance to what was actually said during the 17 January 2014 meeting. We accept these submissions. As Counsel for INPEX stated:

> 129. What that note actually means is unclear. It is not apparent what previous information the word 'this' in the first line refers to, and, critically, it is consistent with INPEX showing interest in a broader accommodation services agreement. It is not clear what it is that INPEX wanted, or what the 'direction' is that the notes refer to. Nor do the notes state precisely that they refer to the 17 January 2014 meeting. The final line could be interpreted in any number of ways, and that too is consistent with INPEX showing interest only in a broader accommodation services agreement.

[300] For all of the findings challenged in paragraph 6 of Schedule A, INPEX contended that, and we accept, the trial judge adopted the proper approach to fact-finding, and the findings are not incorrect. As INPEX submitted the trial judge properly had regard to: the 17 January 2014 presentation (see R [64]); Mr Wheeldon's 6 December 2013 email (see R [65]); Mr Weeks' 18 January 2014 email (see R [68]); Mr Dignan's 29 January 2014 email (see R [72]); Mr Weeks' 29 January 2014 email (see R [74]); Mr Kildare's

31 January 2014 email (see R [75] – [76]); and 'the other objective documentary evidence both before and after the meeting' (see R [64]). Immediately after the paragraphs of the Reasons in which the trial judge made the findings challenged by Halikos, her Honour went on to compare the accounts of Halikos' witnesses to the contemporaneous objective evidence.

[301] Moreover we accept INPEX's submissions that the challenged findings do not affect the result.

Conclusions concerning the Perth meeting

[302] Halikos has relied on the 17 January 2014 meeting in Perth as the basis for their contentions:

(a) about the ostensible authority of Messrs Kildare and Wheeldon and (possibly) Davies to reach and bind INPEX to the agreement said to have been made on 13 February 2014; and

(b) to prove that Halikos informed INPEX that it would not construct H105 unless it had a binding or written commitment from INPEX to occupy and pay rent for a minimum number of rooms over the next 15 years.

[303] In the process of challenging the trial judge's findings on these two issues, Halikos embarked upon the lengthy process of asserting numerous failures on the part of her Honour to refer to substantial parts of the evidence in the course of her Reasons. With the assistance of INPEX's detailed analysis of

Halikos' allegations we consider that the complaints are not made out, or to the extent that they may have some merit, they are not such as to warrant interference with the trial judge's findings.

[304] Moreover, even if the Halikos' evidence had been accepted as to what was said at the Perth meeting, it does not follow that the trial judge should have reached a conclusion in Halikos' favour on either of these issues. None of the words or actions said to have emanated from either or both of the directors of INPEX during, or for that matter before or after, the 17 January 2014 meeting can reasonably be construed, either by Halikos or by a Court, as establishing on the balance of probabilities that INPEX authorised Mr Kildare, Mr Wheeldon or Mr Davies to commit INPEX to a binding contract of this magnitude.

[305] At best the purpose, content and outcome of the meeting was for Halikos to present its proposal to senior members of INPEX in the hope that INPEX would enter into a legal agreement of the kind alleged. At that stage there were a number of significant matters yet to be considered. These included rather basic matters such as whether there should be an agreement for four years (as asserted by Mr Dignan[111]) or 15 years[112], whether there should be a broader accommodation provider agreement[113], to what extent any agreement should accommodate persons additional to those employed by INPEX, and

111 R [58(d)].

112 See for example R [59].

113 Cf R [60].

whether INPEX's needs could be met by using clause 3 of the Accommodation Agreement instead of the normal decision note approvals process for a contract of this magnitude.

[306] Her Honour's findings have not been demonstrated to be wrong. Rather, the findings are, in our opinion, supported by the evidence and compelling.

Communications between 28 January and 13 February 2014

[307] We have already referred to some of these communications in the context of the two agreements issue, ground 5.[114]

[308] At the meeting on 29 January 2014, Mr Dignan and Mr Weeks confirmed that the Halikos companies would commence construction of H105.[115] Also, Mr Kildare and/or Mr Wheeldon said, in effect, that JKC was forecasting increased manning levels for completion of construction for which additional construction worker accommodation would be required, but details of any such additional requirements were not yet clear.[116] The trial judge said:

> [71] Mr Weeks also deposed that when he met with Mr Kildare on 28 January 2014, the majority of the time was spent discussing services that Mr Kildare wanted included in the agreement (for example catering services and airport transfers) which supports the evidence of the INPEX witnesses that the brief given to Mr Wheeldon, with Mr Kildare's assistance, was to negotiate the terms of a broader accommodation services agreement.

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114 See [68] to [104] above.

115 ASOC [35](h); Defence [81](h).

116 Defence [24](b)(ii); Reply [20](b)(ii).

[309] Her Honour then referred to Mr Dignan's email sent to Mr Wheeldon and Mr Kildare shortly after the meeting.[117] It said:

> A very productive meeting this morning to address project accommodation requirements long term. The basis of our discussions was to seek a mutually agreed variation that benefits both INPEX and Halikos moving forward:
>
> 1. INPEX and Halikos agree in principle to move to an Accommodation Services Provider Agreement which can be as an extension/variation of existing contract 800575.
>
> 2. Halikos confirmed they would immediately commence construction of 105 Mitchell Street Apartments & Hotel, of which all rooms will be dedicated solely to project accommodation requirements.
>
> 3. The term for this agreement be a minimum of 5 years but preferred to a period of 15 years plus options.
>
> (*emphasis added by the trial judge*)

[310] In addition to the parts of the email quoted by her Honour, the email continued as follows:

> The requirements and duties raised by both parties essential to be incorporated in the preparation of documents process were:
>
> a) An experienced Operator with ability to provide inventory to manage accommodation services on behalf of INPEX and project contractors.
>
> b) JKC and subcontractors to be instructed external accommodation requirements outside the village will be supplied by Halikos.
>
> c) The term to be up to 15 years is preferred to cover construction, commissioning and operational phrases.
>
> d) Additional services will be required such as airport transfers and inductions.
>
> e) Halikos Hospitality to provide properties with both apartments and hotel style accommodation.
>
> f) Existing terms and conditions remain as per contract 800575.

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117 ASOC [15](g); Defence [23](a), [25]; Reply [21].

g) …

Sean, could I please ask you confirm back to me your agreement, in principle, of our discussions regarding items 1 to 3, and that I have captured all the key elements that were discussed in items (a) to (j).

I look forward to your reply to achieve the outcomes we see beneficial to both INPEX and Halikos.

[311] The trial judge said:

> [73] This [email] is not consistent with Mr Dignan's evidence that he told Okawa san and the others at the 17 January meeting that Halikos would not begin construction of 105 Mitchell without a binding written agreement from INPEX. It is consistent with the evidence of the INPEX witnesses that what was discussed at the meeting was accommodation requirements for the Ichthys Project as distinct from a lease of rooms in a specific building to INPEX.

[312] Mr Weeks also sent an email on 29 January 2014 to Mr Kildare, Mr Wheeldon and Mr Dignan. He wrote:[118]

> Please find below a snapshot of the existing agreement outlining the key elements supporting a variation that benefits INPEX and its sub-contractors by appointing Halikos Hospitality as its Accommodation Services Provider.
>
> (*emphasis added by the trial judge*)

[313] The trial judge said:

> [75] Again, this supports the evidence of the INPEX witnesses that what was discussed at the 17 January 2014 meeting was the negotiation of an accommodation services agreement, as does the reply from Mr Kildare dated 31 January 2014.[119]

118 R [74].

119 R [75] and R [76].

[314] Mr Kildare's email[120] included the following:

> Thank you for your time to further discuss the Halikos accommodation proposal and with Chris and Geoff's assistance, I think we have laid of a suitable way forward for both parties to work with over the coming months.
>
> Also, I note your summary of the key points of the discussion, set out below and agree that they capture the principle objectives and shared view of the way forward.
>
> The principle of re-negotiating and agreeing a more robust, longer-term and broader accommodation services contract, that meets the long term needs of our construction phase and the on-coming operations phase, is much more suitable to both party's needs.
>
> This should allay the need for INPEX and Halikos to discuss specific accommodation allocation on a 'per-building' basis, which does not represent the bigger picture for both parties.
>
> I have discussed this new approach with my Director and he is now aware of the next steps to be taken and agrees it is far more suitable for our needs. Though, he did state, and I do agree, that our future needs (while expected), are not clearly defined at this time. That is a work currently in progress and Chris Wheeldon will bring that [sic] details to the table.
>
> Further into the future, INPEX's Operations accommodation needs will also clarify as we move closer to operational start-up in late 2016.
>
> The next tasks to be undertaken are:
>
> 1. Chris Wheeldon to determine numbers and timing of ex-village accommodation requirements in the Darwin area. This will include INPEX, EPCs and their sub-contractors (as best as can be determined).
>
> 2. The current accommodation services contract (noted below) is held with Chris Wheeldon. Chris will take the lead to negotiate a broader, longer term contract and propose that for execution.
>
> 3. We welcome the assurances from Halikos that the pricing and priority terms and conditions agreed win the current contract will form the basis of the new one.
>
> …
>
> I support and look forward to successfully reaching a contractual agreement that meets the needs of both parties and remain ready to assist if required.

120 ASOC [15](g); Defence [23](a), [25]; Reply [21].

(*emphasis added by the trial judge*)

[315] The trial judge went on to state that that email supports the evidence of the INPEX witnesses that at the meeting of 17 January 2014:

> (a) the idea of a broader accommodation services agreement was favoured over an arrangement relating to a single building;
>
> (b) the discussions concerned the accommodation needs of the Ichthys Project as a whole;
>
> (c) the future accommodation needs were not yet known and would have to be assessed;
>
> (d) Chris Wheeldon was asked to assess those needs and also to negotiate a broader accommodation services agreement with Halikos.

[316] Her Honour said that this evidence:

> [76] … conflicts with the evidence of Mr Dignan that these things were not discussed; that Mr Wheeldon said he had already run the numbers; that Okawa san had approved INPEX taking all of the rooms in H105 and wanted more; and that Mr Wheeldon had been instructed to find out how many more rooms were needed and finalise an agreement with Halikos to provide them.

[317] We see no reason to disagree with her Honour's conclusions drawn as they were largely from these email exchanges very soon after the meeting of 29 January 2014.

[318] Nor do we discern any appellable error in the view which her Honour then expressed at R [77]:

> [77] Given the general consistency of the evidence of Mr Wheeldon and Mr Kildare with the objective documentary evidence, and the relative inconsistency of the evidence of Mr Dignan and Mr Weeks with that objective evidence, where there is no such objective evidence of what occurred and there is a conflict between the evidence of Mr Kildare and/or Mr Wheeldon and that of Mr Dignan and/or

Mr Weeks, I have preferred the evidence of Mr Kildare and Mr Wheeldon.

[319] The trial judge then referred to a number of other meetings and discussions between 28 January 2014 and 13 February 2014 involving Messrs Wheeldon, Kildare, Dignan and Weeks and said:

> [78] … It is not necessary to set out that evidence in detail. In summary, I accept the evidence of Mr Wheeldon and Mr Kildare that:
>
> (a) either Mr Wheeldon or Mr Kildare told Mr Weeks and Mr Dignan that INPEX did not need the apartments in H105 but said that other personnel working on the Project might;
>
> (b) Mr Wheeldon advised Mr Weeks and Mr Dignan that he was working on obtaining revised future workforce numbers but did not yet have them and that INPEX would analyse the accommodation numbers for the Project but that this would take some time;
>
> (c) Mr Wheeldon told Mr Weeks and Mr Dignan that if the analysis of the accommodation requirements justified the appointment of an accommodation services provider, a decision note on the additional accommodation requirements and the appointment of a service provider would have to be generated and circulated to all relevant departments within INPEX and that that process would take time.[121]

[320] On 6 February 2014, Mr Dignan and Mr Weeks met with Mr Wheeldon at One30.[122] The trial judge said:

> [79] I do not accept the evidence of Mr Dignan that on 6 February 2014, Mr Wheeldon told him, "INPEX Legal are happy for this agreement to be completed under the existing contract and clause 3 to allow for ease of signing," or that Mr Wheeldon said that because Legal were happy, and because the parties could just use clause 3 of the existing agreement to make the new agreement a 'variation', as they

121 R [78].

122 ASOC [15](h); Defence [23](a).

had done in the past,[123] INPEX did not need to go out to tender, or that Mr Wheeldon told him that INPEX wished to avoid going to tender due to the delays that a tender may cause.

[80] I do not accept the evidence of Mr Dignan that around this time (ie 6 February 2014) Mr Wheeldon asked Halikos to send him, as soon as possible, a draft of the variation to the Accommodation Agreement that contained a minimum of 250 apartments. I accept the evidence of Mr Wheeldon that as at 6 February 2014, he did not have numbers for the accommodation requirements for the Project and was not in a position to tell Mr Weeks the accommodation numbers required by the Project.

[321] On 7 February 2014, Mr Weeks sent an email to Mr Wheeldon which had attached a draft variation agreement. The email stated:

> As discussed here is the draft document that I have put tentative numbers (minimum) and tenure in for us to confirm. The basis of the document is to ensure only the variations are noted and all other terms remain as per 800575 [that is, the Accommodation Agreement] which I believe is covered.
>
> If the number I have put 250 is very easy achieved then we can move this document to Perth & Japan very quickly as it will also satisfy INPEX and Shane's/Halikos needs as well. Additional requirements can be called on as required or as per forecast scheduling. The major commitment is to the 250 which we believe is achievable.
>
> I have attached the original 800575 again as well.
>
> (*emphasis added by the trial judge*)

[322] Her Honour said:

> [82] The wording of this email strongly suggests that the figure of 250 inserted into the draft Variation Document came from Mr Weeks

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123 There is evidence that, at an earlier time, a minor variation was made to the Accommodation Agreement without going through the decision note, RFA etc process. (It was a matter of substituting rooms in one building for rooms in another without additional cost to INPEX.) It may be that this initially gave Mr Dignan and Mr Weeks the idea that a proposal for INPEX to take additional accommodation could be documented in a variation to the Accommodation Agreement without going through the usual process. If so, the evidence shows that they were informed otherwise, at the meeting on 17 January and in later discussions and correspondence, for example in the email from Mr Kildare on 16 April 2014, referred to in para [170] below.

> (as deposed to by Mr Wheeldon), and from not Mr Wheeldon (as deposed to by Mr Dignan), and that it was inserted as a basis for future discussion. I accept the evidence of Mr Wheeldon that he told Mr Weeks, "Drop it down to 225 and we will leave that as the base for us to prepare a decision note".

[323] Halikos has challenged every one of the findings in R [78] – [80], and the finding in the first sentence of R [82]. Again, we accept the responses in the INPEX Schedule, and we see no reason to reject the findings. The only finding of some remaining relevance, in light of our conclusions about the two agreements issue, is whether or not the normal decision note process was to be followed, even if the agreement being discussed was to be completed by way of variation to the 2012 Accommodation Agreement.

[324] Of particular relevance to this point is the unchallenged finding in the last sentence of R [82] where her Honour accepted that Mr Wheeldon told Mr Weeks on or before 7 February to "drop [the estimated requirements] to 225 and we will leave that as the base for us to prepare a decision note."[124] We would add that Mr Weeks' reference in his email of 7 February to moving the document "to Perth and Japan very quickly" is consistent with his understanding that it was not an agreement that could be executed by any of those INPEX personnel present in Darwin, namely Mr Kildare and / or Mr Wheeldon.

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124 See too the first sentence in R [92] where the trial judge repeats her acceptance of that evidence.

[325] Halikos did not receive any written response to Mr Weeks' email of 7 February 2014.[125] On 12 February 2014 Mr Weeks sent another email to Mr Wheeldon and Mr Kildare annexing a revised draft variation agreement, referring to it as "a broader, longer term contract".

[326] Her Honour said that:

> [93] The revised draft variation agreement is similar to the version emailed on 7 February except that the number of apartments and hotel rooms was reduced from 250 to 225; a split of 150 apartments and 75 hotel rooms was specified; the 225 apartments and hotel rooms were to be provided until 28 February 2019; from 1 March 2019 until 20 February 2029, Halikos was to provide not less than 150 apartments and hotel rooms; and INPEX was to pay only for the rooms occupied by its employees and contractors until 28 February 2015 (rather than 28 February 2014 as specified in the version emailed on 7 February). The recitals are the same in both.

[327] Also, the draft variation agreement provided, in effect, that the apartments and hotel rooms would be furnished and equipped as detailed in schedule 1 and that INPEX's requirements for apartments and hotel rooms for the first five years would be as detailed in schedule 1. However, the draft did not include any such details in schedule 1. Halikos contended that "schedule 1 to the Accommodation Agreement carried over as schedule 1 to the Additional Accommodation Variation (as that was a variation to the Accommodation Agreement)".[126]

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125 R [89].

126 Defence [33](j); Reply [29](c).

[328] After stating that the further draft included reference to the "225 apartments and hotels, the Term, and meeting the priority terms and conditions agreed within the current contract 800575" Mr Weeks stated in his email:

> If you or Sean could now confirm the above and your instruction for Halikos Hospitality Pty Ltd to secure the accommodation whilst the document is being executed.

[329] Mr Weeks deposed that he then had a discussion with Mr Wheeldon during which Mr Wheeldon said that, subject to a number of qualifications one of which concerned the number of rooms that would be needed after the construction phase was finished, he was happy with the agreement. Her Honour found:

> [92] I accept the evidence of Mr Wheeldon that, other than agreeing that he told Mr Weeks to drop the numbers to 225 as the base to prepare a decision note, he did not have any such discussions with Mr Weeks. Mr Wheeldon deposed that he had not, at that stage, received preliminary numbers from JKC and did not discuss numbers with Mr Weeks. He deposed that he did not receive those numbers until late in February, and this is supported by the evidence that on 24 February, Mr Wheeldon sent two emails to Mr Weeks attaching the figures supplied by JKC.

[330] Paragraphs 7 to 11 of Schedule A challenge many of the findings made by the trial judge at various places including in R [71], [73], [78], [79], [80], [81] and [82] (first sentence only). Many of these are findings similar to those previously considered by us in other findings. These include discussions and instructions given to Mr Wheeldon about negotiating the terms of a broader accommodation services agreement ([7.1] re R [71], [75] and [76]), the commitment issue ([7.2] re R [73]), and discussions

concerning numbers including requirements for the whole Project ([8.1], [8.2] re R [78](a) & (b) and [9.2] re R [80]). Others concern Mr Wheeldon's reference to the need for a decision note and the approvals process ([8.3] re R [78](c)), discussion on 6 February regarding advice from INPEX Legal about the use of clause 3 without a tender ([9.1] re R [79]), the drafting and sending of the draft variation agreement sent on 7 February 2014 ([10.1] regarding R [81] – [82]), and Mr Wheeldon's response to the further draft sent to him on 12 February ([11] re R [92]).

[331] Clearly the parties were not contemplating and were not in a position to enter into any agreement on 13 February 2014, the day after the further draft was provided by Mr Weeks. So much is apparent from the findings which Halikos have not challenged, including that Mr Weeks in his email of 7 February 2014 strongly suggested that the figure of 250 was inserted into the draft variation document as a basis for future discussion; Mr Wheeldon then told Mr Weeks to "drop it down to 225 and we will leave that as the base for us to prepare a decision note"; and that Mr Wheeldon had not received and did not discuss final numbers with Mr Weeks prior to 24 February 2014.[127]

127 R [82] and [92].

[332] We have already discussed the commitment issue and found no error in the trial judge's conclusions that no relevant commitment was sought by Halikos or promised by INPEX.[128]

[333] Similarly, we have found no errors in the trial judge's findings about the broader accommodation services agreement discussions and the instructions given to Mr Kildare and Mr Wheeldon which, if established, would have been materially relevant to the issues at trial. We repeat our observations made earlier at [302] to [306].

[334] Furthermore, we find no relevant error in her Honour's conclusions about who said what and when and to whom about accommodation requirements (the "numbers" issue) during the discussions prior to 13 February 2014.

The alleged 13 February 2014 contract

[335] The trial judge noted that the various participants gave totally different evidence about what happened after Mr Weeks sent the revised draft variation agreement on 12 February 2014, and in particular what was said at the meeting of 13 February 2014 and the context in which the letter of 13 February 2014 was prepared and signed.[129]

[336] It is not necessary for us to dwell on the numerous criticisms made of the trial judge's other findings of those events. Even if Halikos' versions of what was said and done on 13 February 2014 were accepted, no binding

128 See [227], [240], [247] – [248], [266] – [269], [279], [283], [288], [298] and [302] above.

129 R [94].

contract of the kind alleged was entered into. There are a number of different bases for this conclusion.

(a) This follows from our discussion and conclusions about ground 5 including the ongoing discussions and negotiations about a broad accommodation services provider agreement and Halikos' belated attempts in July to split that agreement into two separate agreements, the first of which was aimed at securing a contract for the 225 / 150 apartments.

(b) This also follows from our agreement with the trial judge that neither Mr Kildare nor Mr Wheeldon had authority, actual or ostensible, to complete an agreement of the kind alleged. Not only did the facts not support such a conclusion, it follows as a matter of law that such authority could not have been conferred in the manner alleged.

(c) Further, we have agreed with the trial judge's conclusion that whatever the desires of Halikos there was no intention on the part of INPEX to enter into a legally binding contract on 13 February 2014.

[337] There was substantial disagreement between Mr Kildare on the one hand and Messrs Dignan and Weeks on the other as to what was said and done at the meeting on 13 February 2014. In short Mr Dignan and/ or Mr Weeks deposed that: Mr Kildare was given a hard copy of the revised draft variation agreement and he asked Mr Weeks to make a number of changes to it, which he did on the spot; Mr Kildare said that no RFA would be required

as it was a variation of the 2012 Accommodation Agreement; Mr Kildare said that INPEX's Legal team had signed off on the variation; Mr Kildare agreed to provide a commitment in writing by signing a letter that Messrs Dignan and Weeks had prepared and that Mr Davies (Mr Wheeldon's deputy) had authority to sign the letter.[130]

[338] Mr Kildare's evidence was quite different. He said that he was not given nor shown a copy of any draft variation agreement and that agreement was not discussed at the meeting. The meeting began with Mr Weeks repeating what he had said to Mr Kildare on the telephone the day before about Halikos' need for a letter from INPEX setting out its interest in a broad accommodation agreement. During the telephone conversation Mr Weeks told Mr Kildare that he had been talking to other accommodation providers around Darwin about INPEX's accommodation needs and INPEX's suggestion that Halikos prepare a proposal to manage all of INPEX's accommodation needs in the Darwin CBD. Mr Weeks said that he was having difficulty pulling the Halikos proposal together because other accommodation providers would not speak to them as they did not believe INPEX was asking Halikos for such a proposal. He said that he needed some form of note, or letter or "something from INPEX" that Halikos could show the other providers so that Halikos could put a proposal together.

130 See R [97] – [100].

Mr Kildare said he would speak to Mr Wheeldon and get back to Mr Weeks.[131]

[339] Mr Kildare deposed that at the meeting on 13 February 2014 he said that anything INPEX provided in writing was subject to final approvals from INPEX and that Mr Weeks said, "Yes," and that he understood that. Mr Kildare said that he had discussed the matter with Mr Wheeldon and that Mr Wheeldon had agreed to provide a letter, but that the letter had to be subject to all final approvals from INPEX. He deposed that Mr Weeks pulled up a draft letter on his computer. After he had a quick read of the document, Mr Kildare pointed to the screen after the sentence that begins "In the interim," and said that this was "subject to" either final approvals or a final contract. (He could not recall which exact words he used, except "subject to".) Mr Weeks said words to the effect of, "Yes, yes, yes – understood." Mr Kildare was not given a hard copy of the letter at the meeting. Mr Kildare then telephoned Mr Davies and made arrangements for him to sign the letter in the absence of Mr Wheeldon.[132] He said that when he later saw the signed letter, it did not contain the change he had requested.

[340] Her Honour accepted the evidence of Mr Kildare and found that the meeting occurred substantially as he deposed. Her Honour said:

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131 R [96].

132 R [101].

> [104] … This is partly for the reason set out at [77] above, and partly because the evidence of Mr Weeks and Mr Dignan is inherently implausible. Mr Kildare occupied a relatively junior position in the INPEX hierarchy and he was attached to the "Corporate Co-ordination" division so that the accommodation requirements for either the construction or operational phases of the Ichthys Project did not fall within his area of responsibility. Whether or not Halikos knew about INPEX's internal requirements for entering into a contract, Mr Kildare certainly did. Given those matters, it is inconceivable that he would purport to finalise the terms of an agreement with Halikos which would involve a commitment by INPEX to pay many millions of dollars over a 15 year period and which concerned a different division of the company from the one in which he was employed.
>
> [105] I do not accept Mr Weeks' evidence that Mr Wheeldon had told him he was happy with the revised draft variation agreement previously sent to him (on 12 February) and that INPEX's legal team had signed off on the variation. There is no evidence at all that the revised draft variation agreement had even been sent to INPEX's lawyers. Mr Wheeldon went on leave the following day, and it is unlikely in the extreme that even if the lawyers had seen the revised draft variation agreement they would have "signed off" on it so quickly and no reason why Mr Wheeldon would have told Mr Weeks that they had.
>
> [106] Mr Weeks' evidence that Mr Kildare said, "I am happy with the Variation Document. It is correct and is all that is required. The RFA for the first agreement [Accommodation Agreement] was fully signed off and that is all that's needed for the variation," is likewise implausible. Mr Kildare knew that a contract of this nature required a decision note to be prepared, circulated and signed by the appropriate people, an RFA to be prepared and other processes to be gone through within INPEX. There is no reason at all why he would tell Mr Weeks and Mr Dignan that this was not necessary. This evidence of Mr Weeks is also inconsistent with later documents and other communications passing between Mr Weeks and Mr Dignan and INPEX personnel in which Mr Wheeldon sought information for preparation of a decision note and Mr Dignan said in an email to Okawa san that he was "totally unaware that the internal decision note had not yet been completed" and that "we do understand that this is required"; as well as the evidence that Mr Dignan had discussed the progress of the decision note with Mr Wheeldon.

[341] Her Honour proceeded to discuss the letter of 13 February 2014. It was common ground on the pleadings that Mr Weeks sent an email to Mr Kildare

and Mr Davies attaching a form of letter for signing on behalf of INPEX.[133] That email stated, in effect, that a contract document (which was not further identified) was being sent to Perth by INPEX for possible approval, authorisation and execution.[134] The email did not attach any draft or other version of a possible variation to the Accommodation Agreement.[135]

[342] Her Honour said:

> [107] Further, the letter of 13 February itself does not purport to annex the Variation Document and does not signal unambiguously that it is intended to bind INPEX. There is other evidence that Mr Dignan wanted to extract from INPEX a letter that would commit INPEX to taking the rooms and apartments referred to in the Variation Document. Mr Dignan instructed Halikos' solicitor, Mr Henschke, to draft such a letter and he did so in the following terms:
>
> > This letter is to record INPEX's agreement to enter into a Variation of Contract No 800575 for the purpose of appointing Halikos Hospitality Pty Ltd as INPEX' sole and exclusive accommodation service provider.
> >
> > It is a term of that appointment that Halikos Hospitality Pty Ltd provide ……. Hotel Rooms and Apartments with effect from ……
> >
> > Prior to the terms of the Variation of Contract being documented and the Variation of Contract being executed by all parties this letter serves as a request for Halikos Hospitality Pty Ltd to secure …… Apartments and Hotel Rooms for that purpose.
> >
> > INPEX commits to entering into the Variation of Contract No 800575 within 45 days of this letter.
>
> [108] Mr Dignan and Mr Weeks did not use the draft prepared by the solicitor: they drafted their own using words that did not signal an intention to create binding legal relations. The inescapable inference is that Mr Dignan and Mr Weeks were well aware that Mr Kildare would

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133 Defence [39](a); Reply [34](b).

134 Defence [39](b); Reply [34](c).

135 Defence [39](c); Reply [34](c).

not have agreed to sign (or procure Mr Davies' signature on) an unambiguously binding document.

[343] As we have said we do not need to examine in further detail the numerous challenges to the trial judge's findings about what was said and what happened during and after that meeting. Again, we find the detailed responses in the INPEX Schedule compelling.

Subsequent conduct and communications

[344] Halikos also relied on evidence of conduct after the 13 February 2014 meeting to support its contention that the parties regarded themselves as bound to a 15 year agreement in terms of the AAV.[136] Much of that conduct was also relied upon for Halikos' estoppel and misleading or deceptive conduct claims.

[345] Her Honour found that the documentary evidence did not support such a conclusion.[137] Her Honour discussed the material upon which Halikos relied in detail over some 55 pages of the Reasons in which there was a detailed assessment of the relevant communications, both oral and written, between 17 February and 28 February, drafting of media releases, the meeting and dinner with the Chief Minister, discussions about a "decision note" and INPEX's internal requirements, along with discussions about two different agreements and the termination of negotiations.

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136 Her Honour identified and summarised the conduct relied on at R [236].

137 R [109].

[346] In light of the submissions made to this Court we have reviewed the identified evidence and the Reasons about each of those matters. We find no error on the part of her Honour. Indeed, we find the reasoning compelling. It is convenient to discuss some of the conduct emphasised by Halikos at trial, and her Honour's conclusions about that conduct.

Events between 17 February and 28 February 2014

[347] The trial judge considered Mr Weeks' email of 17 February 2014 to Messrs Wheeldon and Kildare which attached a "final draft of the Variation which includes the recommended changes from both Chris and Sean." Although her Honour noted that Mr Kildare may have been mistaken when he said that he did not suggest any changes to the draft, the trial judge accepted Mr Kildare's evidence about Mr Weeks' explanation as to why Halikos wanted the letter, that he suggested that the words "subject to" be inserted and that he made it clear to Mr Dignan and Mr Weeks that anything INPEX provided in writing was subject to final approvals from INPEX. Neither Mr Kildare nor Mr Wheeldon responded to that email. Mr Wheeldon said that he had ignored the document. He had not completed the analysis of the accommodation requirements for the project and he had not started the decision note procedure.

[348] A telephone conversation occurred between Mr Wheeldon and Mr Weeks towards the end of February. There is disagreement between them about what was said during that conversation. Mr Weeks said, and Mr Wheeldon denied, that Mr Wheeldon stated that there were no problems with the

variation, and that the Variation Document would be signed. Her Honour rejected Mr Weeks' evidence about that. Her Honour said, at R [116]:

> Whatever the state of the Halikos parties' knowledge of INPEX's internal procedures, Mr Wheeldon knew them. He knew that there was no guarantee that the Variation Document would be approved in its present form or at all. He had not yet started the decision note process. It is therefore most unlikely he would have told Mr Weeks that it would be signed.

[349] The trial judge then referred to a discussion and email exchange between Mr Weeks and Mr Kildare on 25 February concerning a media release about H105 and the need for quality accommodation for the corporate and business travelling market. Mr Kildare's comments, together with comments by Mr Weeks were used in an article in the NT News on 26 February 2014. Her Honour observed, at R [121]:

> There is no mention in the article by either Mr Weeks or Mr Kildare of INPEX having agreed to take a lease of all of the rooms in H105 or of Halikos agreeing to provide 225/150 rooms and apartments to INPEX for 15 years. In fact the comments attributed to Mr Weeks are inconsistent with there being an agreement between Halikos and INPEX for INPEX to occupy the whole of H105 as claimed by Halikos.

Draft media releases

[350] The trial judge then considered the 14 March 2014 email from Mr Weeks to Mr Kildare which attached a draft media release and invited Mr Kildare to add a comment or quote. The draft included the following:

> In finding a solution to concerns regarding project workers filling hotels in Darwin, Halikos Hospitality Pty Ltd has been awarded a major contract by INPEX Operations Australia as the exclusive Accommodation Services Provider for the Ichthys project.

…

[351] Mr Kildare deposed that later that day he telephoned Mr Weeks and told him INPEX was not ready to put out a media release because they did not have the "sign offs" for any additional accommodation and INPEX had not executed any variation or other contract. He deposed that Mr Weeks said words to the effect that he understood that but that they could prepare the media release so it was ready to go when they had the "sign offs". In the event, that media release was never issued.

[352] Her Honour said:

> [125] Halikos relies on the draft media release as supporting its case that there was a concluded agreement in place at that time. However, the draft media release does not support the agreement pleaded by Halikos. Mr Weeks deposed:
>
> > Shortly after returning from leave, in the afternoon of on 14 March 2014 (a Friday), I sent an email to Sean Kildare to which I attached a draft media release in relation to the Additional Accommodation Variation. [ie the pleaded agreement]
>
> However, the email actually says:
>
> > Shane Dignan has asked that I prepare a media release for our Accommodation Services Provider Agreement.
>
> [126] The email of 14 March 2014 refers to the preparation of a media release in relation to an "Accommodation Services Provider Agreement". Since it is common ground that no "services provider agreement" was ever concluded, that supports Mr Kildare's evidence that the draft media release was prepared in advance of the agreement it refers to.

[353] On 18 March 2014, Mr Weeks sent an email to Mr Kildare stating:

> As discussed please find attached electronic version of the full variation document for the Accommodation Services Provider Agreement.

> I would be very grateful, as discussed, if you could co-ordinate a meeting with Okawa San for Friday afternoon whilst I am in Perth to finalise the discussions and proceed.
>
> I will work on the amended press release and send to you later today for your quote.
>
> (*emphasis added by the trial judge*)

[354] Her Honour noted that the document attached to this email was headed "Accommodation Services Provider Agreement" and was in substantially the same terms as the document relied on by Halikos as the agreement said to have been entered into on 13 February 2014 but was dated 14 February 2014.

[355] Mr Weeks said that the reference in his email to meeting with Okawa san "to finalise the discussions and proceed" was a reference to the discussions about the media release – rather than the agreement between Halikos and INPEX. Her Honour rejected that evidence saying:

> [129] …The plain meaning of the email is that Mr Weeks wished to have a meeting with Okawa san to "finalise the discussion" in relation to the proposed agreement for Halikos "to provide a combination of not less than 225 additional Apartments and Hotel rooms" – ie the pleaded agreement. There is no other reason why Mr Weeks would have attached an electronic copy of what he refers to in the email as "a document for" the Accommodation Services Provider Agreement (and not as "the agreement") – especially one with a different issue date from the one Halikos claims was finalised on 13 February. The email goes on to talk about sending the amended press release to Mr Weeks (not Okawa san).
>
> [130] So read, Mr Weeks' email of 18 March 2014 is inconsistent with Halikos' claim that, as at that date there was a concluded agreement between Halikos and INPEX in the terms pleaded which had been made on 13 February.

[356] Messrs Dignan and Weeks met Okawa san in Perth on 21 March 2014. Again the parties differed as to what was said at that meeting.

[357] The trial judge referred to *a meeting* with the then Chief Minister Adam Giles on 24 March 2014. Mr Kildare deposed that he thought he was at that meeting. However Mr Dignan and Mr Weeks both said Mr Kildare was not present. Mr Weeks and Mr Dignan deposed that they told the Chief Minister that Halikos had entered into a 15 year agreement with INPEX to provide accommodation and Halikos was constructing 105 Mitchell Street dedicated to INPEX's project accommodation requirements. Mr Giles also deposed to what occurred at that meeting. He could not remember if Mr Kildare was present. He said that during *the meeting* Mr Dignan and Mr Weeks told him that an agreement had been entered into between Halikos and INPEX for additional accommodation for the Ichthys Project and that this would be in a new purpose-built building. The Chief Minister's then Chief of Staff, Mr Ron Kelly, gave similar evidence. Her Honour said:

> [144] I do not know what to make of this evidence. It may be that Mr Dignan and Mr Weeks did tell Mr Giles that an agreement was already in place. If so, it was likely in the absence of Mr Kildare. However, I have found that as at the date of the meeting, there was no concluded agreement in place for the provision of additional accommodation by Halikos to INPEX of the kind pleaded. (This does not exclude the possibility that Mr Dignan and Mr Weeks told the Chief Minister that there was such an agreement.)

[358] On the evening of 24 March 2014, Mr Dignan, Mr Weeks, Mr Kildare, Chief Minister Giles, Mr Kelly and Mr Gary Barnes (the then Chief Executive of

the Department of Chief Minister) attended *a dinner together at Hanuman restaurant*. Again, there were significant differences between the participants as to what happened and what was said at the dinner. Messrs Dignan and Weeks deposed that Mr Kildare spoke about Halikos having been appointed as the INPEX accommodation services provider for the next 15 years and that an agreement had been reached for the provision of 225 hotel rooms and apartments at 105 Mitchell Street. It seems that Mr Giles was under the impression that an agreement had been reached between the parties. He and Mr Kelly deposed that there was discussion during the dinner about the agreement reached between INPEX and Halikos. However, Mr Kildare deposed that he did not speak to Mr Dignan or Mr Giles at the dinner except to exchange pleasantries. He said he did not discuss any Accommodation Agreement Variation and did not mention negotiations with Halikos. Chief Minister Giles proposed a toast to the economic health of the Northern Territory and INPEX's role and that Mr Kildare responded in general terms without any reference to any specific building or asset owned by Halikos or to any proposal for a broader accommodation services agreement. He also said that he did not hear everything that was said at the dinner because the restaurant was very noisy.

[359] Mr Giles also deposed that in about March 2014, he frequently spoke with Mr Kildare, and that during one of those conversations Mr Kildare told him that an agreement had been entered into between INPEX and Halikos for additional accommodation. Mr Giles deposed that Mr Kildare told him that

the agreement was that Halikos would build a new apartment complex at 105 Mitchell Street, which INPEX would rent for its workers for 15 years.

[360] Her Honour said:

> [152] ...I do not accept this evidence. All of the objective evidence points to there being no such agreement at that time, and I do not accept that Mr Kildare told Mr Giles there was.
>
> [153] Nor do I accept the evidence of Mr Dignan, Mr Weeks or Mr Giles about what happened at the dinner on 24 March. Nor, in so far as it conflicts with the evidence of Mr Kildare, do I entirely accept the accuracy of the evidence of Mr Kelly. It is entirely possible that the construction of 105 Mitchell Street was discussed at the dinner and that someone said words to the effect that on the projected numbers of workers employed by JKC and the sub-contractors, that building would be filled as well as other properties as numbers were expected to exceed capacity. Such indeed was the expectation at the time based on the numbers supplied to Mr Weeks by Mr Wheeldon. (See above.) I do not accept that this was said in the context of anyone saying that there had been a concluded agreement between Halikos and INPEX for INPEX to take and pay for 225 apartments and rooms. It is also entirely possible that there was talk of H105 being "purpose built" for the Ichthys Project. The Halikos promotional material in the presentation given to Okawa san and Sakamoto san on 17 January says as much, and there can be little doubt that Halikos went ahead with the construction of H105 in the expectation (no doubt encouraged by the figures supplied by Mr Wheeldon) that there would be plenty of demand for accommodation of that kind from workers on the Ichthys Project. That is a very different thing from being purpose-built to lease to INPEX. It is also possible (indeed likely) that it was said that the development of H105 "was good for everyone and would relieve the pressure on tourist accommodation in Darwin". However, given the other evidence, I consider that Mr Kelly is mistaken when he says that this was said in the context of a discussion about a "deal" between INPEX and Halikos.

[361] Following discussions on 24 March 2014 about some form of joint media release a draft media release was sent by Danielle Perry, Mr Giles' Media Advisor to Mr Giles, who then sent it on to Mr Kildare, Mr Dignan, Mr Barnes and Mr Kelly with the message: "Early draft".

[362] The draft media release began:

> Territory company Halikos Hospitality is joining forces with INPEX in a 15 year agreement to reduce pressure on Darwin's tourist accommodation.

It continued:

> I am delighted to report that INPEX has signed a new deal to put employees in the 1100 apartments that Halikos Hospitality will have in its inventory by the end of the year.
>
> …
>
> This deal will get our executive staff into more appropriate, permanent accommodation improving their Top End experience and enhancing their Darwin lifestyle.
>
> Halikos Hospitality is constantly adding to its stock of accommodation with construction due to begin this week on its apartment block at 105 Mitchell St.
>
> "We are delighted to have won this contract and to be part of stabilising Darwin's tourist accommodation market," Halikos Hospitality General Manager Geoff Weeks said.
>
> We will have a portfolio of 1100 properties available for use by Ichthys staff by the end of the year and we are working with a range of apartment developers to secure more.

[363] On 25 March 2014, Mr Dignan's Executive Assistant, Debbie Long sent a redrafted proposed media release to Mr Kildare, Mr Weeks and Mr Dignan by email.[138] That draft began:

> Darwin company Halikos Hospitality has signed a major deal with INPEX to provide short and long term accommodation for corporate and management staff in Darwin's CBD.
>
> INPEX General Manager Sean Kildare said a key aspect of appointing Halikos Hospitality as its accommodation services provider was to avoid disruption to the tourism market in Darwin.

138 R [156].

> "Halikos will increase its portfolio of hotels and apartments in the city to cater for our demand," he said.
>
> "They have already built the H Hotel in Smith Street, which has become a popular address for INPEX workers, and this week started demolition of the old Top End Hotel, with plans to build an 18-storey apartment building to cater for increased demand," he said.
>
> Halikos Hospitality General Manager Geoff Weeks said the deal was a major coup for a local business that would mean a substantial boost to the local economy.
>
> "We have an inventory of more than 1200 hotel rooms and apartments," he said. "Since 2012 we have committed 400 of these to the project, including the H Hotel and the C2 serviced apartments on the Esplanade".
>
> "We will have another xxxxxxxx rooms available at 105 Mitchell Street by mid-2015," Mr Weeks said.

It also contained the following:

> A service agreement signed by the two companies includes the construction, commissioning and operations of quality city rooms that will be dedicated to INPEX's use.
>
> "This helps meet our commitment to both INPEX staff and to growing local business, with flow-on benefits to a range of suppliers used by Halikos," he [ie Mr Kildare]said.
>
> He said the three key considerations for INPEX in signing the agreement were:
>
> - not impacting on city accommodation available for tourists and events
> - Halikos increasing its stock of quality apartments, which they are doing with the construction of xxx new apartments at 105 Mitchell Street
> - that INPEX would also enter into agreements with other accommodation providers as their properties come onto the market.

[364] Her Honour said:

> [157] Mr Weeks' response to that redrafted proposed media release is instructive. On the same day (25 March) he sent an email to Debbie Long, Mr Kildare and Mr Dignan in the following terms:

> Guys
>
> Whilst it has been tidied up it has gone off course.
>
> This reads more about Halikos construction and buildings being built for INPEX which is not the case.
>
> It also says that INPEX will enter into agreements with other developers which is not the case.
>
> It mentions the H Hotel is also purpose built for INPEX which is not the case.
>
> I also agree with Shanes comments that the photo shoot should not be at Mitchell St.
>
> Sean I think we can use what has been re drafted but tidy up and correct the anomalies.
>
> Your thoughts

[158] Mr Weeks' evidence about the underlined words[139] in his email of 25 March, is that he was concerned that the focus of the media release was on Halikos' construction activities rather than the accommodation activities. I do not accept that this is all that was intended by the words in the email. The email plainly states that it is "not the case" that Halikos "buildings [were] being built for INPEX", contrary to the case now put by Halikos in these proceedings.

[159] Mr Kildare deposed that, in addition to this email, there was a telephone conversation between Mr Kildare and Mr Weeks in which Mr Weeks made similar comments including a comment that the draft media release "incorrectly suggested INPEX would enter into agreements with other developers, instead of referring to Halikos as the conduit".

[365] Her Honour then referred to a further draft media release dated "April 2014" which Mr Giles said was prepared by his office together with Mr Kildare.

That draft media release contained the following:

> Planning and preparing for the future, Territory company Halikos Hospitality is joining forces with INPEX in a 15 year agreement to reduce pressure on Darwin's tourist accommodation.
>
> …

139 We assume that her Honour was referring to one or more of the phrases "which is not the case".

The draft quoted Mr Giles as saying:

> I am delighted to report that INPEX has signed a new Accommodation Services Agreement to place executives and corporate management in some of the 1100 apartments and rooms that Halikos will have in its inventory by the end of the year. …
>
> ….
>
> Halikos Hospitality already houses 400 INPEX project staff and now has a 15 year contract as the primary accommodation provider for the Ichthys project.
>
> …..

It continued:

> Halikos Hospitality is constantly adding to its stock of accommodation with construction pre-commenced on its apartment block at 105 Mitchell St.

It quoted Mr Weeks as saying:

> We will have a portfolio of 1100 apartments and rooms available for use by Ichthys workers by the end of the year and we are working with a range of apartment developers to secure more.

[366] Her Honour said:

> [161] It should be noted that:
>
> (a) none of the draft media releases say anything about an agreement between INPEX and Halikos for Halikos to supply and INPEX to pay for not less than 225/150 apartments and rooms over a 15 year period;
>
> (b) there is no reference in any of them to Halikos building H105 for INPEX or INPEX agreeing to take all of the apartments in H105 (and when one of the media releases seemed to suggest as much, Mr Weeks sent an email denying that that was the case);
>
> (c) the final draft (attached to Mr Giles Affidavit) refers to an "Accommodation Services Agreement" and an earlier draft talks

about INPEX appointing Halikos Hospitality as its "accommodation services provider";

(d) the drafts refer to Halikos' portfolio of 1100 apartments and rooms not to H105 alone; and

(e) the drafts refer to the fact that Halikos was working with other developers to supply rooms.

[162] All of these factors point to the draft media releases being about the proposal which was then being negotiated, for the parties to enter into an "Accommodation Services Agreement". It is common ground that such an agreement was never finalised. That, the fact that none of these media releases was ever issued, and the fact that the draft media release talks about an agreement being "signed" when at that time nothing had been signed, all support Mr Kildare's evidence that the purpose of these drafts was to have a media release prepared to be issued once an agreement had been finalised.

[163] These drafts do not support Halikos' contention that the media releases were intended for immediate issue and were intended to refer to an agreement said to have been made on 13 February, for Halikos to supply, and INPEX to pay for, not less than 225 (later reducing to 150) additional apartments and rooms, including all of the rooms in H105. Nor is there any credible explanation as to why, if that were the case, the parties should wait until 24 and 25 March to announce the agreement to Government and prepare media releases announcing the agreement which were never issued.

[367] We have set out at some length parts of the evidence and parts of her Honour's reasons because Halikos relied heavily on these discussions and draft media releases both at trial and on appeal. In our opinion her Honour's reasoning is unexceptional and leaves us satisfied as to the correctness of her conclusions.

Events from mid-April

[368] Her Honour then referred to further communications from 14 April. Mr Weeks and Mr Giles were both asking Mr Kildare when the media releases would be issued. Mr Kildare said that he told Mr Giles that he had

not yet seen a decision note and so INPEX's internal approval processes were not yet completed and because of that they could not make the press release.

[369] On 16 April 2014, Mr Kildare sent an email to Mr Weeks in the following terms:

> Updating the situation regarding announcements, as you know we have not yet completed our project internal processes to assess, and review the Variation to the accommodation services contract.
>
> This work is actively underway and the range of construction, operational, legal, commercial, contractual, joint venture and managerial stakeholders involved is significant. The materiality of the numbers in question and the adjoining issues engaged by this significant change (eg aviation, bus transport, site logistics, etc) warrants careful planning that cannot be rushed.
>
> The internal due diligence processes are not complete at this time and until they are, Inpex will not be in a position to make any public announcements regarding accommodation services.
>
> At this stage, I anticipate the announcement will be ready to go sometime after Easter.

[370] Her Honour said:

> [174] This email unequivocally conveyed to Halikos that INPEX was yet to decide whether to agree to the Variation Document. Mr Halikos gave evidence that Halikos could have stopped construction of H105 at this time.
>
> [175] Mr Weeks did not, at the time, contradict anything said in that email. Mr Weeks deposed that he understood that the comment, "The internal due diligence processes are not complete at this time and until they are, Inpex will not be in a position to make any public announcements regarding accommodation services," referred to the additional services issues only and not to the agreed 225/150 apartments and hotel rooms. I do not accept that evidence. The email speaks unambiguously about "<u>the</u> Variation to the accommodation services contract." For the reasons which follow, I do not accept the evidence of Mr Dignan and Mr Weeks that there was ever any discussion about anything other than a single accommodation services

provider agreement before 9 July 2014 when the possibility of two separate agreements was first raised by Mr Dignan.

(*emphasis added by the trial judge*)

[371] On 17 April 2014, Mr Dignan sent an email to Mr Wheeldon saying (inter alia):

> On another note, regarding 105 Mitchell St, you mentioned the other day that you believed the variation would be signed in May. For me to give my camp an update, would it be possible to email me today an approximate schedule date in May. That would be greatly appreciated.

[372] Mr Dignan did not receive a reply until 7 May 2014 when Mr Wheeldon emailed him saying:

> Sorry matey for the late reply.
>
> I now have a promise that the manning curves from JKC will be formally submitted to us 15th May at which time the DN can be submitted for approval through the company. Without these curves the DN would not be sufficient enough to move forward quickly. The manning curves I have seen will now indicate a significant increase in manning for both blue and white collar staff all of which supports the proposal you have put forward so it was worth the wait.

[373] Her Honour said:

> [176] …On the reasonable assumption that "DN" stands for "decision note", this email would tend to indicate a mutual familiarity with the term and to confirm that there had been previous discussions between Mr Wheeldon and Mr Dignan about the internal processes involved within INPEX and the need for a decision note in relation to "the variation" (singular).
>
> (*emphasis added by the trial judge*)
>
> [177] Mr Dignan deposed that he believed that the decision note related only to the provision of accommodation over and above the 225/150 that he says had already been agreed. There is no support in any of the documents for any such understanding. The email correspondence to that point (and after) talked about "the variation". Further, on 22 May 2014, Mr Weeks sent an email to Mr Wheeldon (cc to Mr Dignan) saying (inter alia):

> Chris
>
> Here are the 1st estimates only of potential requirements for the 225 apartments/hotel in the agreement. I have included your INPEX 1st look numbers we discussed as estimates:
>
> | | |
> |---|---|
> | INPEX (Construction) | 20 |
> | INPEX (Commissioning/Operations) | 38 |
> | KENTZ | 120 |
>
> Total (estimates only) = 178 … which I will set aside for 105 Mitchell Street. I still have balance available in C2, One30, Kim on Smith, H Hotel etc as we receive further requests.

This is a clear indication that, as at 22 May, Mr Weeks regarded "the 225 apartments/hotel in the agreement" as potential only – not the subject of a concluded agreement.

[374] Mr Dignan deposed that at a meeting on 26 May 2014, he told Mr Kildare that he was becoming concerned that Halikos had still not received the final signed Variation document and that Mr Kildare said, "You've got your letter. It's as good as money in the bank"; also that INPEX was an honourable company, Halikos had no need to worry about the agreement, and he would follow up with Mr Wheeldon. Her Honour said:

> [178] …It may be that a meeting occurred: Halikos appears to have been constantly pushing for its Variation Document to be signed. It may also be the case that Mr Kildare said he would follow the matter up with Mr Wheeldon. However, I do not accept that Mr Kildare said, on that date or any other, anything to the effect that Halikos could rely on the letter of 13 January 2014 [sic][140] as binding INPEX to an agreement to take and pay for 225/150 rooms over a 15 year period. Nor do I accept that Mr Wheeldon made any such statements.

[375] Mr Dignan deposed that during a drive to Winnellie Point to inspect some office accommodation on 20 June 2014, he asked Mr Wheeldon what was

140 This is a mistaken reference to the letter of 13 February 2014.

the hold up with the signature on the formal documentation regarding the variation and that Mr Wheeldon told him (among other things) that there were no issues, that the decision note had been done and that Legal and Operations were all on board. Her Honour said:

> [179] …Since the other evidence (supported by later documentation) is to the effect that Legal and Operations were not "all on board", I do not accept Mr Dignan's evidence that Mr Wheeldon told him they were. Mr Dignan deposed that several times over this period, Mr Wheeldon said words to the effect of, "Don't worry about it. You have your letter." Mr Wheeldon denied this and I do not accept Mr Dignan's evidence that this occurred.

[376] Her Honour said that the evidence of Mr Dignan and Mr Weeks was not internally consistent and coherent. Her Honour referred to a number of inconsistencies in their evidence particularly in their insistence that there were two proposed agreements, namely the one already made on 13 February and a broader "services provider agreement", and their assertions that the former did not require a decision note or RFA, but the latter would.

[377] Her Honour also referred to Mr Weeks' evidence that after receiving the email from Mr Wheeldon of 7 May, he spoke to Mr Wheeldon who told him that the decision note had already been approved. Her Honour said:

> [182] …In cross-examination, Mr Weeks said that he understood this to mean a decision note in relation to the broader agreement that was being negotiated. It was pointed out to him that the email of 7 May 2014 said (in part): "the manning curves from JKC will be formally submitted to us 15th May at which time the DN can be submitted for approval through the company" – that is to say that the decision note would not be submitted for approval until after 15 May. Mr Weeks

then changed his evidence. He said the earlier evidence had been a mistake and that Mr Wheeldon had told him the decision note would be approved. I do not accept the evidence of either Mr Weeks or Mr Dignan that they believed that no decision note was necessary for the Additional Accommodation Variation.

(*emphasis added by the trial judge*)

[378] The trial judge referred to a number of communications in July and August. These included:

(a) an email sent by Mr Dignan to Mr Wheeldon on 3 July seeking "an update when you believe the 'Accommodation Services Agreement' might be finalised".[141]

(b) another email sent by Mr Dignan to Mr Wheeldon on 8 July seeking "an ETA of when the Accommodation Services Agreement with Halikos Hospitality will have the required signatures?"[142]

(c) an email from Mr Wheeldon to Mr Dignan on 9 July referring to some issues with JKC and the need to "have JKC on board with this for it to fly."[143]

(d) Mr Dignan's email of 9 July and the subsequent discussions about negotiating two agreements;[144] and

141 R [183].

142 R [184].

143 R [185].

144 R [186] – [221].

(e) other correspondence including Mr Weeks' letter to Okawa san on 21 July[145], Mr Weeks' response on 28 July to INPEX's request for expressions of interest in providing accommodation[146], emails from Mr Weeks on 11 August and 14 August[147], discussions on 19 August[148], Mr Dignan's letter of 20 August enclosing another draft variation agreement[149] and communications in September[150].

[379] The trial judge observed that none of those communications was consistent with a belief on the part of any of the relevant participants that a concluded agreement had already been reached. We see no reason to disagree with her Honour's conclusions about this. Indeed we agree with them.

CONCLUSIONS AND DISPOSITION

[380] In our opinion the Reasons provided by the trial judge set out a compelling basis for her Honour to reject the various claims made by Halikos in the proceedings below. In light of the submissions made by both parties we have conducted a detailed review of the evidence given at first instance, including the documentary material, and have not been persuaded that the findings of the trial judge were in error.

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145 R [199] – [200].

146 R [201] – [204].

147 R [205] – [206].

148 R [208].

149 R [209] – [212].

150 R [213] – [221].

[381] The appeal is dismissed.

SCHEDULE A

Dealings in 2012-2103

1. In respect of the findings at R [22] that Mr Dignan (of Halikos):

    1.1. told Messrs Wheeldon and Davies (both of INPEX) that Halikos was going to build a hotel at 105 Mitchell Street (referred to as **H105**); and

    1.2. did not say that Halikos would only do so if it got a commitment from INPEX,

    the trial judge failed to have any regard to:

    1.3. Mr Weeks' (of Halikos) oral evidence that he wrote his email of 22 April 2013 in order to put Halikos's best foot forward in order that Mr Walker (of INPEX) would meet with him (cp R [23] to [24]);

    1.4. Mr Weeks' oral evidence that the development moving ahead did not mean that Halikos was in the process of building anything (cp R [25]); and

    1.5. Mr Dignan's and Mr Halikos's evidence that Halikos does not undertake speculative developments and therefore requires an agreement, a pre-commitment, pre-sales or the like before starting.

2. In respect of the finding at R [27] that when Mr Wheeldon responded in respect of "*numbers*", he said he was unable to provide numbers because he had not received them, the trial judge failed to have any, or any sufficient, regard to:

2.1. Mr Wheeldon's oral evidence that he probably discussed the number of 126 apartments, contained in Mr Dignan's email of 20 November 2013 (set out in R [30]), with Mr Dignan; and

2.2. Mr Wheeldon's email correspondence by which he kept Messrs Dignan and Weeks updated as to the progress of finalising accommodation numbers, including by his email of 24 October 2013.

3. In respect of the finding at R [29] that particular words in Mr Weeks' email of 7 October 2013 suggest that the idea of utilising clause 3 of the original Accommodation Agreement came from Mr Weeks and not Mr Wheeldon, the trial judge failed to have any, or any sufficient, regard to:

3.1. Mr Wheeldon's oral evidence that he told Messrs Dignan and Weeks that clause 3 of the original Accommodation Agreement could be used to obtain additional accommodation; and

3.2. the plain meaning of the content of Mr Weeks' email of 7 October 2013.

Lead up to the Perth meeting

4. In respect of the findings at R [32], [35], [36], [38] and [40] that:

4.1. it was likely that Messrs Weeks and Dignan requested the meeting with Messrs Okawa and Sakamoto (of INPEX), rather than it being suggested by Mr Wheeldon;

4.2. Mr Dignan's account of the meeting on 6 December 2013 is highly improbable;

4.3. Mr Wheeldon's account is consistent with the email correspondence;

4.4. Messrs Dignan and Weeks asked Mr Wheeldon to arrange a meeting with Mr Okawa;

4.5. Mr Dignan's letter of 6 December 2013 is unambiguous that Halikos was about to start construction on H105 and that Mr Dignan wanted a meeting with the INPEX directors to put a proposal to INPEX; and

4.6. Mr Wheeldon's email of 6 December 2013 is inconsistent with Mr Dignan's evidence,

the trial judge failed to have any regard to:

4.7. Mr Wheeldon's oral evidence that:

4.7.1. he confirmed to Mr Weeks in about November 2013 that INPEX needed additional apartments;

4.7.2. he requested that Mr Dignan prepare the letter of 6 December 2013;

4.7.3. he told Mr Dignan to include the phrase "*we are about to commence construction of a dual hotel and apartment complex – 105 Mitchell Street*" in the letter of 6 December 2013;

4.7.4. he mentioned a need for 65 rooms at the meeting of 6 December 2013;

4.7.5. at the meeting of 6 December 2013, he and Mr Dignan discussed that the 65 rooms could be provided in the proposed H105 complex;

4.7.6. he proposed to Messrs Okawa and Sakamoto that they meet with Messrs Dignan and Weeks; and

4.7.7. he subsequently organised the meeting with Messrs Okawa and Sakamoto;

4.8. Mr Wheeldon's forwarding of the letter of 6 December 2013 to Messrs Okawa and Sakamoto (among others within INPEX) within one hour of receiving it;

4.9. Mr Wheeldon's and Mr Kildare's oral evidence that they advised Messrs Dignan and Weeks as to the form and content of their subsequent presentation to Messrs Okawa and Sakamoto;

4.10. Mr Kildare's oral evidence that Mr Wheeldon subsequently spoke about workforce numbers exceeding estimates and that more accommodation would be needed for the Construction, Commissioning and Operations phases;

4.11. Mr Dignan's and Mr Halikos's evidence that Halikos does not undertake speculative developments and therefore requires an agreement, a pre-commitment, pre-sales or the like before starting; and

4.12. Mr Dignan's evidence that it did not make commercial sense for Halikos to undertake the H105 development without an agreement.

5. In respect of the findings at R [43] to [45] that:

5.1. Mr Dignan did not say that Halikos would not start construction without a written commitment;

5.2. Mr Wheeldon did not suggest referring to the use of clause 3;

5.3. Mr Dignan said that Halikos would commence demolition in early April 2014 and would then start construction; and

5.4. neither Mr Dignan nor Mr Weeks said that construction was conditional upon INPEX making a commitment to take accommodation in H105,

the trial judge failed to have any regard to:

5.5. the commercial logic and sense of Mr Dignan's evidence that he would not abandon the existing Top End Hotel (profitable) business, terminate leases (also profitable), demolish premises, take on a large loan facility, and outlay substantial capital building H105 without a written commitment;

5.6. Mr Kildare's oral evidence that Mr Wheeldon discussed the use of a variation (ie, clause 3); and

5.7. Mr Wheeldon's oral evidence that he had previously told Messrs Dignan and Weeks that clause 3 could be used to obtain additional accommodation.

The meeting in Perth on 17 January 2014

6. In respect of the findings at R [62] to [64] and [67]:

6.1. that the meeting of 17 January 2014 (**17 January meeting**) happened generally as outlined in the evidence of the INPEX witnesses;

6.2. to reject the evidence of Messrs Dignan and Weeks that:

6.2.1. Mr Dignan said that Halikos would not go ahead with the development of H105 without a binding written agreement from INPEX (or anything to that effect);

6.2.2. either Mr Dignan or Mr Weeks proposed that INPEX enter into a four year lease of the 148 rooms in H105;

6.2.3. Mr Wheeldon said that he had already run the numbers and that INPEX needed the accommodation that Halikos was proposing, or that INPEX needed every bit of accommodation it could get for the project;

6.2.4. Mr Kildare or Mr Okawa said words to the effect of "*I am happy*", "*I agree with what is proposed*", "*This is what INPEX wants*" or "*Halikos and INPEX should move forward on this basis*"; and

6.2.5. Mr Okawa said "*I want the 148 rooms in 105 Mitchell but also need more*", Mr Okawa said words to the effect that Mr Wheeldon or Mr Kildare should finalise how many more rooms were needed over and above the 148 in H105 and get back to Halikos, Mr Okawa said "*the agreement should be for longer than 4 years so it covers Construction, Commissioning and Operations. It should be for 15 years*" (or anything to that effect), and that Mr Okawa said "*Chris, you are responsible for finalising the amount of accommodation we need. I then want you to finalise the agreement and get things moving*" (or anything to that effect);

6.3. that the statements attributed to Messrs Okawa and Wheeldon are inherently improbable;

6.4. that the discussion likely centred around the accommodation needs of the Project; and

6.5. that Mr Okawa asked Mr Wheeldon to check the Project accommodation requirements and begin negotiating a broader accommodation services agreement with Halikos not limited to one building,

the trial judge failed to have any, or any sufficient, regard to:

6.6. the commercial logic and sense of Mr Dignan's evidence that he would not abandon the existing (profitable) Top End Hotel business (at 105 Mitchell Street), terminate leases (also profitable) (at 105 Mitchell Street), demolish the existing premises (at 105 Mitchell Street), take on a large loan facility, and outlay substantial capital building H105 without a written commitment;

6.7. the wording of the presentation document provided and discussed during that meeting, which required a "*prompt commitment*" from INPEX to allow construction of H105 to commence and accommodation deadlines to be met, together with Mr Dignan's evidence that he required a binding agreement and commitment from INPEX before the development would go ahead;

6.8. the content of Mr Sakamoto's email sent on 18 January 2014 to Mr Wheeldon in which he set out that a difficult side of the Halikos proposal was "*making such commitment*", and his subsequent oral evidence that the two-week period of time mentioned was too short for INPEX to provide a "*commitment, agreement, decision or any kind of support*";

6.9. the subsequent correspondence on 26 February 2014 between Mr Okawa and his personal assistant which revealed that there was a discussion within INPEX that Halikos sought a commitment from INPEX at that meeting;

6.10. Mr Wheeldon's oral evidence that:

6.10.1. Mr Sakamoto's use of "*commitment in a short time*" was a reference to making a commitment to Halikos based upon the matters discussed at the 17 January meeting;

6.10.2. during the meeting, he said that Halikos's service was "*fantastic*" and "*world class*" and that it had the required expertise to provide the solution to INPEX's accommodation issues;

6.10.3. during the meeting, he said that Halikos's proposal was an attractive one and was going to be great for INPEX;

6.10.4. during the meeting, he said that INPEX needed every bit of accommodation that it could get for the Project;

6.10.5. during the meeting, he said there was a discussion that H105 would allow Halikos to meet INPEX's accommodation requirements in 2015 and beyond;

6.10.6. at the end of the meeting, Mr Okawa said that the proposal is what INPEX wants, that Mr Wheeldon and Mr Kildare were to finalise the amount of accommodation needed as soon as possible, with Mr Kildare to assist Mr Wheeldon (Mr Kildare also gave evidence to this effect);

6.10.7. it was not inconsistent with his memory that during the meeting Mr Okawa said "*I want a broader, longer term accommodation*

solution covering the three phases of the project" and "*I'm happy and I agree with what is proposed*"; and

6.10.8. he read Mr Weeks' email of 18 January 2014 and would have corrected the position if he thought it incorrectly described what happened at the 17 January meeting;

6.11. Mr Kildare's oral evidence that:

6.11.1. during the meeting, Mr Wheeldon said that INPEX needed more accommodation and that he had "*run the numbers*";

6.11.2. during the meeting, Mr Dignan said that H105 could support INPEX's accommodation requirements and avoid negative press issues, and that the building would be dedicated to INPEX; and

6.11.3. the first paragraph of Mr Weeks' email of 18 January 2014 – which referred to a discussion that the proposal could be dealt with under the existing accommodation agreement – was a reasonable reflection of what was discussed during the 17 January meeting;

6.12. Mr Sakamoto's oral evidence that H105 was to be purpose built to provide the project with a local accommodation solution, and that there was a discussion that H105 could relieve negative publicity for INPEX;

6.13. Mr Okawa's oral evidence that he did not have a clear recollection of the events of that meeting, notwithstanding the contents of his affidavit;

6.14. Mr Okawa's oral evidence that there was a discussion that Halikos planned to build a new building that would provide dedicated accommodation for INPEX personnel, and that it could provide a solution to the accommodation problem previously identified by the Chief Minister (Mr Giles);

6.15. the content of the entirety of Mr Weeks' email of 18 January 2014;

6.16. the content and context of Mr Dignan's email of 29 January 2014; and

6.17. Mr Weeks' contemporaneous handwritten notes (unchallenged) of a meeting with Mr Okawa on 21 March 2014, which include "*HO thanked us and spoke that this was what INPEX wanted and direction when we met in January. Longer – broader – construction – oper.*" (addressed further in [19.4] below).

Follow up to the meeting of 17 January 2014

7. In respect of the findings at R [71], [73] and [76] that:

7.1. the meeting of 28 January 2014 supports the evidence of the INPEX witnesses that the brief given to Mr Wheeldon was to negotiate the terms of a broader accommodation services agreement; and

7.2. Mr Dignan's email of 29 January 2014 is not consistent with Mr Dignan's evidence that Halikos would not begin construction of H105 without a binding written agreement, and that the content of Mr Kildare's email of 31 January 2014 contradicts Mr Dignan's evidence,

the trial judge failed to have any, or any sufficient, regard to:

7.3. the evidence in relation to the further meeting between Messrs Dignan, Weeks, Wheeldon and Kildare on 29 January 2014 (**29 January meeting**), including:

7.3.1. Mr Wheeldon's oral evidence that at that meeting two separate agreements – one specific to rooms in H105, and the other being a broader accommodation services arrangement – were discussed;

7.3.2. Mr Kildare's evidence, both oral and in writing at the time, that the matters discussed at that meeting were summarised in the three key points set out in Mr Dignan's email of 29 January 2014;

7.3.3. Mr Dignan's and Mr Week's evidence that there was no mention of INPEX requiring additional internal processes to be completed and that it was their understanding that a variation for additional accommodation could be made legally binding by a letter of instruction under clause 3; and

7.3.4. Mr Dignan's evidence that Mr Kildare confirmed that Mr Wheeldon had the authority to vary the existing Accommodation Agreement, and Mr Kildare's oral evidence that it was for Mr Wheeldon to negotiate over rates, numbers, terms and conditions; and

7.4. the content of Mr Dignan's email of 29 January 2014, including the statement that the "*basis of our discussions was to seek a mutually agreed variation*" and that all rooms of H105 "*will be dedicated solely to project accommodation requirements*".

8. In respect of the findings at R [78] that in the period between 28 January 2014 and 13 February 2014:

8.1. either Mr Wheeldon or Mr Kildare told Messrs Weeks and Dignan that INPEX did not need the apartments in H105 but said that other personnel working on the project might;

8.2. Mr Wheeldon advised Mr Weeks and Mr Dignan that he was working on obtaining revised future workforce numbers but did not yet have them and that INPEX would analyse the accommodation numbers for the Project but that this would take some time; and

8.3. Mr Wheeldon told Messrs Weeks and Dignan that if the analysis of the accommodation requirements justified the appointment of an accommodation services provider, a decision note on the additional accommodation requirements and the appointment of a service provider would have to be generated and circulated to all relevant departments within INPEX and that that process would take time,

the trial judge failed to have any, or any sufficient, regard to:

8.4. the evidence referred to above in respect of the 29 January meeting and Mr Dignan's email of 29 January 2014; and

8.5. Mr Wheeldon's oral evidence that at the meeting with Messrs Dignan and Weeks on 6 February 2014:

8.5.1. he requested a copy of the draft variation agreement with the number of 250 rooms included in it;

8.5.2. he requested including the number of 250 in that document;

8.5.3. he discussed putting tentative minimum numbers in that document; and

8.5.4. he discussed that the document would proceed by way of a variation to the existing agreement.

9. In respect of the findings at R [79] and [80]:

9.1. not to accept the evidence of Mr Dignan that on or around 6 February 2014 Mr Wheeldon:

9.1.1. told him "*INPEX Legal are happy for this agreement to be completed under the existing contract and clause 3 to allow for ease of signing*";

9.1.2. said that because Legal were happy, and because the parties could just use clause 3 of the existing agreement to make the

new agreement a variation as they had done in the past, INPEX did not need to go out to tender;

9.1.3. told him that INPEX wished to avoid going to tender due to the delays that a tender may cause; and

9.1.4. asked Halikos to send him, as soon as possible, a draft of the variation to the Accommodation Agreement that contained a minimum of 250 apartments; and

9.2. accepting the evidence of Mr Wheeldon that as at 6 February 2014 he did not have numbers for the accommodation requirements for the Project and was not in a position to tell Mr Weeks the accommodation numbers required by the Project,

the trial judge failed to have any, or any sufficient, regard to:

9.3. Mr Wheeldon's oral evidence that at the meeting with Messrs Dignan and Weeks on 6 February 2014:

9.3.1. he requested a copy of the draft variation agreement with the number of 250 rooms included in it;

9.3.2. he requested including the number of 250 in that document;

9.3.3. he discussed putting tentative minimum numbers in that document; and

9.3.4. he discussed that the document would proceed by way of a variation to the existing agreement;

9.4. the evidence of Mr Weeks and Mr Wheeldon (oral evidence) in relation to problems Mr Wheeldon had previously experienced as a result of going out to tender for accommodation;

9.5. the body of evidence that INPEX wished to address promptly the accommodation issues raised with Mr Okawa by the Chief Minister;

9.6. Mr Wheeldon's oral evidence that he told Messrs Dignan and Weeks in 2013 that clause 3 of the original Accommodation Agreement could be used to obtain additional accommodation; and

9.7. the contents of Mr Dignan's email of 29 January 2014, including the statement the "*basis of our discussions was to seek a mutually agreed variation*".

10. In respect of the findings at R [81] and [82]:

10.1. not to accept that Mr Weeks sent a draft variation agreement to Mr Wheeldon on 7 February 2014 in response to a request from Mr Wheeldon; and

10.2. that Mr Weeks' email of 7 February 2014 strongly suggests that the figure of 250 came from Mr Weeks and not from Mr Wheeldon,

the trial judge failed to have any, or any sufficient, regard to:

10.3. Mr Wheeldon's oral evidence that at the meeting on 6 February 2014, he requested a copy of the draft variation agreement with the number of 250 rooms included in it, and that he requested the number of 250 be included in that document; and

10.4. The failure of Mr Wheeldon to respond to Mr Weeks' email of 7 February 2014 objecting to the contents of that email.

11. In respect of the findings at R [92] that Mr Wheeldon did not say to Mr Weeks that after the construction phase was finished only the Operations division's 150 hotel rooms and apartments would be needed and that he was otherwise happy with the agreement, the trial judge failed to have any regard to:

11.1. Mr Wheeldon's oral evidence that by Mr Weeks' email of 12 February 2014, Mr Wheeldon understood that Mr Weeks believed that the parties could move forward on the basis of an instruction to secure accommodation, without any decision note, whilst the Variation Document was being executed; and

11.2. Mr Wheeldon's oral evidence that he accepted that Mr Weeks' views were a significant matter, and he did not point out to Mr Weeks that he was labouring under a misapprehension.

The meeting on 13 February and the letter of 13 February

12. In respect of the finding at R [96] that, as to the events of 12 February 2014, the evidence of Mr Kildare is to be preferred to that of Mr Weeks, including

because Halikos rather than INPEX was pressing for a concluded agreement, the trial judge failed to have any, or any sufficient, regard to:

12.1. the body of evidence that INPEX wanted a solution to the accommodation issues raised by the Chief Minister;

12.2. the evidence of Mr Weeks and Mr Wheeldon (oral evidence) concerning problems Mr Wheeldon had previously experienced as a result of going out to tender for accommodation;

12.3. the evidence addressed above in relation to the 17 January meeting, including Mr Wheeldon's evidence that it was not inconsistent with his memory that during the meeting Mr Okawa said "*I want a broader, longer term accommodation solution covering the three phases of the project*" and "*I'm happy and I agree with what is proposed*";

12.4. the evidence addressed above in relation to the 29 January meeting and Mr Dignan's email of 29 January;

12.5. Mr Wheeldon's oral evidence that at the meeting with Messrs Dignan and Weeks on 6 February 2014:

12.5.1. he requested a copy of the draft variation agreement with the number of 250 rooms included in it;

12.5.2. he requested including the number of 250 in that document;

12.5.3. he discussed putting tentative minimum numbers in that document; and

12.5.4. he discussed that the document would proceed by way of a variation to the existing agreement;

12.6. the content of Mr Weeks' email of 12 February 2014;

12.7. Mr Wheeldon's oral evidence that by Mr Weeks' email of 12 February 2014, Mr Wheeldon understood that Mr Weeks believed that the parties could move forward on the basis of an instruction to secure accommodation, without any decision note, whilst the Variation Document was being executed;

12.8. Mr Weeks' evidence that he was confident that Halikos could provide the 225 apartments requested by Mr Wheeldon at that time without needing to speak to other accommodation providers;

12.9. Mr Wheeldon's (and any other INPEX witness's) failure to corroborate Mr Kildare's evidence as to the purport of the letter allegedly requested by Mr Weeks; and

12.10. the apparent acceptance by the trial judge of the evidence of Mr Kildare that the letter allegedly requested by Mr Weeks at that time did not concern an agreement (it was just to show other developers).

13. In respect of the findings at R [104] to [106] and [111]:

13.1. that the meeting on 13 February 2014 (**13 February meeting**) occurred substantially as Mr Kildare deposed;

13.2. that the evidence of Mr Dignan and Mr Weeks was inherently implausible;

13.3. that it was inconceivable that Mr Kildare would purport to finalise the terms of an agreement with Halikos of the kind alleged;

13.4. not to accept Mr Weeks' evidence that Mr Wheeldon had told him that he was happy with the revised draft variation agreement and that INPEX's legal team had signed off on the variation;

13.5. that there is no reason why Mr Wheeldon would have told Mr Weeks that the lawyers had "*signed off*" on the revised draft variation agreement;

13.6. that Mr Weeks' evidence that Mr Kildare said "*I am happy with the Variation Document. It is correct and is all that is required. The RFA for the first agreement was fully signed off and that is all that's needed for the variation*" is implausible;

13.7. that there was no reason at all why Mr Kildare would tell Mr Weeks and Mr Dignan that the INPEX internal processes were not necessary;

13.8. that Mr Weeks' evidence was inconsistent with later documents and other communications;

13.9. to accept Mr Kildare's evidence about Mr Weeks' explanation as to why Halikos wanted the letter dated 13 February 2014 (**13 February letter**), that he requested the words "*subject to*" be inserted and that he made it clear that anything INPEX provided in writing was subject to final approvals from INPEX;

the trial judge failed to have any, or any sufficient, regard to:

13.10. Mr Kildare's inconsistent oral evidence in relation to the words "*subject to*" (which he allegedly wanted incorporated in the 13 February letter):

13.10.1. that they were of great significance;

13.10.2. that he saw the need to include them because he did not want Halikos to be under a misunderstanding;

13.10.3. that he included them for completeness;

13.10.4. that the inclusion of these words was not an important step and did not seem important to him at the time; and

13.10.5. that he did not see the letter as a whole being important or that the omission of these words was a problem;

13.11. Mr Kildare's evidence that although he was sent the letter and acknowledged it did not contain the words "*subject to*" he did not take any steps to correct this because the letter as a whole was not important;

13.12. the evidence of Messrs Dignan and Weeks that:

13.12.1. while Mr Kildare dictated changes to the Variation Document, Mr Weeks typed them into his computer, and the computer monitor was a large television screen visible from all parts of the room;

13.12.2. after Mr Kildare finished making changes to the Variation Document, a copy of that document was printed out and given to him;

13.12.3. while Mr Kildare dictated changes to the letter, Mr Weeks typed them into his computer, and the computer monitor was a large television screen visible from all parts of the room;

13.13. Mr Weeks' contemporaneous handwritten notes (unchallenged) of that meeting which are consistent with his and Mr Dignan's evidence;

13.14. Mr Davies' (of INPEX) evidence that Mr Kildare described the letter as "*a letter of intent for accommodation*" and that Mr Kildare said to him in respect of it "*… it's all good. Chris knows about it*";

13.15. the evidence of Messrs Dignan and Weeks that Mr Weeks emailed the draft letter to Mr Davies, Mr Kildare and Mr Dignan in Mr Kildare's presence, and that a hardcopy of the signed letter was given to Mr Kildare before he left that meeting;

13.16. Mr Wheeldon's evidence that upon reviewing Mr Weeks' email of 17 February 2014, he thought that Halikos thought that they has an agreement in place;

13.17. Mr Weeks' contemporaneous notes (unchallenged) of a meeting with Mr Kildare on 25 March 2014 which record Mr Kildare saying in response to questioning about the signing of the Variation Document "*You have your letter and don't need to worry*"; and

13.18. Mr Weeks' contemporaneous notes (unchallenged) made during a meeting with Mr Kildare on 26 May 2014 which record Mr Kildare saying at that meeting "*we are an honourable company and we will stick to the agreement*" and "*you have got your letter it's as good as money in the bank*".

14. In respect of the findings at R [107] and [108] that the 13 February letter does not signal unambiguously that it is intended to bind INPEX, and that Messrs Dignan and Weeks were well aware that Mr Kildare would not have agreed to sign an unambiguously binding document, the trial judge failed to have any, or any sufficient, regard to:

14.1. the terms of the letter of 13 February 2014, including the subject line "*Variation to Existing Contract 800575*";

14.2. the terms of the letter, which are inconsistent Mr Kildare's explanation for the existence of the document;

14.3. the inconsistency between Mr Kildare's evidence that "*subject to*" was to be included as he did not want Halikos to be under a misunderstanding, and his purported explanation that the letter was to show to third parties;

14.4. the differences between the 13 February letter as signed by INPEX and the earlier draft which was no more than an agreement to agree;

14.5. Mr Wheeldon's evidence that the letter should not have been signed and that he disagreed with it;

14.6. Mr Okawa's oral evidence that the letter was a significant document;

14.7. Mr Weeks' contemporaneous notes (unchallenged) of a meeting with Mr Kildare on 25 March 2014 which record Mr Kildare saying in response to questioning about the signing of the Variation Document "*You have your letter and don't need to worry*";

14.8. Mr Weeks' contemporaneous notes (unchallenged) made during a meeting with Mr Kildare on 26 May 2014 which record Mr Kildare saying "*you have got your letter it's as good as money in the bank*";

14.9. Mr Wheeldon's email of 21 July 2014 in which he confirmed that the 13 February letter was to stand as the first agreement in respect of additional accommodation and his oral evidence to this effect (addressed further in [31] below);

14.10. the body of evidence that immediately after the 13 February meeting, Halikos put in train the development of H105; and

14.11. the evidence of Messrs Halikos and Dignan that they would not have developed H105 without a commitment from INPEX.

Dealings after the meeting on 13 February 2014

15. In respect of the finding at R [109] that the documentary evidence subsequent to the 13 February meeting does not support the Halikos contention that the parties regarded themselves as bound to a 15 year agreement in terms of the Variation Document, the trial judge failed to have any, or any sufficient, regard to:

15.1. Mr Wheeldon's evidence that upon reviewing Mr Weeks' email of 17 February 2014, he understood that Halikos thought that they has an agreement in place;

15.2. the body of evidence that immediately after the 13 February meeting, Halikos put in train the development of H105;

15.3. the body of evidence that H105 was designed and constructed to meet INPEX's requirements as communicated by representatives of INPEX to Mr Dignan;

15.4. Mr Weeks' contemporaneous notes (unchallenged) of the meeting with Mr Okawa on 21 March 2014;

15.5. Mr Weeks' contemporaneous notes (unchallenged) of a meeting with Mr Kildare on 25 March 2014 which record Mr Kildare saying in response

to questioning about the signing of the Variation Document "*You have your letter and don't need to worry*";

15.6. the terms of the two press releases sent by Mr Kildare to Mr Okawa on 25 and 26 March 2014 (addressed further in [21] below);

15.7. Mr Weeks' contemporaneous notes (unchallenged) made during a meeting with Mr Kildare on 26 May 2014 which record Mr Kildare saying "*you have got your letter it's as good as money in the bank*"; and

15.8. Mr Wheeldon's email of 21 July 2014 in which he confirmed that the 13 February letter was to stand as the first agreement in respect of additional accommodation and his oral evidence to this effect.

(a) Events from 17 February to 28 February 2014

16. In respect of the findings at R [116] and [118]:

16.1. not to accept Mr Weeks' evidence that towards the end of February 2014 Mr Wheeldon said there were no problems with the variation and that the Variation Document would be signed; and

16.2. to accept Mr Wheeldon's evidence that he told Messrs Dignan and Weeks that he had spoken to Operations and they may be interested in a proposal for an accommodation service provider, but it had to await a tender process,

the trial judge failed to have any, or any sufficient, regard to:

16.3. Mr Wheeldon's oral evidence that upon reviewing Mr Weeks' email of 17 February 2014, he understood that Halikos thought that they has an agreement in place;

16.4. Mr Wheeldon's evidence that he disagreed with the 13 February letter and thought that it should not have been sent, and his further oral evidence that any such disagreement was an important matter and something that should have been communicated in writing, but that he did not do this;

16.5. Mr Wheeldon's oral evidence that he included the 13 February letter in a pack of documents that he provided to, and discussed with, Mr Sakamoto in April 2014;

16.6. the evidence described by the trial judge in R [117] that Mr Wheeldon advised Mr Weeks that there would be thousands of project personnel needing accommodation outside the project village;

16.7. the body of evidence that INPEX wanted a solution to the accommodation issues raised by the Chief Minister; and

16.8. the evidence of Mr Weeks and Mr Wheeldon (oral evidence) concerning problems Mr Wheeldon had previously experienced as a result of going out to tender for accommodation.

17. In respect of the finding at R [121] that the comments attributed in the *NT News* article of 25 February 2014 attributed to Mr Weeks were inconsistent with there

being an agreement between Halikos and INPEX, the trial judge failed to have any regard to:

17.1. Mr Weeks' evidence that he did not mention the agreement as Mr Kildare had asked him not to do so until the Government had been informed.

(b) Draft media release and dealings from 14 to 21 March 2014

18. In respect of the findings at R [125], [126], [129], [130] and [132]:

18.1. that the draft media release of 14 March 2014 does not support the agreement pleaded by Halikos and supports Mr Kildare's evidence that it was prepared in advance of the agreement it refers to;

18.2. to reject Mr Weeks' evidence that the reference in his email of 18 March 2014 to "*to finalise the discussions and proceed*" was a reference to the discussions in relation to the media release, rather than the agreement;

18.3. Mr Weeks' email of 18 March 2014 is inconsistent with Halikos's claim that as at that date there was a concluded agreement which had been made on 13 February 2014; and

18.4. to accept Mr Kildare's evidence as to an alleged conversation with Mr Weeks on about 18 March 2014 and to reject Mr Weeks' denial that any conversation occurred,

the trial judge failed to have any regard to:

18.5. Mr Weeks' oral evidence, including in respect of his email of 18 March 2014.

19. In respect of the findings at R [135] to [138]:

19.1. not to accept Mr Dignan's evidence of what Mr Okawa said at the meeting on 21 March 2014 (**21 March meeting**);

19.2. at the 21 March meeting it was highly unlikely that Mr Okawa gave the go ahead to issue a media release, unlikely that Mr Dignan made reference to the provision of accommodation that "*had already been agreed*", and unlikely that reference was made during the meeting to "*the agreement*" and "*the deal*"; and

19.3. not to accept Mr Weeks' evidence of what he said at the 21 March meeting,

the trial judge failed to have any, or any sufficient, regard to:

19.4. Mr Weeks' contemporaneous handwritten notes (unchallenged) of that meeting which set out (among other things):

19.4.1. "*Advised HO [Mr Okawa] recieved (sic) letter of instruction*";

19.4.1.1."*HO said that was very pleasing tourism support our agreement*";

19.4.2. "*Explained we now need to get CM [Chief Minister] on board for his support. HO confirmed and approved this happen ASAP*";

19.4.3. "*We all agreed a Media Release would benefit the agreement and take pressure off the negative press of last 3 month*";

19.4.4. "*Advised there were additional numbers to the 225 instructed*"; and

19.4.5. "*HO thanked us and spoke that this was what INPEX wanted and direction when we met in January. Longer – broader – construction – oper.*";

19.5. the evidence of Messrs Dignan and Weeks that they provided Mr Okawa with a copy of the 13 February letter and the Variation Document and gave him an update on the construction of H105, and Mr Okawa's evidence during cross-examination that he did not deny that he was provided with these documents;

19.6. the evidence that the meeting with the Chief Minister took place on 24 March 2014 (the next business day after 21 March 2014); and

19.7. Mr Weeks' contemporaneous notes (unchallenged) of a meeting with Mr Kildare on 25 March 2014 which described the purpose of that meeting to follow up from the 21 March meeting and "*prepare a media release*".

(c) Meeting with the Chief Minister and dinner at Hanuman

20. In relation to the findings at R [144], [152], [153]:

20.1. not to know what to make of the evidence of the meeting;

20.2. not to accept the evidence of Messrs Dignan, Weeks, Giles and Kelly about what happened at the dinner at Hanuman;

20.3. that the discussion of the construction of H105 did not take place in the context of anyone saying there had been a concluded agreement between Halikos and INPEX for INPEX to take and pay for 225 rooms; and

20.4. Mr Kelly was mistaken when he said the discussion of H105 took place in the context of a discussion about a "*deal*" between INPEX and Halikos,

the trial judge failed to have any, or any sufficient, regard to:

20.5. the consistency of the evidence of Messrs Giles, Kelly, Dignan and Weeks in circumstances where there was no suggestion (including during cross-examination) of collusion;

20.6. the letter sent by Mr Giles to Mr Ito (President Director of INPEX) dated 6 November 2014 which referred to the dinner as a "*celebratory dinner*", and which set out that it was specifically to celebrate a commitment by INPEX to secure additional accommodation, and that the commitment meant that Halikos's H105 development would move forward and play a key role in meeting that demand;

20.7. the unlikelihood that the consistent memories and accounts of Messrs Giles, Kelly, Dignan and Weeks would all be wrong and the purported memory and account of Mr Kildare would be the only correct memory and account of those present; and

20.8. the draft press release sent by Mr Giles' office during that dinner which set out, among other things that "*Halikos Hospitality is joining forces with INPEX in a 15 year agreement to reduce the pressure on Darwin's tourist accommodation*".

(d) Further draft media releases

21. In relation to the findings at R [156], [158], [162], [163], [226(e)]:

21.1. that on 25 March 2014 Ms Long (of Halikos) sent a redrafted proposed media release by email;

21.2. to reject Mr Weeks' explanation of his email of 25 March 2014;

21.3. that nothing had been "*signed*" at the time the media releases were prepared;

21.4. that the media releases support Mr Kildare's evidence that the purpose of the drafts was to have a release prepared to be issued once an agreement had been finalised;

21.5. that the drafts do not support the contention that the media releases were intended for immediate issue and were intended to refer to an agreement said to have been made on 13 February 2014;

21.6. that there is no credible explanation why the parties should wait until 24 and 25 March 2014 to announce the agreement to the Government and prepare media releases; and

21.7. that the trial judge was unable to locate evidence in relation to what Mr Kildare said on 26 March 2014, but that her Honour did not accept that at any time he made a statement to the effect that there had been a concluded agreement reached on 13 February 2014,

the trial judge failed to have any, or any sufficient, regard to:

21.8. the fact that the 13 February letter had been signed at the time the media releases were prepared;

21.9. the evidence that there were two separate media releases, one prepared by Mr Giles' office and one prepared between INPEX (Mr Kildare) and Halikos (Messrs Dignan and Weeks);

21.10. the documentary evidence that shows Mr Kildare amended Mr Giles' draft press release, forwarded it to Mr Okawa (marked as high importance), and asked Mr Okawa to add his comments and to pass it on to Ms McNamara, the head of INPEX's Media Relations department, and that he did so first thing in the morning after the Hanuman dinner;

21.11. Mr Kildare's evidence that he sought that the INPEX Media Relations department approve Mr Giles' press release;

21.12. Mr Weeks' contemporaneous notes of the meeting with Mr Kildare on 25 March 2014 (unchallenged) (there was no evidence of a meeting taking place on 26 March 2014) at which the INPEX-Halikos press release was drafted, which record Mr Kildare saying in response to a query about the signing of the Variation Document (among other things) "*you have your letter and don't need to worry*";

21.13. the evidence that on 25 March 2014, the INPEX-Halikos press release was sent to public relations consultants retained by INPEX;

21.14. Mr Kildare's response to Mr Weeks' concerns about the press release contained in his email sent on 25 March 2014, including his forwarding the final version to Mr Okawa and asking that it also be sent to Ms McNamara; and

21.15. Mr Kildare's oral evidence that the draft press releases contained statements of fact that were true at that time.

(e) Communications re "decision note", tenders and "internal processes" to 9 July 2014

22. In relation to the findings at R [166], [169] to [171]:

22.1. that Mr Wheeldon asked Mr Weeks for information to enable him to prepare a decision note;

22.2. that the proposal was given to Mr Wheeldon in response to his request for information for a decision note;

22.3. that the document pack plainly is a proposal and not just "*information*";

22.4. that the information in the proposal of what happened at the 17 January meeting supports the evidence of the INPEX witnesses about what happened at that meeting and does not support the evidence of Messrs Dignan and Weeks; and

22.5. the proposal is not consistent with the claim by Halikos that at that time Halikos already had a binding agreement with INPEX in terms of the Additional Accommodation Variation,

the trial judge failed to have any, or any sufficient, regard to:

22.6. the statement in the document pack that on 13 February 2014, INPEX provided to Halikos the minimum amount of additional accommodation that the project required to be secured, and Mr Wheeldon's oral evidence that this was a reference to the 13 February letter;

22.7. the statement in the document pack that H105 was due for completion in March 2015 and will provide a further 254 hotel suites and apartment rooms specifically for the Ichthys Project management, contractors and subcontractors and will be the main hub for INPEX's accommodation requirements over the 15 years in the Variation Document for the construction, commissioning and operation phases;

22.8. the two press releases were contained within the document pack;

22.9. Mr Wheeldon's oral evidence, in addition to that of Messrs Dignan and Weeks, that there were two separate agreements – one concerning 225/150 rooms and the other a broader accommodation services provider arrangement;

22.10. Mr Wheeldon's oral evidence that the reference to the decision note in his subsequent email of 7 May 2014 concerned the broader accommodation services provider agreement; and

22.11. the evidence that the document was circulated widely within INPEX, including to Messrs Okawa and Sakamoto.

23. In relation to the findings at R [172] to [178]:

23.1. concerning Mr Weeks' letter to Mr Wheeldon of 11 April 2014;

23.2. in general to prefer the evidence of Mr Wheeldon where it differed from that of Mr Weeks and Mr Dignan;

23.3. that Mr Kildare's email of 16 April 2014 unequivocally conveyed to Halikos that INPEX was yet to decide whether to agree to the Variation Document;

23.4. not to accept the evidence of Mr Weeks that the comments in Mr Kildare's email of 16 April 2014 concerned the additional services issues only and not the agreed 225/150 apartments and hotel rooms;

23.5. not to accept the evidence of Messrs Dignan and Weeks that there was ever any discussion about anything other than a single accommodation services provider agreement before 9 July 2014;

23.6. that Mr Wheeldon's email of 7 May 2014 tends to indicate a mutual familiarity with the term "*decision note*" and that there had been previous discussions between Mr Wheeldon and Mr Dignan about the need for a decision note in relation to "*the variation*";

23.7. that there is no support in any of the documents for Mr Dignan's belief that the decision note related only to the provision of accommodation over and above the 225/150; and

23.8. that at 22 May 2014, Mr Weeks regarded the 225 apartments / hotel rooms as potential only,

the trial judge failed to have any, or any sufficient regard to:

23.9. the contents of the covering email to Mr Weeks' letter of 11 April 2014, which set out "*From correspondence received on the 13th February 2014 from INPEX Operations Australia Pty Ltd we confirm we have secured the additional 225 apartments/hotel rooms*";

23.10. Mr Okawa's evidence that he would have expected Mr Wheeldon and Mr Kildare to have read the correspondence and to have informed him and Halikos if they identified anything in it that was wrong, and that they did not do so;

23.11. Mr Kildare's oral evidence that he likely read the correspondence at the time;

23.12. Mr Wheeldon's oral evidence that:

23.12.1. he read and understood the email and letter, including that it referred to the 13 February letter and the press releases;

23.12.2. at that time he was getting concerned that Halikos was in fact proceeding on the basis that it had entered into an agreement with INPEX for a specific number of rooms;

23.12.3. at that time he understood that Halikos was saying that it had in effect locked in an agreement with INPEX under the 13 February letter;

23.12.4. he accepted that rooms in H105 could be used for the purpose of the variation; and

23.12.5. he understood from his discussions with Halikos representatives that they proposed to develop H105 to provide rooms for INPEX in relation to a specific agreement for the provision of rooms;

23.13. Mr Wheeldon's email to Mr Kildare on 14 April 2014 following receipt of Mr Weeks' email in which Mr Wheeldon asked Mr Kildare "*how do we want to play this*", and Mr Kildare's response that they have a chat over a coffee or beer at the end of the day;

23.14. the statement in Mr Kildare's email of 16 April 2014 that the announcement will be ready to go sometime after Easter, and the fact that the email on its face deals with issues relating to the wider accommodation services provider agreement;

23.15. Mr Wheeldon's oral evidence that as at about 17 April 2014 he said to Mr Dignan that the variation would be signed in May;

23.16. Mr Kildare's oral evidence that by 24 April 2014 he had formed the impression that there was a link in Mr Dignan's mind between the development of H105 and the negotiation of the variation;

23.17. Mr Wheeldon's oral evidence that the reference to the decision note in his email of 7 May 2014 concerned the broader accommodation services provider agreement;

23.18. the evidence of Messrs Dignan and Weeks and the contents of the Variation Document that for the initial period of the variation to 28 February 2015, Halikos was only obliged to provide apartments and rooms when INPEX requested them;

23.19. Mr Wheeldon's oral evidence that at the 29 January meeting two separate agreements (one specific to rooms in H105, and the other being a broader accommodation services arrangement) were discussed; and

23.20. Mr Wheeldon's oral evidence that the reference to the decision note in his subsequent email of 7 May 2014 concerned the broader accommodation services provider agreement.

24. In relation to the findings at R [178]:

24.1. not to accept that Mr Kildare said on 26 May 2014, or on any other date, anything to the effect that Halikos could rely on the 13 February letter as binding INPEX to an agreement to take and pay for 225/150 rooms over a 15 year period; and

24.2. not to accept that Mr Wheeldon made any such statements,

the trial judge failed to have any, or any sufficient, regard to:

24.3. Mr Weeks' notes made during the meeting on 26 May 2014 (unchallenged) which record Mr Kildare saying at that meeting (among other things) "*you have got your letter it's as good as money in the bank*";

24.4. Mr Kildare's late change of evidence that what he originally deposed to taking place on 26 May 2014 actually took place on 19 August 2014;

24.5. Mr Weeks' contemporaneous notes of the meeting with Mr Kildare on 25 March 2014 (unchallenged), which record Mr Kildare saying in response to a query about the signing of the Variation Document "*you have your letter and don't need to worry*"; and

24.6. Mr Wheeldon's email of 21 July 2014.

25. In relation to the findings at R [179] not to accept Mr Dignan's evidence that on 20 June 2014 Mr Wheeldon told him that Legal and Operations were "*all on board*" and that Mr Wheeldon said "*Don't worry about it. You have your letter*", the trial judge failed to have any regard to:

25.1. Mr Wheeldon's oral evidence that:

25.1.1. he did not deny saying that Halikos just had to make sure that it had the apartments and hotel rooms available as agreed;

25.1.2. he may have been trying to assure Mr Dignan at that time that he should have no concerns about an agreement pursuant to the 13 February letter; and

25.1.3. Mr Dignan made it clear to him that Halikos was proceeding with the H105 development to provide part of the accommodation required pursuant to the 13 February letter; and

25.2. Mr Weeks' contemporaneous notes (unchallenged) of a meeting with Mr Kildare on 9 May 2014 which record "*SK [Mr Kildare] said that CW [Mr Wheeldon] had advised him that Operations were on board with Variation*".

26. In relation to the findings at R [182] not to accept the evidence of either Mr Weeks or Mr Dignan that they believed that no decision note was necessary for the Additional Accommodation Variation, the trial judge failed to have any regard to:

26.1. Mr Wheeldon's oral evidence that the reference to the decision note in his email of 7 May 2014 concerned the broader accommodation services provider agreement.

(f) Discussions re "two agreements"

27. In relation to the findings at R [187]:

27.1. that Mr Dignan may have made a phone call to Mr Kildare on 10 July 2014; and

27.2. not to accept that Mr Kildare said anything to the effect that there was a binding agreement for INPEX to lease H105,

the trial judge failed to have any regard to:

27.3. Mr Dignan's email to Ms Long sent after that telephone call in which he wrote that Mr Kildare made a comment that "*105 is committed to INPEX*".

28. In relation to the findings at R [190]:

28.1. not to accept the evidence of Mr Dignan about what happened at the meeting on 11 July 2014; and

28.2. that the meeting occurred substantially as deposed to by Mr Wheeldon,

the trial judge failed to have any regard to:

28.3. Mr Wheeldon, during cross-examination, not denying that he said Halikos and INPEX were already committed to the 225/150 apartments, and not denying that he said "*you just need to make sure you have the accommodation available under the agreement*", "*hurry up and get it built"* and "*don't worry about us*"; and

28.4. Mr Wheeldon's oral evidence that he asked how the construction of H105 was progressing.

(g) Halikos asserts existence of concluded agreement: negotiations continue

29. In relation to the finding at R [193] that Mr Dignan's text message of 15 July 2014 was the first mention in any of the documents of there having been an agreement arising out of the 13 February letter, the trial judge failed to have any, or any sufficient, regard to:

29.1. Mr Weeks' contemporaneous notes of the meeting with Mr Kildare on 25 March 2014 (unchallenged), which record Mr Kildare saying in response to a query about the signing of the Variation Document "*you have your letter and don't need to worry*";

29.2. the documentation pack provided to Mr Wheeldon by Halikos in April 2014;

29.3. Mr Weeks' email to Messrs Wheeldon, Kildare and Okawa of 12 April 2014 attaching a letter of 11 April 2014, and Mr Wheeldon's oral evidence that he understood that by this letter, Halikos was saying that it

had in effect locked in an agreement with INPEX under the 13 February letter; and

29.4. Mr Weeks' notes made during the meeting on 26 May 2014 (unchallenged) which record Mr Kildare saying at that meeting "*you have got your letter it's as good as money in the bank*".

30. In relation to the findings at R [195]:

30.1. not to accept the evidence of Mr Weeks that Mr Kildare said "*There is no problem with the variation*";

30.2. that the trial judge had very serious doubts that Mr Kildare said anything about "*You have your letter*"; and

30.3. that no-one seems to have attached any significance to the 13 February letter before Mr Dignan's text to Mr Wheeldon on 18 July 2014,

the trial judge failed to have any, or any sufficient, regard to:

30.4. the body of evidence that following receipt of the 13 February letter Halikos commenced the H105 development;

30.5. the commercial sense and logic of the evidence of Messrs Halikos and Dignan that without having received the 13 February letter, they would not have undertaken the H105 development;

30.6. Mr Wheeldon's oral evidence that upon reviewing Mr Weeks' email of 17 February 2014, he thought that Halikos thought that they has an agreement in place;

30.7. the evidence that Messrs Dignan and Weeks provided the 13 February letter to Mr Okawa at the meeting on 21 March 2014;

30.8. Mr Weeks' contemporaneous notes of the meeting with Mr Kildare on 25 March 2014 (unchallenged), which record Mr Kildare saying in response to a query about the signing of the Variation Document "*you have your letter and don't need to worry*";

30.9. Mr Weeks' email to Messrs Wheeldon, Kildare and Okawa of 12 April 2014 attaching a letter of 11 April 2014, and Mr Wheeldon's oral evidence that he understood that by this letter, Halikos was saying that it had in effect locked in an agreement with INPEX under the 13 February letter;

30.10. Mr Weeks' notes made during the meeting on 26 May 2014 (unchallenged) which record Mr Kildare saying at that meeting "*you have got your letter it's as good as money in the bank*"; and

30.11. Mr Wheeldon's oral evidence that as at 20 June 2014 he may have been trying to assure Mr Dignan at that time that he should have no concerns about an agreement pursuant to the 13 February letter.

31. In relation to the finding at R [197] that it is difficult to know what to make of Mr Wheeldon's email of 21 July 2014, the trial judge failed to have any regard to:

31.1. the title of the email "*Confirmation*" in circumstances where Mr Dignan had been seeking a confirmation of the variation, including by his email to Mr Wheeldon of 11 July 2014;

31.2. Mr Wheeldon's oral evidence that his reference in the email to the "*original letter*" was a reference to the 13 February letter, whilst the phrase "*suffice for the first agreement*" meant that the letter would suffice for the agreement embodied in the Variation Document specific to additional accommodation;

31.3. Mr Wheeldon's text message to Mr Dignan sent on 21 July 2014 confirming that he had sent the email to Mr Dignan; and

31.4. the evidence that each of Messrs Wheeldon, Kildare and Dignan separately forwarded Mr Wheeldon's email to Mr Weeks within 20 minutes of it having been sent by Mr Wheeldon.

32. In relation to the finding at R [200] that Mr Weeks' letter to Mr Okawa dated 21 July 2014 does not state that there has been a concluded agreement in terms of the pleaded Additional Accommodation Variation, the trial judge failed to have any, or any sufficient, regard to:

32.1. the sentence in the letter "*I have received today confirmation from INPEX that the original letter signed on 13th February 2014 is suffice for the agreement 800575/2 calling for 225/150 hotel and apartments as agreed by both parties*";

32.2. Mr Wheeldon's oral evidence that:

32.2.1. he understood that the letter being referred to was his email to Mr Dignan sent that day;

32.2.2. this letter was a matter of consequence; and

32.2.3. it fell to him to correct anything in it that was incorrect, and that at no time did he correct anything in it; and

32.3. Mr Okawa's oral evidence that he would have expected Messrs Wheeldon and Kildare to have read the letter and that if anything in it appeared untrue, to have done something about it including correcting Mr Weeks, and telling him (Mr Okawa). Mr Okawa could not recall either of Mr Wheeldon or Mr Dignan doing that, and the absence of any evidence that Mr Wheeldon or Mr Kildare ever corrected Mr Weeks on his letter.

33. In relation to the finding at R [202] not to accept that Mr Wheeldon said to Mr Dignan in about July 2014 that the agreed variation for the 225/150 apartments and hotel rooms was unaffected by a tender from INPEX Operations, the trial judge failed to have any sufficient regard to:

33.1. Mr Weeks' contemporaneous notes of the meeting with Mr Kildare on 25 March 2014 (unchallenged), which record Mr Kildare saying in response to a query about the signing of the Variation Document "*you have your letter and don't need to worry*";

33.2. Mr Weeks' notes made during the meeting on 26 May 2014 (unchallenged) which record Mr Kildare saying at that meeting "*you have got your letter it's as good as money in the bank*"; and

33.3. Mr Wheeldon's email of 21 July 2014.

34. In relation to the finding at R [207] that the correspondence referred to in R [205] and [206] is in terms of a proposal, the trial judge failed to have any regard to:

34.1. Mr Weeks' evidence that the emails concerned the broader accommodation services provider agreement which was still being negotiated at that time;

34.2. Mr Wheeldon's oral evidence that at the 29 January meeting two separate agreements (one specific to rooms in H105, and the other being a broader accommodation services arrangement) were discussed; and

34.3. Mr Kildare's email of 18 August 2014, which forwarded Mr Weeks' email of 14 August 2014 to Mr Okawa, and asked "*what do we need to do to get Sakamoto-san to sign these off?*" (referring to the two variation

documents, including the document recording more formally the agreement entered into on 13 February 2104).

35. In relation to the finding at R [208] to accept the evidence of Mr Kildare as to what occurred at the meeting on 19 August 2014, the trial judge failed to have any regard to:

35.1. Mr Kildare's oral evidence that at that meeting Mr Dignan told him that Halikos was proceeding on the basis that the 13 February letter had given rise to a binding agreement;

35.2. Mr Kildare's email of 19 August 2014 to Mr Wheeldon in which Mr Kildare sought Mr Wheeldon's advice as to what he should do about the Halikos issue, including suggesting that Mr Dignan be referred to Mr Sakamoto, asking Mr Dignan to wait until Mr Wheeldon returned from leave or "*handball[ing]*" Mr Dignan to Mr Okawa; and

35.3. Mr Kildare's late change of evidence (via his second affidavit) that although he originally deposed that all of the events that the trial judge found occurred at the meeting on 19 August 2014 took place at a meeting on 26 May 2014, they actually took place on 19 August 2014.

36. In relation to the findings at R [211] concerning Mr Dignan's letter to Mr Okawa dated 20 August 2014 that:

36.1. the portion of Mr Dignan's letter underlined by the trial judge was inconsistent with Halikos's contention that the deal had been finalised on 13 February 2014; and

36.2. it is noteworthy the letter speaks of the many hours of work having culminated in a "*mutually agreeable*" (not "*agreed*") document only now ready to be signed,

the trial judge failed to have any, or any sufficient, regard to:

36.3. the phrase in the letter "*we have now received final confirmation from Chris Wheeldon*" (referring to Mr Wheeldon's email of 21 July 2014) and the body of evidence in relation to that confirmation;

36.4. the body of evidence that Halikos was seeking to obtain from INPEX a more formal document recording the agreement entered into on 13 February 2014; and

36.5. the body of evidence as to the difficulty with finalising the documentation of the agreement given the Variation Document initially embodied both the agreed variation for additional rooms and the broader accommodation service provider agreement, which was still being negotiated.

37. In relation to the findings at R [213] to [215] concerning the meeting on 9 September 2014 involving Messrs Dignan and Weeks, and Okawa and Kildare:

37.1. to accept the evidence of Mr Kildare as to what happened at that meeting;

37.2. not to accept the evidence of Mr Dignan that:

37.2.1. Mr Okawa said that he could not execute the document that day but that "*INPEX does require the additional accommodation for the Project*";

37.2.2. Mr Okawa said that he shared Halikos's concerns that it had taken seven months but that "*this is merely an internal process*";

37.2.3. Mr Okawa said that both companies should "*continue their good relationship*" and "*continue to move to execute the document in good faith*"; and

37.2.4. Mr Kildare said, "*Shane, you have two letters from us now! What more do you need?*"; and

37.3. that Mr Dignan's evidence in relation to "*Excom*" seemed to support the evidence of Mr Kildare that Mr Okawa did mention needing the approval of the Ichthys Excom at the meeting,

the trial judge failed to have any regard to:

37.4. the meeting minutes prepared by Mr Weeks and circulated to all of the meeting's attendees under cover of an email from Mr Dignan of 11 September 2014, which set out (among other things):

37.4.1. "*HO [Mr Okawa] acknowledged that INPEX does require additional accommodation for the project*";

37.4.2. "*HO shared the same concerns with SD [Mr Dignan] that this process has now been near on 7 months and which should have been concluded earlier*";

37.4.3. "*HO reconfirmed our very good mutually working relationship between our companies and we agree to continue to move toward execution of documents in good faith*"; and

37.4.4. "*HO respectfully acknowledged to SD that we are on the right path and affirming the following:-*

- *It is the solution for INPEX accommodation requirements*";

37.5. Mr Okawa's oral evidence that the minutes were essentially correct in almost all respects. (The one aspect with which he took issue was the bullet point quoted above (together with one other bullet point), which he said was to be qualified by the words "*if the project requires additional accommodation*".); and

37.6. Mr Kildare's oral evidence that:

37.6.1. during that meeting, Mr Okawa said words to the effect that INPEX was aware additional accommodation would be required; and

37.6.2. his duties required him to review the minutes and at least notify any corrections or omissions to Mr Okawa, and that INPEX did not correct the minutes.

38. In relation to the finding at R [217] that Mr Dignan's email to Mr Okawa of 11 September 2014 is inconsistent with the evidence given by Mr Dignan that he believed no decision note was necessary for the pleaded Additional Accommodation Variation, the trial judge failed to have any, or any sufficient, regard to:

38.1. Mr Wheeldon's oral evidence that he had referred to the decision note in his email of 7 May 2014 in relation to the broader accommodation services provider agreement only;

38.2. Mr Dignan's evidence that he understood that the decision note was just an INPEX internal process and that Mr Wheeldon had told him it had been completed and circulated in any event; and

38.3. the body of evidence that Messrs Wheeldon and Kildare reassured Mr Dignan not to worry and that he had the 13 February letter and Mr Wheeldon's email of 21 July 2014.

39. In relation to the finding at R [219] to accept the evidence of Mr van der Linden (of INPEX) (and implicitly the truth of the facts stated) that, at a meeting with Mr Weeks on 29 September 2014, Mr van der Linden commented that the numbers looked different to what INPEX needed and said that no-one would agree to a 6% per year increase, the trial judge failed to have any regard to:

39.1. Mr Kildare's email of 26 September 2014 to Mr van der Linden and Mr Davies with the subject "*Tidying up after Chris Wheeldon's departure*" in which Mr Kildare, among other things, referred to the Halikos issue as remaining unfinished and stated "*for some reason, [it] sits in my in-tray*" and sought to discuss and agree how the issue would be resolved "*now that Chris had departed and left us holding this baby*";

39.2. Mr van der Linden's email of 27 September 2014 to Mr Sakamoto and Mr Bon (of INPEX) in which Mr van der Linden stated he had been in contact with Mr Kildare the previous day and set out, among other things, the following matters:

39.2.1. "*Representation had been made to Halycos [sic] by CW than an additional 225 apartment units for the period running from feb 2014 to feb 2029; then going to 150 from 2019 to 2029!!*";

39.2.2. "*A letter issued on Inpex letterhead confirming the same was issued on 13 February this year. This letter was signed by R.Davies acting under CW's instructions- (the man himself conveniently being on 'R&R')*";

39.2.3. "*The provision of these additional units would be executed under a variation to the existing accommodation contract*";

39.2.4. "*Based upon these representations, Halycos [sic] have apparently started the development of a block on 105 Mitchell street*";

39.2.5. "*Halycos [sic] had been led to believe that the signed variation would be forthcoming by CW, hence their phone call to Sean when the news of his departure broke*";

39.3. the subsequent email correspondence between Mr Okawa, Mr Bon and Mr van der Linden in the period to 29 September 2014, including Mr Okawa setting out that there was a "*long story*" which he would tell Mr Bon in full when they met in Tokyo;

39.4. the email correspondence in the period 27 to 29 September 2014 between Messrs Okawa, Sakamoto, Bon and van der Linden, concerning the Halikos issues and how Mr Wheeldon should be handled;

39.5. Mr Okawa's oral evidence that he raised in an email the suggestion on about 29 September 2014 that a demand should be made upon Mr Wheeldon to pay compensation; and

39.6. Mr Okawa's email of 30 September 2014 to Craig Hunter (of INPEX) in which he set out "*CW made an unreasonable over commitment to Halikos regarding the new accommodation for INPEX workforce*" and

sought advice as to whether compensation could be obtained from Mr Wheeldon, even if a deed of release was signed.

40. In relation to the finding at R [221] that Mr Weeks' email of 30 September 2014 and Mr Dignan's email of 7 October 2014 are consistent with the terms of the agreement still being negotiated, the trial judge failed to have any, or any, sufficient regard to:

40.1. the minutes of the meeting (unchallenged) between Mr Okawa and Messrs Dignan and Weeks on 10 October 2014 (which meeting followed the above correspondence), which record "*HO [Mr Okawa] acknowledged INPEX gave written instructions to Halikos to secure the additional accommodation as set out in the variation. (Letter dated 13/02/14 from INPEX Operations Australia Pty Ltd is referred)*".

41. In relation to the finding at R [236(n)] not to accept that in a telephone conversation on 30 October 2014 Mr Kildare said to Mr Weeks to the effect that at a meeting of key INPEX personnel earlier that day, INPEX's legal counsel had stated that INPEX was both legally and morally obligated to comply with the Additional Accommodation Variation, the trial judge failed to have any regard to:

41.1. Mr Weeks' note of that conversation (unchallenged) in which he recorded "*SK advised the legal counsel informed them that INPEX was both legally and morally obligated to the additional accommodation in the variation*.

42. In relation to the finding at R [250] that Messrs Weeks and Dignan were disabused well before 13 February 2014 that they could circumvent INPEX's internal processes by casting the new agreement as a variation of the existing Accommodation Agreement, the trial judge failed to have any, or any sufficient, regard to:

42.1. Mr Wheeldon's oral evidence that in 2013 he had told Messrs Dignan and Weeks that clause 3 could be used to obtain additional accommodation;

42.2. Mr Kildare's oral evidence that Mr Wheeldon discussed the use of a variation (ie clause 3) at the meeting on 10 January 2014;

42.3. the contents of Mr Weeks' email of 18 January 2014;

42.4. Mr Dignan's and Mr Week's evidence that at the 29 January meeting there was no mention of INPEX requiring additional internal processes to be completed and that it was their understanding that a variation for additional accommodation could be made legally binding by a letter of instruction under clause 3;

42.5. Mr Dignan's evidence that at the 29 January meeting, Mr Kildare confirmed that Mr Wheeldon had the authority to vary the existing Accommodation Agreement;

42.6. the contents of Mr Dignan's email of 29 January 2014, including the statement the "*basis of our discussions was to seek a mutually agreed variation*";

42.7. Mr Wheeldon's oral evidence that at the meeting of 6 February 2014, he discussed with Messrs Dignan and Weeks that the document would proceed by way of a variation to the existing agreement;

42.8. Mr Wheeldon's oral evidence that by Mr Weeks' email of 12 February 2014, Mr Wheeldon understood that Mr Weeks believed that the parties could move forward on the basis of an instruction to secure accommodation, without any decision note, whilst the Variation Document was being executed; and

42.9. Mr Wheeldon's oral evidence that he had referred to the decision note in his email of 7 May 2014 in relation to the broader accommodation services provider agreement only.

43. In relation to the findings at R [273]:

43.1. not to accept that Messrs Dignan and Halikos had subjectively decided they would only go ahead with the development of H105 if they got some kind of binding pre-commitment from INPEX; and

43.2. that even if they did have such a subjective intention, they did not communicate it to INPEX,

the trial judge failed to have any, or any sufficient, regard to:

43.3. the body of evidence that it made no commercial logic and sense for Halikos to develop H105, which involved, in addition to the construction costs, shutting down the Top End Hotel (profitable), terminating leases (also profitable) and taking on a large loan facility, without having a binding commitment;

43.4. Mr Sakamoto's email of 18 January 2014 to Mr Wheeldon in which Mr Sakamoto set out that a difficult side of the Halikos proposal discussed at the 17 January meeting was "*making such commitment*", and his subsequent oral evidence that the two-week period of time mentioned was too short for INPEX to provide a "*commitment, agreement, decision or any kind of support*";

43.5. the correspondence on 26 February 2014 between Mr Okawa and his personal assistant which revealed that there was a discussion within INPEX that Halikos sought a commitment from INPEX at that meeting; and

43.6. Mr Wheeldon's oral evidence that Mr Sakamoto's use of "*commitment in a short time*" was a reference to making a commitment to Halikos based upon the matters discussed at the 17 January meeting.