Adjudicator's Decision
Pursuant to the Building and Construction Industry Payments Act 2004

Malay Industries Pty Ltd (Claimant)

and

Appliqué Clothing Alterations (Respondent)

I, Chris Lenz, as the Adjudicator pursuant to the *Building and Construction Industry Payments Act 2004* (the "Act"), decide (with the reasons set out below) as follows:

a. The adjudicated amount in respect of the adjudication application dated 29 April 2005 is **$37,273.80**
b. The date on which the amount became payable is **14 April 2005**;
c. The applicable rate of interest payable on the adjudicated amount is **15.68%** simple interest.
d. The Respondent pay my fees in the adjudication.

Background

1. Malay Industries Pty Ltd (referred to in this adjudication as the "Claimant") was engaged by Appliqué Clothing Alterations (referred to in this adjudication as the "Respondent") to carry out shop fitting work on a building project at the Sunshine Plaza, Maroochydore in Queensland (the "work").
2. Work commenced on 24 November 2004 and was completed in early February 2005.

Appointment of Adjudicator

3. The Claimant applied to the Institute of Arbitrators and Mediators Australia on 29 April 2005 for adjudication. By letter dated 3 May 2005 the Institute of Arbitrators and Mediators Australia referred the adjudication application for me to determine.
4. The Institute of Arbitrators and Mediators Australia is an Authorised Nominating Authority under the Act with registration number N1057859. I am a registered adjudicator under the Act with registration number J622914.
5. By letter dated 4 May 2005 sent by Express Post to the Claimant and to the Respondent I accepted the Adjudication Application and thereby became the appointed Adjudicator.

Threshold jurisdictional issues

6. There are two threshold issues contained in s3 of the Act regarding: (1) the date of the contract, and (2) construction work being carried on in Queensland, that must be satisfied before I have jurisdiction to adjudicate this dispute. There are other issues involving "basic and essential requirements" and "more detailed requirements" that will need to be considered later; however, these need not be considered if the threshold issues have not been established. It does not matter that the partes to the dispute may not have taken issue with one another over the threshold issues because I am required as a matter of law to consider the threshold issues on the evidence.

7. I need not fully consider the terms of the contract at this stage, as it is the date and location of construction work that is currently of importance so as to decide whether

the adjudication should proceed further. The point of departure for this analysis is s3 of the Act which explains the application of the Act in Queensland, and it provides:

"3 Application of Act

(1) Subject to this section, this Act applies to construction contracts entered into after the commencement of parts 2 and 3--

> *(a) whether written or oral, or partly written and partly oral; and*
> *(b) whether expressed to be governed by the law of Queensland or a jurisdiction other than Queensland.*

(2) This Act does not apply to--

> *(a) a construction contract to the extent that it forms part of a loan agreement, a contract of guarantee or a contract of insurance under which a recognised financial institution undertakes--*
> > *(i) to lend an amount or to repay an amount lent; or*
> > *(ii) to guarantee payment of an amount owing or repayment of an amount lent; or*
> > *(iii) to provide an indemnity relating to construction work carried out, or related goods and services supplied, under the construction contract; or*
>
> *(b) a construction contract for the carrying out of domestic building work if a resident owner is a party to the contract, to the extent the contract relates to a building or part of a building where the resident owner resides or intends to reside; or*
>
> *(c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated other than by reference to the value of the work carried out or the value of the goods and services supplied.*

(3) This Act does not apply to a construction contract to the extent it contains-

> *(a) provisions under which a party undertakes to carry out construction work, or supply related goods and services in relation to construction work, as an employee of the party for whom the work is to be carried out or the related goods and services are to be supplied; or*
> *(b) provisions under which a party undertakes to carry out construction work, or to supply related goods and services in relation to construction work, as a condition of a loan agreement with a recognised financial institution; or*
>
> *(c) provisions under which a party undertakes--*
> > *(i) to lend an amount or to repay an amount lent; or*
> > *(ii) to guarantee payment of an amount owing or repayment of an amount lent; or*

> *(iii) to provide an indemnity relating to construction work carried out, or related goods and services supplied, under the construction contract.*

(4) This Act does not apply to a construction contract to the extent it deals with construction work carried out outside Queensland or related goods and services supplied for construction work carried out outside Queensland.

(5) In this section--

resident owner, in relation to a construction contract for carrying out domestic building work, means a resident owner under the Domestic Building Contracts Act 2000, schedule 2, but does not include a person--

> *(a) who holds, or should hold, an owner-builder permit under the Queensland Building Services Authority Act 1991 relating to the work; or*
> *(b) who is a building contractor within the meaning of the Queensland Building Services Authority Act 1991."*

8. Section 3(1) refers to *construction contracts* entered into after the commencement of parts 2 and 3 of the Act. On 25 June 2004, the Government Gazette in Queensland published the Proclamation of the Governor dated 24 June 2004. Schedule 2 of this Proclamation fixed the date of commencement of parts 2 and 3 of the Act as 1 October 2004. Accordingly, the *construction contract* must have been entered into after the 1 October 2004, for this adjudication to have jurisdiction.

9. Before determining whether the contract is a *construction contract* as defined by Schedule 2 of the Act, it is necessary to ascertain its date, because if it is before 1 October 2004, there is no jurisdiction to proceed.

   Paragraph 9 of the Claimant's submissions in support of the Adjudication Application refers to the Claimant's quote of 21 October 2004, and this quote was exhibited as "RB2". Whilst the Respondent's Adjudication Response at paragraph 9 disputes the Claimant's assertions "*in its entirety*", the Respondent also exhibits a quote ("Exhibit A") from the Claimant dated 21 October 2004, which is identical except that does not have "Exclusion 4. Security" printed on it. The difference in the two quotation documents does not relate to the date of 21 October 2004, so it open to me to find, and I do find, that the quotation was made on this date, which is after 1 October 2004.

   Furthermore, paragraph 12 of the Claimant's submissions asserts that the quote was accepted on or about 23 November 2004, and the Respondent in paragraph 12 of the adjudication response states that the quote was only delivered on or about 23 November 2004, and was accepted "*straight away*". Accordingly, I find that a contract was entered into on or about 23 November 2004 because both parties agree on the date. Therefore, providing it is a *construction contract* to which I will now turn, the threshold issue 1 will be satisfied because the contract is after 1 October 2004. The fact that the parties disagree on the contract's terms does not alter my finding on the date of it.

10. Schedule 2 of the Act defines a *construction contract* as follows:

> *"**"construction contract"** means a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to , another party."*

I have found there is a contract (although I have not yet determined its terms), which therefore falls within the first part of the definition of *construction contract*; however, it is necessary to determine whether it is for *construction work* or *the supply of related goods or services* for it to fall within the meaning in the Act.

Construction work is defined in s10 of the Act as:

> *"(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings;…*
> *(c) the installation in any building of …fittings forming, or to form, part of land;..*
> *(d)the external or internal cleaning of buildings…;*
> *(e) any operation that forms an integral part of, or is preparatory to or is for completing, work of the kind referred to in paragraph (a), (b) or (c), including-…*
>
> > *(iii) the erection, maintenance or dismantling of scaffolding; and*
> > *(iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site; and …"*

I have already found that the quotes dated 21 October 2004 annexed to both parties' submissions only differed in relation to "Exclusion 4". Both quotes had the site location and works described as follows:

> *"**JOB SITE:** Tenancy K392 & 303c*
> *Sunshine Plaza*
> *Horton Pde*
> *Maroochydore 4558*
>
> ***DETAILS:** Supply and Finish.*
>
> 1. *Clean out and prepare new tenancy ready for new installation*
> 2. *Remove existing counter and change room. Make modifications to suit new installation*
> 3. *Manufacture and installation of shop front to specifications shown on plan*
> 4. *Manufacture and installation of shelving change room and counter*
> 5. *Finalization of detail as specified*
>
> ***EXCLUSIONS:***
>
> 1. *Signage*
> 2. *Air-conditioning*
> 3. *Sprinkler system"*

The dispute over Exclusion 4 in the quote document, to which I will turn later, does not alter the wording of the rest of the two quote documents, which are otherwise identical. It is open for me to find, and I do find that there is agreement between the parties regarding the job site, which is a tenancy in a shopping centre in Maroochydore, which I find is in Queensland.

"Buildings" are not defined in the Act. It is open to draw the inference that a shopping centre is a "building" by having regard to the ordinary meaning of *building* found in the Collins Concise Dictionary 5th Australian Edition (the "dictionary"). The dictionary defines *building* as "something built with a roof and walls". I can reasonably infer that Sunshine Plaza is something that has been built with a roof and walls. Tenancy is defined in the dictionary as *possession or occupancy of lands, buildings, or other property by title, under a lease, or on payment of rent* so I find that tenancies are "in any building." This means that the exclusion provision of s3(4) of the Act identified above does not apply, because the job site is in Queensland, so that any construction work at the site must therefore be in Queensland, provided it is *construction work*, to which I will turn later.

11. I need to deal with the other exclusionary provisions in s3(2) of the Act in order to be satisfied that the Act applies to this work before considering whether the work is *construction work* under a *construction contract* as defined by the Act. Turning firstly to s3(2)(a), although neither party has made submissions that the construction contract forms part of a loan agreement, I must still be satisfied on the evidence that s3(2) does not apply, because if it does then I have no jurisdiction to adjudicate the dispute.

There is evidence of involvement by a finance company financing the Respondent. The first reference to a financier is in the Claimant's submission, paragraph 44, which exhibits a facsimile "RB8" from the Respondent sent on 4 February 2005 in which the Respondent, inter alia said *"The leasing company needs to know what they are holding as equity against the loan."* The Respondent admits paragraph 44. Furthermore, paragraph 48 of the Claimant's submissions exhibits a letter "RB12" from the Respondent dated 15 February 2005 in which the Respondent, inter alia stated, *"When the final itemized invoice is produced we can get the ball rolling with the financing for the shop fit. This invoice must be fully itemized otherwise it will not be accepted for leasing."* The Respondent in paragraph 48 of its adjudication response submissions admits the Claimant's paragraph 48, so I find that a finance company was involved. However, because there is no earlier reference to a financier before exhibit "RB8", in either the Claimant's or Respondent's submissions, I am satisfied that the Claimant was not aware of the existence of a financier until 4 February 2005. Accordingly, I can draw an inference that until that time, the Claimant was unaware that the Respondent was financing the project, so that the contract was made without reference to finance, and the works concluded by the Claimant without its knowledge of a financier.

In paragraph 50 of the Claimant's submissions evidencing exhibit "RB14", the solicitors for the Claimant in a letter dated 28 February 2005 to Mr J Neal of the Respondent stated that:

"We act for Malay Industries. We understand that you are withholding payment from our client of monies due under the works contract on the basis that you claim your

financier requires itemised invoices to enable you to draw down the financed amount. We are further instructed that you have told our client that he will be paid from the monies you receive from the finance company.

This arrangement does not suit our client. Our client agrees to deliver itemised accounts to your financier in exchange for a Letter of Direction/Irrevocable authority signed by you and the finance company that our client will be paid the full amount to which he is entitled and as claimed under his invoices.

Our client does not agree to make his invoices out to Appliqué if you are financing such works. In our experience finance companies require the invoices from suppliers to be made out directly to the finance company. As such we suggest that you have your finance company contact us with their details as to how they prefer the invoices to be made out."

The Respondent admits paragraph 50, so I find that the Claimant recognised the involvement of the financier, and was prepared to provide itemised accounts to the financier in exchange for an authority from the Respondent and Financier that it would be paid. Furthermore paragraph 51 of the Claimant's submissions exhibits a letter "RB15" dated 4 March 2005 from the Claimant's solicitors to Marcia Neal, who was not part of the Respondent, stating that they had received no response to the "RB14" letter, but in which they reiterated their preparedness to deal with the finance company, providing they received assurances of being paid. The Respondent's submission 51 admits the letter but stated that the letters should never have been submitted because Marcia Neal was not involved in the shop fit.

Having referred to the evidence I now need to consider whether this evidence, despite neither party making submissions on the point, shows that the contract forms part of a loan agreement, to which exclusion s3(2)(a) applies. In seeking assistance as to what is mean by *forms part of,* I have had regard to a case on point in NSW of *Consolidated Constructions Pty Ltd v Ettamogah Pub [2004] NSWSC 110,* where McDougall J at para 12 referred to **"Forms part of"** and held:

"[13] One of the difficulties in resolving this issue is that, although the defendant contended that s 7(2)(a) [**s3(2)(a) of the Act – my comment**] *had the effect that the Act did not apply to the contract, it did not state what was the construction of the words "forms part of" that led to this result. In its written submissions, the defendant submitted that "[s]ection 7(2) of the Act is grammatically capable of only one meaning", and that the Court should apply "the plain grammatical meaning". However, the submissions did not condescend to state, with reference to the words "forms part of", what was that meaning. Instead, the defendant drew attention to some ten circumstances that, it said, would be typically found "where [a] building project [involves] a financial institution making advances for construction". As I understood the submission, it was to the effect that, wherever those circumstances should be found, the construction contract would form part of the relevant loan agreement. It will be necessary to return to those submissions but, before I do, I will deal with the construction that, I think, should be given to the words "forms part of".*
[14] As a matter of ordinary English usage, something may be said to "form part of" another if the first thing is included or incorporated within the second. The first thing may form part of the second as a result of some natural process or as a result of some

artificial process (for example, a process of manufacture). In general terms, the words "forms part of" seem to me to connote something akin to inclusion, as opposed to association. In a particular case, however, it may be difficult to discern the point at which association changes to inclusion: that is to say, the point at which one thing may be said to form part of, rather than merely to be associated with, another….

[21] These considerations suggest to me that, for the purposes of s 7(2)(a) of the Act, a construction contract will not form part of a loan agreement unless, in some way, the former is included in, or incorporated into, the latter."

When the solicitors for the Claimant wrote to the Respondent on 28 February 2005 indicating a preparedness to invoice the financier directly, I have already found that the contract had been entered into on 23 November 2004, and that the work under the contract had been completed on 5 February 2005. Even though it is possible to draw the inference that the parties were negotiating a variation of the contract in late February 2005, there was no response to the Claimant's suggestion of provision by the financier and the Respondent of an irrevocable authority, so I find that a variation was not concluded. Accordingly, I find that a loan agreement did not form part of the contract as it was not included or incorporated into the contract of 23 November 2004. Even if I am wrong in concluding that a variation had not taken place in late February 2005, I find that it would stretch the meaning of s3(2)(a) of the Act to allow for a subsequent variation of a contract, after work had been completed, to then bring a loan agreement into *forming part of* the contract. Accordingly, I find that exclusion s3(2)(a) does not apply.

There is no evidence that either party resides or intends to reside in the building where the work was carried out. I deal later with the issue of *domestic building work*, but suffice is it to say that exclusion s3(2)(b) of the Act does not apply. There is no evidence from either party that the consideration payable for construction work is calculated other than by reference to the value of the work carried out. Exhibit "RB2" and exhibit "A" which evidence a quote dated 21 October 2004 both identify work at the site for a contract sum of $49,500 (including GST) (the "contract sum"), so exclusion s3(2)(c) of the Act does not apply.

Turning now to s3(3) of the Act, that the contract contained provisions that to the extent that:

- the Claimant was an employee of the Respondent. I find no evidence that supports such an inference, so s3(3)(a) of the Act does not apply;

- under which the Claimant undertook to carry out the construction work as a condition of a loan agreement with a financial institution. I have found evidence of a loan agreement between the financier and the Respondent. However, I have also found that at the time the contract entered into in 23 November 2004, the Claimant had no knowledge of the existence of a financier.

  I can draw the inference that the Claimant could not have undertaken to carry out the construction work as a condition of a loan agreement with the financier, because it had no knowledge of the financier's existence, and it did not have a

loan agreement with the financier. Accordingly, s3(3)(b) of the Act does not apply;

- a party undertook to under s3(3)(c) to (i) lend or repay an amount lent, (ii) guarantee payment of an amount owing or repayment of an amount lent, or (iii) provide an indemnity relating to construction work carried out. I find no evidence that the financier undertook to lend or repay an amount lent under the contract as identified in s3(3)(c)(i). In my view this provision appears to be dealing with a "constructor" who borrows money from a financier, being precluded from serving payment claims on the financier to get paid progress claims, and this arrangement is not in evidence in this case, as I have found that the Claimant did not have dealings with the financier. Accordingly, s3(3)(c)(i) does not apply in this case.

- However, the words under s3(3)(c)(ii) and (iii) of the Act are more problematic, because of the evidence in exhibit "RB14" of the Claimant through its solicitor seeking a Letter of Direction/Irrevocable authority from the financier for payment for work carried out. As to (ii) which deals with guaranteeing payment of an amount owing, it appeared that the Claimant was seeking such a guarantee, through its solicitor. However, I have found that no agreement was reached as evidenced by page 4 of the letter exhibit "RB15" in which the Solicitor said that they had received no response from their letter (exhibit "RB14") requesting details of the financier, and that they would deliver invoices to the finance company, if they received from it an "acknowledgement" of payment. There is no evidence that such "acknowledgement" was ever forthcoming from the financier. Furthermore, s56 of the Property Law Act 1974 as it relates to guarantees provides:

  "56 Guarantees to be in writing

  (1) No action may be brought upon any promise to guarantee any liability of another unless the promise upon which such action is brought, or some memorandum or note of the promise, is in writing, and signed by the party to be charged, or by some other person by the party lawfully authorised.

  (2) A promise, or memorandum or note of a promise, in writing shall not be treated as insufficient for the purpose of this section merely because the consideration for such promise does not appear in writing or by necessary inference from a written document."

  In this case, I have found no evidence of anything signed by the financier or the Respondent from either the Claimant's or Respondent's material. In addition, the Claimant through its solicitors stated in exhibit 15 that *unless irrevocable arrangements are made for our client to be paid $45,427.40 within a reasonable time, we hold instructions to commence recovery proceedings….* It is in evidence that recovery proceedings commenced through the service of the payment claim (exhibit "RB17"), so I can draw an inference that no irrevocable arrangements were made to satisfy the Claimant, so s3(3)(c)(ii) as regards *monies owing or amounts lent*, regarding the guarantee provisions of s3(3)(c)(ii) cannot apply;

- As to s3(3)(c)(iii), I have been unable to discover any provision in Queensland that requires indemnities to be in writing. Although there is evidence that the Claimant through its solicitors sought such an indemnity, I have not found any evidence that an indemnity was provided by the financier or by the Respondent. I can also infer that no indemnity was received because the Claimant commenced recovery through the payment claim provisions of the Act, so I conclude that s3(3)(c)(iii) does not apply

I have already dealt with exclusion s3(4) so I conclude that threshold issue 2 will be satisfied, provided the work is *construction work* as defined by the Act, and I now analyse whether the work in this dispute falls within the definition.

12. I have already found that apart from "Exclusion 4", the respective quotes exhibited by each party are otherwise identical, so that the parties agree about Details 1 to 5 in the contract. I find that these Details formed part of the contract because they agree on these facts. These Details describe activities to be carried out by the Claimant. Applying each detail to the definition of *construction work*, I find as follows:
    (a) Detail 1 dealing with "clean out and preparation" falls within s10(d) of the Act as "external or internal cleaning of buildings" so it is *construction work*;
    (b) Detail 2 dealing with "removal of a counter and change room and making of modifications" falls within s10(a) of the Act as "demolition and alteration of a building" so it is *construction work*;
    (c) Details 3 and 4 dealing with "manufacture" falls with s10(e)(iv) as "prefabrication of components to form part of a building" so it is *construction work*, and "installation" falls within s10(1) of the Act as "construction.. of buildings" so it is *construction work*;
    (d) Detail 5 dealing with "finalization of detail as specified" falls within s10(e) of the Act as "any operation that …is for completing, work of the kind.." so it is *construction work*.

    I therefore conclude that the contract is a *construction contract* under s10 of the Act and it was for *construction work* as defined in Schedule 2 of the Act, and therefore threshold issues 1 and 2 have been satisfied, which provides me with jurisdiction to adjudicate further.

The Construction Contract

13. The Claimant and Respondent entered into negotiations for shop fitting work in early October 2004 resulting in the Claimant sending the Respondent a written quotation dated 21 October 2004 in which certain work was described to be carried out at tenancy K392&303c, Sunshine Plaza, Horton Pde, MAROOCHYDORE (the "site") for the sum of $49,500. There were no rates or prices in the contract used to derive the contract sum.
14. On or about 23 November 2004, the Respondent accepted the quotation and the Claimant commenced works at the site on 24 November 2004.
15. Plans for the construction of the shop fit out at the site were provided by the Respondents, and some measurements on the plans were inaccurate.
16. The Claimant carried out variations to the Contract including the construction of temporary premises for the Respondent at the River Walk Sunshine Plaza.
17. The works at the site were completed by 5 February 2005.

Chronology of Service of Documents

18. On 22 March 2005 the Claimant served a payment claim on the Respondent's solicitors as evidenced in exhibit "RB17".
19. On 31 March 2005 the Claimant served the payment claim on the Respondent by facsimile as evidenced in exhibit "RB17".
20. On 14 April 2005 the Respondents served a payment schedule on the Claimant as evidenced in exhibit "RB19".
21. On 29 April 2005 the Claimant lodged an Adjudication Application with the ANA.
22. On 9 May 2005 the Respondent served an Adjudication Response on the Adjudicator and Claimant by express post, which is deemed to be delivered the next day in the ordinary course of post.

Payment Claim (Exhibit "RB17")

23. The payment claim provided as follows:

"PAYMENT CLAIM

Building and Construction Industry Payments Act 2004
Section 17

Claimant: **Malay Industries Pty Ltd ACN 088 062 346**
ABN 40 088 062 346

Respondent: **Joshua Campbell Neal and Jennifer Helen Neal trading as Appliqué Clothing Alterations – Sunshine Coast**

The claimant hereby gives you notice that the payment claim as set out hereunder is made under the *Building and Construction Industry Payments Act 2004.*

Construction work and related goods and services to which the progress payment relates:

All works performed by the claimant for the respondent from 21 October 2004 to 22 March 2005 including:

(a) Shop fit out of Tenancy 303c Sunshine Plaza Maroochydore including requested variations;

(b) Framing, plastering and painting at second Appliqué tenancy on River Walk Market location Sunshine Plaza Maroochydore;

(c) Electrical works for Tenancy 303c Sunshine Plaza Maroochydore including installation of exit lighting and test switch; and

(d) Carpet for Tenancy 303c Sunshine Plaza Maroochydore.

Amount of progress payment payable by the respondent to the claimant:

$46,811.20

The above amount is due for immediate payment by you.

…….
Solicitors for the Claimant
Elias Mumford"

24. Invoices and other documents were attached to the payment claim as follows:

- Invoice number 82 dated 10 December 2004 for a progress payment of $5,000.00 including GST. The invoice identified that $4,750.00 had been received leaving a balance due of $250.00.
- Invoice number 83 dated 16 December 2004 for a progress payment of $20,000.00, including GST. The invoice identified that $10,000.00 had been paid leaving a balance due of $10,000.00.
- Invoice number 86 dated 3 February 2005 identified as the final invoice for the sum of $24,500.00 including GST.
- Invoice number 88 dated 3 February 2005 claiming variations for the sum of $8,965.00 including GST.
- Invoice number 89 dated 23 February 2005 for work done at the River Walk Market in the sum of $2,310.00 including GST.
- Invoice from Pacific Power Electrical Services invoice dated 7 February 2005 for supply and installation of an exit light for the sum of $613.80, including GST.
- An invoice from Pacific Power Electrical Services dated 2 December 2004 for disconnection of electrical services and refitting for the sum of $422.40 including GST.

Payment Schedule (Exhibit "RB19")

25. The Payment schedule provided as follows:

"PAYMENT SCHEDULE

Building and Constructions Industry Payments Act 2004
Section 18

Claimant: **Malay Industries Pty Ltd ACN 088 062 346**
ABN 40 088 062 346

Respondent: **Joshua Campbell Neal and Jennifer Helen Neal trading as Appliqué Clothing Alterations – Sunshine Coast**

The Respondents refer to the Payment Claim in the sum of $46,811.20.

[A] The Respondents have now made payment of the sum of $12,310.00 being payment for:-

1. Framing plastering and painting at second Appliqué tenancy on River Walk Market location Sunshine Plaza Maroochydore being item (b) in the Payment Claim.

2. Shop fit out of tenancy 303c Sunshine Plaza, Maroochydore including requested variations being item (a) in the Payment Claim in the sum of $10,000.00 being only a payment of so much of the claim as the Respondents concede is payable.

[B] The Respondents dispute liability for all other element of the Claimant's Payment Claim, and the balance of the claim referred to in item (b) of

the Claimant's Payment Claim. In particular the reasons the payment made is less and the reasons for withholding payment are as follows:-

1. There have been a number of variations to the contract which should result in a reduction of the contract price.

These include:	Credit claimed by Respondents
Tiles to front of shop	$ 600.00
Glass panels on top of old carcass	$1,500.00
Plumbing	$ 300.00
Cupboard on side of old carcass incorrect height	$1,000.00
Adjustments to counter from plan	$1,000.00
Lights to front windows	$ 320.00
Beading on doors	$ 360.00
	$5,080.00
Plus GST	$ 508.00
	$5,588.00

2. The Respondents claim that works required under the plans have not been performed and claims the following amounts for the cost of attending such works:-

External corner finishes to shopfront	$1,200.00
Bookcase	$ 700.00
Lower floor to accommodate new strip	$1,700.00
	$3,600.00
Plus GST	$ 360.00
	$3,960.00

3. The Respondents claim that the Electrical works for tenancy 303c Sunshine Plaza Maroochydore including installation of exit lighting and test switch identified in item (c) in the Payment Claim were works included in the original contract price and do not constitute an additional obligation upon the Respondents to pay.

4. The Respondents do not accept that the Claimant is entitled to make additional claim for variations. In this regard the Claimant identifies the sum of $8,965.00. The Respondents contend variations were agreed to plans due to error made by the Claimant and resulted in the fit out being to a lesser standard to that contemplated by the plans. In particular, the Respondents rely upon the Claimant's failure to measure up. Certain variations were made to reduce costs and the credit claimed for this by the Respondents has been referred to above.

5. The Respondents dispute that the work required by the plans, after allowing for variations, has been performed to a satisfactory standard of workmanship and contend that substandard materials have in part been used in substitution for those required and further that the standard of finish was unsatisfactory and that finishing trims are marked and poorly fitted. For example laminate was used in place of stainless steel trim as specified.

6. The Respondents also withhold payment of monies claimed by way of compensation for loss of trade due to the protracted time taken to effect the shop fit. The Respondents contend that a period of five weeks would have been reasonable to plan fabricate and fit out the shop premises. The time taken by the Claimant was 9 weeks.

The Respondents contended that their loss of income due to the additional time taken to effect the fit out was $40,000.00.

7. The Respondents' franchisor and the lessee of the premises has been billed for static security in the sum of $2,553.38 which amount is payable by the Claimant pursuant to the contract. If the Claimant does not pay this sum to Spotless, the Respondents will be required to pay the charge due to their franchise agreement. On this basis the Respondents claim to be entitled to withhold $2,553.38.

DATED the 14th day of April 2005.

……..
Solicitors for the Respondent

Cameron Rogers & Co
1st Floor, 52 Burnett Street
BUDERIM QLD 4556"

The Claimant's Case and the Respondent's Case in summary

26. The Claimant asserts that it is entitled to:
(i) the balance of the contract sum;
(ii) together with variations, either:
  i. ordered by the Respondent; or
  ii. resulting from the Claimant having to carry out extra work and provide additional materials because the plans provided by the Respondent to the Claimant were discovered to be incorrect; or
  iii. necessary work in disconnecting and refitting electrical services and providing exit lighting

27. The Respondent asserts that it has now paid all that the Claimant is entitled to under the contract and that any monies not paid are due to the Respondent withholding money:

(i) for a reduction in the contract sum for variations to the work for work that was deleted;
(ii) for work that has not been performed under the contract requiring the Respondent to attend to those works;
(iii) for work that should have been included in the original contract sum;
(iv) because variations claimed by the Claimant were caused by the Claimant's own errors in failing to measure up the works;
(v) for works that did not meet the required standard and substandard materials were used in part;
(vi) for damages for loss of trade due to the protracted time for the work to be completed;
(vii) for security fees that are payable by the Claimant under the contract

Scope of the determination

28. The Act at s 26(1) requires that I am to determine:
    a. The amount of the progress payment, if any, to be paid by the Respondent to the Claimant (the "**adjudicated amount**"); and
    b. The date on which any such amount became or becomes payable; and
    c. The rate of interest payable on any such amount.

29. The Act at s35(3) also gives me the discretion to determine the proportion of the contribution to be made by the Claimant and by the Respondent to the adjudicator's fees and expenses. I will exercise that discretion after dealing with the substantive issues.

Matters regarded in making the Decision

30. s26(2) of the Act restricts the matters which I may consider in determining an adjudication application. s26(2) of the Act provides:

    "In deciding an adjudication application, the adjudicator is to consider the following matters only:

    > *(a) the provisions of this Act, and to the extent they are relevant, the provisions of the Queensland Building Services Authority Act 1991, part 4A;*
    > *(b) the provisions of the construction contract from which the application arose;*
    > *(c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;*
    > *(d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;*
    > *(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates."*

    Material considered

31. In making this decision I have had regard to the following:
    (a) The provisions of the *Building and Construction Industry Payments Act 2004* and, the provisions of part 4A of the *Queensland Building Services Authority Act 1991;*
    (b) The payment claim dated 31 March 2005 to which the application relates.
    (c) The payment schedule dated 14 April 2005.
    (d) The Adjudication Application and the relevant documentation
    (e) The Adjudication Response and the relevant documentation.

    Material not considered

32. In making this decision I have had regard to all material provided, and have then referred to what was not taken into consideration in my reasons.

Further preliminary issues

33. Prior to determining the issues associated with this dispute, it is useful to determine the context in which the procedures provided by the Act are to be considered by an adjudicator in carrying out their adjudication function. I have considered the Object of the Act and how the Object is to be achieved, which are found in sections 7 and 8 as follows:

"7 Object of Act

The object of this Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person--

(a) undertakes to carry out construction work under a construction contract; or
(b) undertakes to supply related goods and services under a construction contract."

8 How object is to be achieved

The object is to be achieved by—

(a) granting an entitlement to progress payments whether or not the relevant contract makes provision for progress payments; and

(b) establishing a procedure that involves—
(i) the making of a payment claim by the person claiming payment; and
(ii) the provision of a payment schedule by the person by whom the payment is payable; and
(iii) the referral of a disputed claim, or a claim that is not paid, to an adjudicator for decision; and
(iv) the payment of the progress payment decided by the adjudicator.

34. Accordingly, the amount, if any, of a progress payment payable by the Respondent to the Claimant is the principal issue associated with adjudication. Associated with this principal issue is the due date for payment [s26(1)(b) of the Act], and the rate of interest payable on any amount [s26(1)(c) of the Act].

35. I have already considered two threshold issues contained within s3 of the Act in order to continue with the adjudication, and it is now necessary to have regard to some other important issues before dealing with the numerical analysis. Whilst this may appear tedious to the parties, it is vital that adjudication is conducted properly in accordance with the Act so that disputants can have confidence in the fairness, transparency and rigour of this important legislative initiative, which facilitates cash flow in the building and construction industry.

36. In doing so I have had regard to the important case of *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport and another [2004] NSWCA 3* ("Brodyn"). There has not yet been a decision by a Court in Queensland on the operation of the Act, so it is open for me to seek guidance from a Court of Appeal in New South Wales, which considered that State's legislation, since it is essentially identical to the Act in Queensland. At

paragraph 53, Hodgson JA, in the Court of Appeal referred to 5 basic and essential requirements laid down for the existence of an adjudicator's decision to have legal effect. These are essential pre-conditions for the existence of an adjudicator's decision (see paragraph 54 of Brodyn). These are listed in paragraphs 37 to 41 below and are issues that must be satisfied for me to proceed further. These are paraphrased as follows, and with reference to the provisions in the Act and not that of NSW:

Basic and Essential Requirements

37. Whether a Contract existed between the Claimant and Respondent, and if so whether the Contract is a *construction contract* to which the Act applies, and in particular sections 7 and 8 of the Act.
38. Whether the Claimant served the Respondent with a payment claim as required by section 17 of the Act.
39. Whether the Claimant made an adjudication application to an authorised nominating authority as required by section 21 of the Act.
40. Whether there was reference of the application to an eligible Adjudicator who accepted the application as required by sections 22 and 23 of the Act.
41. That this decision by the Adjudicator requires the determination of the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable, all of which are to decided in writing as required by section 26 of the Act.

More detailed Requirements

In addition, some more detailed requirements were developed by His Honour at paragraph 54 of Brodyn and are listed in paragraphs 42 to 45 below. These more detailed requirements do not have to be exactly complied with for my determination to be valid, provided that I make a bone fide attempt to exercise the powers under the Act and have adhered to the rules of natural justice (see paragraph 55 of Brodyn.)

42. Whether the contents of the payment claim are sufficient to satisfy section 17 (2) of the Act.
43. Whether the Claimant has complied with the time requirements for an adjudication application and whether the adjudication application satisfies the requirements of section 21 of the Act.
44. Whether the time required under section 25 of the Act has been adhered to allow the Adjudicator to make a decision.
45. Whether the Adjudicator has considered the matters required to be considered under section 26 (2) of the Act.

Decision on the issues

In determining the issues that arise in this adjudication, and to which I turn later, I recognise that the Claimant bears the legal burden of proof, and retains this burden in relation to its payment claim. There are occasions when the evidentiary onus of proof shifts to the Respondent, but this does not detract from the requirement that the Claimant always bears the legal burden of proof. At all times I need to be mindful of the need to adhere to the principles of natural justice.

I deal first with the basic and essential issues, so that I can be satisfied that I have jurisdiction to deal with the merits of the claim. Thereafter, I will deal with the more detailed requirements.

Basic and essential issues

46. The first basic and essential issue is that there must be a contract between the Claimant and Respondent, and that the contract is a *construction contract* to which the Act applies, with particular reference to sections 7 and 8 of the Act.

47. In dealing with threshold issues 1 and 2, I have already found that the contract between the Claimant and Respondent is a *construction contract* under the Act. s3(1)(a) of the Act provides that the contract can be *written or oral, or partly written and partly oral*, which provides considerable latitude. So far I have found the existence of a written contract entered into on or about 23 November 2004, so if I later find that there were also oral terms, this will still comply with the wide ambit of s3(1)(a).

    I need, however, to be satisfied that the Claimant *undertook to carry out construction work under a construction contract* to satisfy s7 of the Act.
    My findings on the "Details: Supply and Finish" refers to a list of 5 activities dated 21 October 2004 which the Claimant offered to carry out at the job site. I have also found that this offer was accepted on or about 23 November 2004. Paragraph 13 of the Claimant's submissions refers to commencement of work on or about 24 November 2004, and paragraph 13 of the Respondent's submissions does not take issue with this assertion. I therefore find that the parties agreed that work commenced on or about 24 November 2004, which is after the date of the contract. Accordingly, it is open to draw the inference that the Claimant had *undertook to carry out construction work* at the date of the contract because it was not until the next day that actual construction work commenced. I therefore find that s7 of the Act is satisfied.

    Brodyn suggests that s8 of the Act should also be satisfied under the first basic and essential requirement. s8 of the Act has already been transcribed in paragraph 23 above and the effect of it is to:

    a. grant an entitlement to progress payments whether or not the contract provides for it; and
    b. provide a procedure for:
        i. making a payment claim;
        ii. the provision of a payment schedule;
        iii. the referral of a disputed claim to an adjudicator; and
        iv. payment of a progress payment decided by the adjudicator.

    With the greatest respect to His Honour Mr Justice Hodgson in Brodyn, the Court of Appeal could not have intended that all of the elements of s8 of the Act had to be satisfied under the first basic and essential requirement. s8(a) of the Act merely facilitates the progress payment regime, so it is not a requirement. s8(b)(iii) deals with a referral to an adjudicator, which is Brodyn's basic and essential requirement number 4, and so it will be dealt with under that issue. S8(b)(iv) deals with payments after the adjudication, so it cannot be an essential requirement of an adjudication.

This leaves s8(b)(i) which deals with the making of a payment claim, and s8(b)(ii) which deals with payment schedules and both of these activities are basic and essential. However, as regards the payment claim, Brodyn identified the service of a payment claim as the second basic and essential requirement, and so payment claims matters will be dealt with under that issue. However, the provision of a payment schedule is something under the first basic and essential requirement, and I turn to this matter at this stage.

Paragraph 58 of the Claimant's submissions refers to the receipt of a payment schedule at the offices of the Claimant's registered office on 14 April 2005 that the Respondent had caused to be served and it is exhibited as "RB19". Paragraph 58 of the Respondent's submissions admits paragraph 58 of the Claimant's submissions. It is open for me therefore to find that a payment schedule was served by the Respondent on 14 April 2005 because the parties agree on this fact and s8(b)(ii) of the Act is thus satisfied. I turn to another important aspect of the service issue relating to solicitors under the second basic and essential requirement below.

Accordingly, I am satisfied that the first basic and essential requirement is complied with.

48. Under the second basic and essential requirement I need to be satisfied that the Respondent was served with a payment claim. In the Chronology of Service of Documents I have referred to undated payment claims being served on 22 March 2005 (the "first service") and 31 March 2005 (the "second service") by facsimile. Paragraph 56 of the Claimant's submissions refers to the payment claim being served on the Respondent's solicitors by facsimile on 22 March 2005 (Exhibit RB17") and the Respondent admits this submission in its paragraph 56 of the Respondent's submissions.

    However, in paragraph 57 of the Claimant's submissions, the Claimant said that the Respondent's solicitors did not have instructions to accept service on behalf of Jennifer Neal and that the Respondent was then served the payment claim by facsimile (with reference to proof of a facsimile receipt in an Exhibit "RB18" <u>which was not exhibited in the submissions</u>) and the Respondent admits this in paragraph 57 of its submissions. I find that the first service and second service took place on 22 March 2005 and 31 March 2005 respectively because the parties agreed that these were the dates of service.

    Whilst it is evident from their submissions that the parties agree about service of the payment claim on 2 separate occasions, they are unable to albeit unknowingly waive the requirements of the Act. I have the duty to determine whether this basic and essential requirement has been satisfied, and s17(5) of the Act provides that "*A claimant can not serve more than 1 payment claim in relation to each reference date under the construction contract*".

    The evidence agreed by both parties is that there was the same payment claim sent on 2 separate occasions, so I find essentially that there was not *more than 1 payment claim* served. However, if I am wrong on this point, under s24(a) of the *Business Names Act 1966*, I am entitled to have regard to the Certificate of Registration of the Business Name of the Respondent as prima facie evidence of what is contained in the

document. Exhibit "RBX" in the Claimant's submissions exhibits the Certificate which has Jennifer Helen Neal as a registered proprietor together with Joshua Campbell Neal. I therefore find that Jennifer Helen Neal was carrying on business under the name of the Respondent and was therefore a party to the *construction contract* so that she needed to have been served with the payment claim. S103 of the Act deals with service of notices and under s103(2) of the Act it is clear that s39 of the *Acts Interpretation Act 1954* is preserved. s39(1)(a)(ii) of the *Acts Interpretation Act 1954* provides for service by facsimile on an individual, however, the first service was by facsimile on the Respondent's solicitors and not her.

Having regard to the correspondence between solicitors annexed to the Claimant's submissions in relation to the issue of service of the payment claim only, I find that the Respondent's solicitors did not have instructions to accept service on Jennifer Helen Neal's behalf on 22 March 2005, as indicated in their email to the Claimant's solicitors dated 31 March 2005. The Claimant's solicitors had been advised by the Respondent's solicitors on 22 March 2005, that they had instructions to accept service on behalf of Joshua Neal, whom they said was the contracting party trading under the name of the Respondent.

However, there was no reference to Jennifer Helen Neal under those instructions, and the Claimant was required to serve Jennifer Helen Neal (as a party to the contract) at least by facsimile, which they succeeded in doing on 31 March 2005. Accordingly, I find that the first service did not constitute service on her because I have found that the Respondent's solicitors did not have instructions to accept service on her behalf on 22 March 2005. Support for this conclusion can be found in *Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd [2003] NSWSC 903* where the Court held at para 38 that:

> *"Service being effected in accordance with the Act is critical as it governs the commencement of the time limitations following such service.."*

I conclude therefore that s17(5) of the Act has been complied with because I have found that there was service of only 1 payment claim under the Act on 31 March 2005.

49. However, before I can depart from this second basic and essential requirement, there is a live issue surrounding the evidence, which is important to be decided before proceeding further. Exhibits "RB17" and "RB19" are the evidence of the payment claim and payment schedule respectively. In both instances it was the solicitors for the Claimant and Respondent that signed and served the payment claim and payment schedule respectively on the other party (not on the solicitors for the other party). There are a number of decisions of single judges in the New South Wales Supreme Court dealing with the issue of service and the involvement of solicitors in such service. Firstly, I need to consider the case of *Taylor Projects Group Pty Limited v Brick Dept Pty Limited & Ors [2005] NSWSC 439*, a decision of Einstein J, because it deals with service by a solicitor of a payment schedule. It must be emphasised that the respondent had taken issue about improper service of the payment schedule because it had been served by its solicitor, which had the effect that the adjudicator had not considered either the payment schedule or the adjudication response. His Honour had found in paragraph 6 that the second basic and essential requirement in Brodyn was *service of a payment claim*, and not the wider *service by the claimant on the*

respondent of a payment claim (s.13) as actually stated in Brodyn. His Honour held at para 37 and following:

"[37] Even if this be incorrect, there is another, and equally fatal, matter. The 27 January letter was not provided by Taylor . It was provided by Taylor's solicitor. [38] Section 20(2A) requires "the respondent" to have provided a payment schedule within the time specified in s17(2)(b). In Emag Constructions Pty Ltd v Highrise Concrete Contractors Pty Ltd [2003] NSWSC 903 at [59] the Court held that the general principles of actual or ostensible authority in solicitors to receive documents must yield to the strictures of the Act , which must be complied with in terms. 39 Provision of a payment schedule by a respondent's agent does not comply with the "strictures" of s20(2A), which requires provision by the respondent….

[49] The point was made in Emag that the whole of the rationale underpinning the procedures laid down by the Act is directed at providing a quick and efficient set of procedures permitting recovery of progress payments and the quick resolution of disputes in that regard; that the time limits under the Act are strict and that the consequences of not complying with stipulated time limits may be significant. In my view it is simply critical for a rigid approach to be taken to compliance with the terms of the Act, particularly for the reason that the legislation provides for a fast dual-track interim determination, reserving the parties' final legal entitlements for subsequent determination. The adjudicator is not shown to have erred in failing to consider the payment schedule provided by Taylor on 20 January 2005.

[50] Section 17(2)(b) is not satisfied by providing a document which does not ex facie satisfy the statutory requirements for a payment schedule and does not even purport to be a provision of a payment schedule.

[51] Taylor's submissions as to "technical infringement" and "time-frames and requirements" set up by section 17(2)(b) are rejected. The Act requires to be construed in the orthodox fashion – in accordance with the ordinary meaning of the words used."

In *Emag Constructions Pty. Limited v. Highrise Concrete Contractors (Aust) Pty. Limited [2003] NSWSC 903,* Einstein J had held at par 58 and following:

"[58] None of the other submissions put by the defendant are of substance. There was neither actual authority in the plaintiff's solicitors to receive a copy of the adjudication application nor ostensible authority in that regard. And in relation to the submission that the solicitors for Emag **[my underlining]** *are presumed to have acted in the usual way by passing on the adjudication application to Emag, this is not now a circumstance in which such a presumption is available to be relied upon by the defendant. The presumption/inference for which the defendant contended which may in some circumstances be drawn, has now been resoundingly rebutted having been the subject of strict proof .*

[59] In my view the character of the subject legislation is such that general principles of actual or ostensible authority in solicitors to receive service of copies of relevant notices must yield to the strictures of the strict requirement to prove service. The service provisions of the Act require to be complied with in terms. Prudence dictates

that those responsible for complying with the service provisions take steps to be in a position to strictly prove service in the usual way. One only example of the difficulties which may arise is where a solicitor who may have been instructed to act in relation to an adjudication application has his/her instructions withdrawn. There are no provisions similar to those to be found in the Supreme Court Rules 1970 for notices of ceasing to act and the like. The Act here under consideration simply proceeds by requiring particular steps to be taken by the parties and by the adjudicator and proof of strict compliance with the Act is necessary for the achievement of the quick and efficient recovery of progress payments and resolution of disputes in that regard."

I am required to revisit Brodyn because the single judges above have referred to the equivalent NSW legislation as requiring particular steps to be taken by the parties. In both cases, one of the parties had taken issue about the question of service, and the facts involved the Respondent's solicitor serving or being served with a payment schedule or an adjudication application respectively. Accordingly, neither case dealt with the Claimant's solicitors, and payment claims and could be distinguished on that ground alone.

Furthermore, the primary issue associated with those cases was the necessity for strict compliance with the service provisions under that legislation, about which one of the parties had taken issue, so that the adjudicator could properly take into account only the material required to be considered under that legislation. Nevertheless, there is a theme of strict compliance woven through these cases, and in the dispute before me it is clear that neither party served (and in fact signed) the respective documents, which is not in strict compliance with the Act. These are single judge decisions of a Supreme Court in another jurisdiction, so they are persuasive, but not binding in Queensland. As I have already stated, Brodyn is a Court of Appeal decision in NSW, and there would have to be some very good reason to depart from what that Court held and I need to carefully consider whether Brodyn, holds directly or by analogy, that the service by a solicitor on the other party of a payment claim complies with the Act. It is useful to restate what His Honour Hodgson JA said, and to cover more than the Court's basic and essential and more detailed requirements, but also the context in which the principles were stated. At para 53 and following His Honour held, with reference to the NSW legislation:

"[53] What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:

1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).
2. The service by the claimant on the respondent of a payment claim (s.13).
3. The making of an adjudication application by the claimant to an authorised nominating authority (s.17).
4. The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).
5. The determination by the adjudicator of this application (ss.19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).

[54] The relevant sections contain more detailed requirements: for example, s.13(2) as to the content of payment claims; s.17 as to the time when an adjudication application can be made and as to its contents; s.21 as to the time when an adjudication application may be determined; and s.22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.

[55] In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf. Project Blue Sky Inc. v. Australian Broadcasting Authority (1998) 194 CLR 355 at 390-91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf. R v. Hickman; Ex Parte Fox and Clinton (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance.

[56] It was said in the passage in Anisminic quoted by McDougall J that a decision may be a nullity if a tribunal has refused to take into account something it was required to take into account, or based its decision on something it had no right to take into account. However, in Craig v. South Australia (1995) 184 CLR 163 at 177 the High Court said that this would involve jurisdictional error if compliance with the requirement in question was made a pre-condition of the existence of any authority to make the decision. I do not think that compliance with the requirements of s.22(2) are made such pre-conditions, for the same reasons as I considered the determination not to be subject to challenge for mere error of law on the face of the record. The matters in s.22(2), especially in pars.(b), (c) and (d), could involve extremely doubtful questions of fact or law: for example, whether a particular provision, say an alleged variation, is or is not a provision of the construction contract; or whether a submission is "duly made" by a claimant, if not contained in the adjudication application (s.17(3)(b)), or by a respondent, if there is a dispute as to the time when a

relevant document was received (ss.20(1), 22(2)). In my opinion, it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s.22(2), or bona fide addresses the requirements of s.22(2) as to what is to be considered. To that extent, I disagree with the views expressed by Palmer J in Multiplex Constructions Pty. Limited v. Luikens [2003] NSWSC 1140.

"57 The circumstance that the legislation requires notice to the respondent and an opportunity to the respondent to make submissions (ss.17(1) and (2), 20, 21(1), 22(2)(d)) confirms that natural justice is to be afforded to the extent contemplated by these provisions; and in my opinion, such is the importance generally of natural justice that one can infer a legislative intention that this is essential to validity, so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions, the determination will be a nullity. On this basis, I agree with the result reached in Emag Constructions Pty. Limited v. Highrise Concrete Contractors (Aust) Pty. Limited [2003] NSWSC 903. I note there is some controversy as to whether denial of natural justice generally results in voidness or voidability (see for example Ridge v. Baldwin [1964] AC 40, Durayappah v. Fernando [1967] 2 AC 337, Banks v. Transport Regulation Board (Vic) (1968) 119 CLR 222 at 233, Calvin v. Carr [1980] AC 574 at 589-90, Minister for Immigration v. Bhardwaj (2002) 209 CLR 597 at 630-34); but in my opinion, in cases such as this where there is a disclosed legislative intention to make a particular measure of natural justice a pre-condition of validity, failure to afford that measure of natural justice does make the determination void ."

The theme running through Brodyn in the context of service related to the respondent being given an opportunity to make submissions, and the Court agreed with the result reached in *Emag* in which improper service of an adjudication application had meant that time under the legislation had not begun to run. The result of the improper service was that the respondent did not lodge an adjudication response within the time allowed under the legislation, and the adjudicator considered service was proper and adjudicated the matter. There is nothing in Brodyn that deals with a claimant's solicitors being unable to serve a document, so I need to consider whether the principles in *Taylor* and *Emag*, coupled with Brodyn hold that by having a solicitor serve a payment claim on the Respondent means that s17(1) is not complied with.

I agree that strict compliance with the timing and service requirements Act is essential because the essence of the Act is to facilitate rapid payment claims and resolutions of disputes. Einstein J in *Taylor* said so at paragraph 39 where he said: *The point was made in Emag that the whole of the rationale underpinning the procedures laid down by the Act is directed at providing a quick and efficient set of procedures permitting recovery of progress payments and the quick resolution of disputes in that regard; that the time limits under the Act are strict and that the consequences of not complying with stipulated time limits may be significant.* In my view, however, to find that as a basic and essential requirement that it is only a claimant who may serve a payment claim, and not their duly authorised solicitor as agent with actual authority to do so, is too strictly constraining the requirements of the Act. Solicitors regularly file documents in Courts on behalf of their clients, and strict time limits apply after a document is properly served on another party, or their solicitors, if they have instructions to accept service.

It is understandable that the legislation requires service on an actual claimant or respondent, because one could never be certain that a solicitor acting on that party's behalf had instructions to accept service, and the Act has very short time frames within which procedures are to be complete. However, for an adjudicator to find that it is essential that only the claimant may serve a payment claim which commences the rapid process under the Act is straining what appears to be required in Brodyn too far. How can an adjudicator know whether it was the claimant who served a payment claim, or how could an adjudicator determine who constitutes the claimant? The adjudicator would have to determine such issues at the outset, because to allow an adjudication to proceed in the face of the failure of this supposed basic and essential requirement would render the adjudication void. This would mean that an affidavit of service would need to be provided on every occasion, otherwise the adjudicator could fall into error. What happens if the claimant is incapacitated or out of the State? Are they unable to commence the procedures under the Act until they are healthy or back in Queensland? In my view the legislature could not have put such a constraint on the commencement of the rapid progress payment regime. The better view in my opinion in relation to this case is to consider the identity of the server of the payment claim as a more detailed requirement, in which it is open to the adjudicator to consider the submissions of the parties on this point, if any, and I am aware in this case that neither party has taken issue with service of the payment claim and the payment schedule. Both parties have had notice of the other's assertions in the documents, and for me to find on a strict analysis of s17(1), that the Claimant has not properly complied with the section because it had not served the payment claim, which would have the effect of rendering the whole adjudication process a nullity would, in my view, constitute a failure to bone fide to exercise my power under the Act.

Accordingly, I find that the second basic and essential requirement is thus satisfied.

50. I must now be satisfied that the Claimant made an adjudication application to an authorised nominating authority. I have already found that the Institute of Arbitrators and Mediators Australia is an Authorised Nominating Authority ("ANA") under the Act with registration number N1057859. s21 of the Act deals with adjudication applications and s21(3) of the Act provides:

"…(3) An adjudication application--

(a) must be in writing; and

(b) must be made to an authorised nominating authority chosen by the claimant; and

(c) must be made within the following times--

(i) for an application under subsection (1)(a)(i)-- within 10 business days after the claimant receives the payment schedule;

(ii) for an application under subsection (1)(a)(ii)- - within 20 business days after the due date for payment;

(iii) for an application under subsection (1)(b)--within 10 business days after the end of the 5 day period referred to in subsection (2)(b); and

(d) must identify the payment claim and the payment schedule, if any, to which it relates; and

(e) must be accompanied by the application fee, if any, decided by

the authorised nominating authority; and
(f) may contain the submissions relevant to the application the claimant chooses to include."
(4) The amount of an application fee must not exceed the amount, if any, prescribed under a regulation.
(5) A copy of an adjudication application must be served on the respondent.
(6) The authorised nominating authority to which an adjudication application is made must refer the application, as soon as practicable, to a person eligible to be an adjudicator under section 22."

The ANA sent me documentation in a file headed "Submissions of the Claimant" from the solicitors for the Claimant. Within the file was a document headed "Adjudication Application" which was dated 29 April 2005 and addressed to the ANA in which it identified that the Claimant applied for adjudication under the Act. I find that the document was in writing thereby complying with s21(3)(a) of the Act and that it was addressed to the ANA, thereby complying with s21(3)(b) of the Act. As to the timing of the adjudication application, I am guided by Brodyn to consider that this is a more detailed requirement and not basic and essential, and I will consider the timing aspect under the more detailed requirements below.

Accordingly, the third basic and essential requirement is satisfied.

51. I have already established that the adjudication application was referred to me but I need to be satisfied that there was compliance with the Act regarding the reference to an eligible adjudicator. I turn firstly to s23 of the Act which provides:

"23 Appointment of adjudicator
(1) If an authorised nominating authority refers an adjudication application to an adjudicator, the adjudicator may accept the adjudication application by serving notice of the acceptance on the claimant and the respondent.
(2) On accepting an adjudication application, the adjudicator is taken to have been appointed to decide the application.

I find the ANA referred the adjudication to me in writing on 3 May 2005 in accordance with s23(1) and that I am eligible adjudicator because I am registered under the Act with registration number J622914 thereby satisfying s22(1) of the Act. I am not party to the contract and I have no conflict of interest thereby satisfying s22(2) and s22(3) of the Act. I have also established that I accepted the application in writing to the parties by express post on 4 May 2005 which complies with s23(2) of the Act.

Accordingly, the fourth basic and essential requirement has been satisfied.

52. As to the fifth basic and essential requirement, I find that my decision at the start of this document which identifies the amount of the progress payment, the date on which it was payable and the rate of interest payable complies with this fifth basic and essential requirement.

53. I now turn to the more detailed requirements.

More detailed requirements

54. As to the content of the payment claim, I refer to s17(2) of the Act, which provides:

> *"A payment claim-*
>
> *(a) must identify the construction work or related goods and services to which the progress claim relates; and*
>
> *(b) must state the amount of the progress payment that the claimant claims to be payable (the **"claimed amount"**); and*
>
> *(c) must state that it is made under this Act."*

Although the Respondent takes issue in the payment schedule with matters raised in the payment claim, at this juncture I must merely be satisfied that the payment claim's contents comply with s17(2).

As to s17(2)(a) I note that the payment claim makes reference to work at the job site for shop fitting work at two tenancies, with electrical works and carpeting; and invoices were attached resulting in a claim of $46,811.20. I am satisfied that the test suggested by Einstein J in *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Limited [2003] NSWSC 1103* ("Leighton") has been complied with. His Honour at paragraph 52 said that the purpose of the NSW equivalent of s17(2)(a) was that a "respondent served with a payment claim be provided with adequate information to enable it to provide a payment schedule…". His Honour stated at paragraph 53 that adequacy of the information in the payment claim was essentially a question of fact.

The Respondent provided a payment schedule on 14 April 2005, which dealt fairly extensively with the payment claim. This points to the information in the payment claim being adequate. However, as a matter of prudence I have regard to what I believe to be the current law in relation to sufficiency of compliance with this issue. In the case of *Jemzone Pty Ltd v Trytan Pty Ltd [2002] NSWSC 395* ("Jemzone"), Austin J at paragraph 41 stated that, "*While the court should not taken unduly strict approach to the construction of the claim, it ought not cure defects in the claim document by reference to extraneous circumstances or previous communications. In the present case there was some evidence given by Mr. Nott suggesting that when he received the document date 14 March 2001, he was able to identify the work to which it related. In my opinion, evidence of that kind does not relieve the Claimant of the obligation of ensuring that the payment claim complies with s13(2) on its face **[s17(2) of the act – my comment]***."

If one applied the principles of Jemzone to this claim, it would be open to find that the payment claim itself was insufficient in that there was no means of determination from the payment claim document alone how the claimed amount was derived, nor that previous payments had been made by the Respondent. Furthermore, at paragraph 43 Austin J stated that, "*In my opinion, this requires the claimant to identify the particular work that is the subject of the progress payment, rather than simply to identify in general terms the work that is the subject of the construction contract as a whole. The document in question refers to "motel construction for Jemzone Pty Ltd". That falls well short of satisfying the requirements of section 13(2)(a)… It merely begins by specifying a balance owing as at 9 February 2001, and then makes adjustments for variations and payments and other matters. At no stage is there any*

statement purporting to identify the work carried out since the making of the last payment claim." If one was to apply the principles in Jemzone to this particular payment claim, it could be held that section17(2) of the Act has not been satisfied because for example reference to "shop fit out of tenancy 303c…" sounds similar to "motel construction for Jemzone Pty Ltd".

However, in my view such an approach is too restrictive for the facts in this case. I prefer the later NSW cases of Leighton referred to above and *Walter Construction group Ltd v CPL (Surry Hills*) *Pty Ltd [2003 NSWSC 266 (*"Walter Construction"*).* Einstein J at paragraph 55 in Leighton referred with approval to the decision of Nicolas J in Walter Construction and some other NSW cases and said that the views in Walter "*should be preferred to the views expressed as obiter by Austin J in Jemzone, generally for the reasons set out above*". Einstein J at paragraph 54 in Leighton had already adopted the principle that the equivalent of s17(2) of the Act "*should not be approached in an unduly technical manner keeping in mind the considerations to which counsel pointed. The terms used in subsection (2) of s13 are well understood words of the English language. They should be given their normal and natural meanings. As the words are used in relation to events occurring in the construction industry, they should be applied in a common sense practical manner.*"

Nicolas J at paragraph 68 in Walter Construction stated in relation to the question of compliance with the equivalent of s17(2)(a), "*the question is not whether an item of the payment claim relates to construction work or related to goods and services within s5 and s6 respectively, but whether the payment claim adequately identifies such work or goods and services.*" In that case a letter referred to an enclosed payment claim indicating an amount of progress payment for work carried out to 20 December 2002 in the sum of $14,915,255.00 including GST. To that letter were attached some documents which gave particulars of the item of work claimed and underneath this information was the endorsement required under the act. In Walter Construction, Nicolas J held that payment claim sufficiently complied with the equivalent of s17(2)(a) of the Act. In my view I prefer the latter two cases because strict technicality appears contrary to the intention of the legislation for facilitation of rapid progress payments. In addition, the Respondent has put in a detailed payment schedule, and this is a more detailed requirement only, for which strict compliance is not required. Accordingly, I find that this payment claim sufficiently complies with s17(2)(a) of the Act because the construction work is identified sufficiently enough for the Respondent to respond with a payment schedule, and the attached invoices provide the calculation of the amount payable, having taken off the amounts already paid by the Respondent.

The payment claim states the amount of $46,811.20 which in my view satisfies s17(2)(b) because it expressly states the "Amount of progress payment payable by the respondent to the claimant." I take this to mean what it says, and this is enough to satisfy s17(2)(b). The invoices form part of payment claim and the amount is calculated under the contract: s13(a) of the Act, and valued under the contract, thereby complying with s 14(1)(a).

The endorsement is clearly on the payment claim, so that s17(2)(c) is complied with.

I have already referred to the issue of the Claimant's solicitors and not the Claimant serving the payment claim. I note that nothing in the Respondent's material takes

issue with such service, so I find that it is not necessary to require strict adherence to only the Claimant serving the payment claim, which is consistent with Brodyn's approach to the more detailed requirement, so I find accordingly that, the first more detailed requirement is satisfied.

55. I must now determine the time when the adjudication application could be made, as well as the requirements of the contents of the application.

It is necessary to ensure that the time limits in s21(2)(c) of the Act are complied with. I have already found that the payment claim was served on 31 March 2005. The Contract does not contain a term dealing with a time requirement for service of payment claims so that s18(4(b)(i) does not apply. This means that s18(4)(b)(ii) of the Act applies and this requires a payment schedule to be served within 10 business days after the payment claim was served. I have then calculated that the payment schedule needed to be served by 14 April 2005 and the parties in their respective submissions in paragraphs 58 agree that this was the date that a payment schedule was served. It was exhibited as "RB19" in the Claimant's submissions, which did not take issue with the fact that it was served by the Respondent's solicitors. Accordingly, I find that there was a payment schedule and that it was served on 14 April 2005.

I now need to decide which of the timing provisions contained within s21(1)(a) dealing with adjudication applications are relevant. S21(1) provides:

*"(1) A claimant may apply for adjudication of a payment claim (" an **adjudication application**") if-*

"(a) the respondent serves a payment schedule under division 1 but –

(i) the scheduled amount stated in the payment schedule is less than the claimed amount stated in the payment claim; or…"

Paragraph [A] of the payment schedule refers to a statement that the respondents have made payment in the sum of $12,310.00 for the work at River Walk Market location under item (b) of the payment claim and $10,000.00 towards the claim under item (a) in the payment claim as being the payment of "so much of the claim as the Respondents concede is payable." This does not strictly comply with s18(2) which provides:

"(2) A payment schedule-

(a) must identify the payment claimant to which it relates; and
*(b) must state the amount of the payment, if any, that the Respondent proposes to make (the **"scheduled amount"**)."*

In this payment schedule the Respondent has identified actual payment that has been made rather than what the Respondent *proposes to make.* I find that this payment was made, because it is supported by paragraph 58 of the Claimant's submission that payment was made on 13 April 2005, so the payment schedule did not state what the Respondent *proposes to make*.

However, if one takes the more liberal view identified in Leighton and Walter Constructions, then it is open for me to find that the amount of $12,310.00 falls within

the definition of "**scheduled amount**". There is a reference to payment of $12,310.00 together with a concession that $10,000.00 of the amount paid under item (a) of the payment claim is the only amount that the Respondents conceded was payable. I would consider finding that actual payment as failing to satisfy s18(2)(b) on the strict interpretation of the words, would be contrary to the legislative intent. If that interpretation was adopted, parties could *hold back* paying undisputed amounts until the delivery of a payment schedule, so as to satisfy the strict meaning of *propose to make*. Given that cash flow is the primary driver behind the legislation, such a strict reading would hardly seem correct. It would also be inconsistent with the *more detailed requirement* approach in Brodyn of not requiring strict adherence to these matters.

Accordingly, I find there was a **scheduled amount** stated in the payment schedule of $12,310, which was less than the claimed amount of $46,811.20 stated in the payment claim, so s21(1)(a)(i) applies to permit the making of an adjudication application.

One then has recourse to s21(3)(c)(i) which provides that an application under s21 (1)(a)(i) must be made within 10 business days after the Claimant receives the payment schedule. The payment schedule was served on the Claimant on 19 April 2005 according to the submissions in paragraphs 58 of the parties' respective submissions. By my calculation, the claimant then had until 29 April 2005 to make an adjudication application, and I have already found that on that date an adjudication application was made, so that the timing requirements of the adjudication application have been satisfied.

I now deal with the adjudication application's contents as required by s21(3)(d) which essentially deals with the necessity *to identify the payment claim and the payment schedule, if any, to which it relates.* The adjudication application refers to the payment claim details in the amount of $46,811.20, together with the payment schedule details dated 31 March 2005 with reference to the date of it being 14 April 2005 and the scheduled amount of $12,310.00. This means that s21(3)(d) has been complied with.

Section21(3)(e) need also be satisfied and I note that the ANA's application fee for a payment claim for up to $200,000.00 requires no fee to be paid and the adjudication application identifies this payment as nil, so I find that section21(3)(e) has been satisfied.

I now turn to s21(3)(f) and note that the Claimant has provided submissions relevant to its application thereby complying with this subsection. Accordingly, this more detailed requirement regarding the adjudication application timing and its contents has been satisfied.

56. I then need to determine the time when an adjudication decision may be made under s25 of the Act, as I may not decide until after the Respondent may give an adjudication response to me: s25(1). Furthermore, s25(2) of the Act provides:

> *"An adjudicator must not consider an adjudication response unless it was made before the end of the period within which the respondent may give a response to the adjudicator."*

Section 24 provides the time within which the Respondent could give an Adjudication response and I have found the response was made on 9 May 2005. Section 24(1) provides:

> *"Subject to subsection (3), the respondent may give the adjudicator a response to the claimant's adjudication application (the* ***"adjudication response"****) at any time within the later of the following to end-*
>
> *(a) 5 business days after receiving a copy of the application;*
>
> *(b) 2 business days after receiving notice of an adjudicator's acceptance of the application."*

In the adjudication application, the claimant's solicitors agreed to serve it on the day it was lodged on the ANA and, if not, then the claimant would immediately notify the ANA about the date of service on the respondent. I have not been advised of any other date of service, so I am entitled to assume that service of the adjudication application was made on 29 April 2005. An adjudication response was provided to me on 9 May 2005 which satisfies s24(1)(a) as being within 5 business days of service of the adjudication application. The adjudication response date was also 2 business days after receiving my notice of acceptance, which was the day after posting by express post. I commenced to decide the adjudication on 10 May 2005, the day after receipt of the adjudication response. Accordingly, this more detailed requirement is satisfied.

57. The final more detailed requirement is whether I have considered the matters required to be considered under s26(2) of the Act.

In considering whether s26(2)(a) is complied with, I consider that it is firstly necessary to determine whether the Claimant is entitled to a progress payment under the Act because entitlement is required before consideration can be made to the amount of progress payment, and the valuation thereof. S12 provides as follows:

> *"From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract."*

The payment claim identifies no reference date, but the Act does not require one to be identified and support for this view is found in the case of *Kembla Coal & Coke v Select Civil & Ors [2004] NSWSC 628.* McDougall J (at para 24) referred to the concept of a *jurisdictional fact* and defined it as *one that must be seen to exist before the statutory power can be exercised.* In that case Kembla and Select both agreed that the existence in fact of a reference date under the NSW legislation was a *jurisdictional fact*. Despite the opposing parties' arguments, McDougall J stated that this was not the correct interpretation. At para 37 His Honour said:

> *"It does not mean that the adjudicator is required to make a positive finding as to a reference date, or that the adjudicator can rely on the absence of a reference date to find against the claimant where that point has not been raised by the respondent in its payment schedule or adjudication response"*

Further at para 39 His Honour added:

> *"The Act does not specify, expressly or by implication, that an adjudicator is required to be satisfied as to the relevant reference date before proceeding further with the adjudication. Instead, I think, it leaves it to the parties (in the usual case, the respondent) to raise the point if it is appropriate to do so. If the point is raised, then it is one that the adjudicator can determine. For the reasons given by Spigelman CJ in Timbarra at 65 [44], that would suggest that the existence of a relevant reference date is not a jurisdictional fact."*

A reference date is defined in Schedule 2 as:

> *"(a) a date stated in, or worked out under, the contract as the date on which a claim for progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied; or*
>
> *(b) if the contract does not provide for the matter-*
>
> *(i) the last day of the named month in which the construction work was first carried out, or related goods and services were first supplied, under the contract; and*
>
> *(ii) the last day of each later named month."*

There is no date stated in the contract, evidenced by exhibit "A", or that can be worked out from the contract for the reference date. Accordingly the first reference date is the 30 November 2004 in accordance with Schedule 2(b)(i), and then the last day of each subsequent month, i.e. 31 December 2004, 31 January 2005, 28 February 2005, 31 March 2005. Elsewhere, I have found that the payment claim was served on 31 March 2005 and this is the reference date for work carried out in March 2005. The contract was completed on 5 February 2005, so that it was open for the Claimant to have made a progress claim for this work on 28 February 2005 (the reference date for the February work). Accordingly, although I do not have to find the reference date for the contract, I am satisfied that the payment claim was made from the reference date of 28 February 2005 for the last work which was carried out in February 2005.

In the case of *Kembla*, it was determined that a person making a claim for work under a construction contract was prima facie able to show entitlement, subject to the respondent demonstrating a disentitling circumstance. The Respondent has not asserted a disentitling circumstance regarding the reference date. Accordingly, I find that the Claimant is prima facie entitled to a progress payment under the Act because:

- the first basic and essential requirement was satisfied above, and
- I found that the Claimant had undertaken to carry out construction work under a construction contract, and
- I found that the Claimant has carried out some construction work

thereby satisfying s12 of the Act.

58. As a more detailed requirement I now need to turn to essentially the merits of the application, and to so do I must be mindful of only those matters which arise under s26(2) of the Act. In the analysis thus far I have had extensive regard to the provisions of the Act, thereby satisfying that part of s26(2)(a), but I firstly need to have regard to Part 4A of the *Queensland Building Services Authority Act 1991* (the "BSAA"). Before I canvass this in more detail, I mention that I have had no regard to s26(2)(e)

because I did not carry out an inspection. Accordingly, I will confine this adjudication to those matters in s26(2)(a), (b), (c) and (d) because they are the only ones applicable.

59. Turning firstly back to s26(2)(a), the BSAA deals with *building work*, whereas the Act considers *construction work*, which is much wider, and includes *building work.* Part 4A of the BSAA deals with *Building contracts other than domestic building contracts.* Having regard to Schedule 2 of the BSAA:

*"**DICTIONARY***

"….building work" means--

(a) the erection or construction of a building; or
(b) the renovation, alteration, extension, improvement or repair of a building; or …

but does not include work of a kind excluded by regulation from the ambit of this definition.

carry out building work, for part 4A, see section 67A….

…domestic building contract means a domestic building contract under the Domestic Building Contracts Act 2000….

progress payment, for part 4A, see section 67A."

I have already established above that the tenancy is a "building". If one therefore looks at the work the subject of this adjudication, I find that it falls within the definition of *building work* under the *BSAA* as shop fitting, framing, plastering & painting, electrical works and carpeting would form part of (a) *the construction of a building* or (b) *the renovation, alteration, extension...of a building*.

It is now necessary to identify whether the Claimant's and Respondent's contract is a *building contract* under part 4A of the BSAA. S67A of the BSAA provides:

"67A Definitions for pt 4A

In this part--

approved security provider means a financial institution that is an approved security provider under the Financial Management Standard 1997.

building contract means a contract or other arrangement, other than a domestic building contract, for carrying out building work in Queensland.

carry out building work means--

(a) carry out building work personally; or
(b) directly or indirectly, cause building work to be carried out; or..

…progress payment see the Building and Construction Industry Payments Act 2004, schedule 2."

I find that the payment claim and attached invoices in Exhibit "RB 17", provide sufficient evidence that the Claimant directly, or indirectly (with the joiners and electrician) caused this shop fitting work to be carried out at Maroochydore in Queensland, thereby falling within the meaning of *carrying out building work in Queensland.* The Respondent in paragraph 58 of its adjudication response, which admitted the Claimant's paragraph 58, did not deny that this work was carried out, so I am safe in making this finding.

I need now to turn to the definition of *domestic building contract* to determine whether the agreement the subject of this adjudication is *other than a domestic building contract. Domestic building contract* is defined in Schedule 2 of the BSAA as meaning a *domestic building contract* under the *Domestic Building Contracts Act 2000* ("DBCA").

Looking at the definition in Schedule 2 of the DBCA, refers one to s7 of that Act which at s7(1) refers to "carry out or manage *domestic building work*" which in s8(1) refers to work referring to a "detached dwelling or a home". Schedule 2 of the DBCA provides:

"7 Meaning of "domestic building contract"

(1) A "domestic building contract" is a contract--

> *(a) to carry out domestic building work; or*
> *(b) to manage the carrying out of domestic building work.*

(2) However, a "domestic building contract" does not include--

> *(a) a contract between a building contractor and subcontractor; or*
> *(b) a contract under which the building owner is the State, an entity representing the State or a local government.*

8 Meaning of "domestic building work"

(1) Each of the following is "domestic building work"--

> *(a) the erection or construction of a detached dwelling;*
> *(b) the renovation, alteration, extension, improvement or repair of a home;*
> *(c) removal or resiting work for a detached dwelling.*

13 Meaning of "home"

(1) A "home" is any residential premises.

(2) A "home" includes a part of commercial or industrial premises used as residential premises.

(3) However, a "home" does not include the following--

(a) premises not intended to be used for permanent habitation;
(b) a guesthouse, hostel or similar residential premises;….."

I find that this work was on a tenancy in a shopping centre and at a market location, which would not be considered as a "detached dwelling or home". "Home" is defined in s13 of the Dictionary of the DBCA as "*any residential premises…used as residential premises*" which could not extend to a tenancy in a shopping centre or market unless they were *used as residential premises.* Neither party has led any evidence that this is the case. Accordingly, even though the list of exclusions in s13(3) does not cover a shopping centre, I find that the site and the market location do not fall within the definition of detached dwelling or home as there is no *residential* quality associated with these places. Accordingly, the work was not *domestic building work* and therefore the contract was *other than a domestic building contract* so that Part 4A of the BSAA applies to this agreement. S67P of the BSAA provides:

"**67P Late progress payments**

(1) This section applies if--

(a) the contracting party for a building contract is required to pay an amount (the progress amount) to the contracted party for the building contract; and
(b) the progress amount is payable as the whole or a part of a progress payment; and
(c) the time (the payment time) by which the progress amount is required to be paid has passed, and the progress amount, or a part of the progress amount, has not been paid.

(2) For the period for which the progress amount, or the part of the progress amount, is still unpaid after the payment time, the contracting party is also required to pay the contracted party interest at the penalty rate, as applying from time to time, for each day the amount is unpaid.

(3) In this section--

penalty rate means--

(a) the rate made up of the sum of the following--
(i) 10% a year;
(ii) the rate comprising the annual rate, as published from time to time by the Reserve Bank of Australia, for 90 day bills; or
(b) if the building contract provides for a higher rate of interest than the rate worked out under paragraph (a)--the higher rate."

The effect of the BSAA in the context of this particular contract is confined to the provisions relating to late progress payments in s67P of the BSAA, which is under Part 4A of the BSAA. s67P(1)(c) of the BSAA refers to the situation where the time for progress payments has passed and the part or whole of the progress payment has not

been made, when the particular section becomes operative. s67P(2) refers to the period in which the progress payment is still unpaid, during which and until it is paid, as attracting a penalty rate interest component on these unpaid monies. Having regard to the BSAA Schedule 2 dictionary definition of *progress payments*, it is evident that one looks back to the *Building and Construction Industry Payments Act* to find its meaning.

Schedule 2 of the Act provides:

"DICTIONARY

> *…progress payment means a payment to which a person is entitled under section 12, and includes, without affecting any entitlement under the section--*
>
> > *(a) the final payment for construction work carried out, or for related goods and services supplied, under a construction contract; or*
> > *(b) a single or one-off payment for carrying out construction work, or for supplying related goods and services, under a construction contract; or*
> > *(c) a payment that is based on an event or date, known in the building and construction industry as a "milestone payment".*"

I have already found that the Claimant was entitled to a progress payment under s12 of the Act, and this appears to be a claim for the final payment, which still accords with the definition in ss(a) above. s15(3) of the Act, which is reproduced below, expressly provides that if the construction contract falls within s67P of the BSAA because it is a building contract, then interest is payable at the penalty rate provided by s67P of the BSAA. I find that there is nothing in the contract that provides for an interest rate, so that the penalty rate as provided in s67(3)(b) of the BSAA does not apply.

This means that I must look at s67P(3)(a) of the BSAA. Turning firstly to s67(3)(a)(ii) of the BSAA, it is necessary to find the annual rate of bank bills as published from time to time. I accessed the web site of the Reserve Bank, but could not find publication of this information, nor was I able to find anything on the ASX web site. The Courier Mail dated 20 May 2005 on page 34 published the 90 day bank bill rate as 5.68%, and I could find that this is the applicable interest rate to which must be added the rate of 10% provided in s67P(3)(a)(i) of the BSAA, resulting in an interest rate of 15.68%. s67(3)(a) requires the addition of the 2 interest rates in calculating the penalty interest.

The alternative approach is to find that the penalty interest is 10% plus *the rate comprising the annual rate, as published from time to time by the Reserve Bank of Australia, for 90 day bills.* This would mean the parties would have to agree and calculate this interest amount themselves so that the Respondent could pay this amount if the Respondent so chose. If payment of the interest is not made, the Claimant would be entitled under s30(1) to ask the ANA for an adjudication certificate. Under s30(4), in the event that the amount of interest payable on the adjudicated amount is not paid, the Claimant could ask the ANA to state the amount of interest payable in the adjudication certificate. This would mean that the ANA would have to search for the 90 day bank bill rate before performing the calculation to state the mount of interest

payable. I do not prefer this approach because it could get the ANA unnecessarily embroiled in a dispute over its calculation, and more importantly, it would require additional work for the ANA, which I do not believe the legislation intended was required by the ANA. In my view this is a responsibility of the adjudicator and I therefore prefer to decide the actual rate of interest payable.

Accordingly, I find that the rate of interest payable as 15.68% simple interest.

60. At this point it is important for the parties to be reminded that the statutory payment regime under the Act is designed to facilitate cash flow for construction work as provided in s7 of the Act, and that regard is had to the contract for the amount to be paid: s13 of the Act. Valuation of the amount of that work is made, either by means of a specific provision dealing with valuation of the particular work under the contract: s14(1)(a) and s14(2)(a)of the Act, or by having regard to other contractual rates or prices or agreed variations and estimated costs of rectifying defects: s14(1)(b) and s14(2)(b) of the Act. S15 deals with the due date for payment of a progress payment. These provisions of the Act are now provided:

"13 Amount of progress payment

The amount of a progress payment to which a person is entitled in relation to a construction contract is--

(a) the amount calculated under the contract; or
(b) if the contract does not provide for the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, by the person, under the contract.

14 Valuation of construction work and related goods and services

(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued--

(a) under the contract; or
(b) if the contract does not provide for the matter, having regard to--
(i) the contract price for the work; and
(ii) any other rates or prices stated in the contract; and
(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and
(iv) if any of the work is defective, the estimated cost of rectifying the defect.

(2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued--

(a) under the terms of the contract; or
(b) if the contract does not provide for the matter, having regard to--
(i) the contract price for the goods and services; and
(ii) any other rates or prices stated in the contract; and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and
(iv) if any of the goods are defective, the estimated cost of rectifying the defect.

(3) For subsection (2)(b), for materials and components that are to form part of any building, structure or work arising from construction work, the only materials and components to be included in the valuation are those that have become or, on payment, will become the property of the party or other person for whom construction work is being carried out.

15 Due date for payment

(1) A progress payment under a construction contract becomes payable--

(a) if the contract contains a provision about the matter that is not void under section 16 or under the Queensland Building Services Authority Act 1991, section 67U or 67W--on the day on which the payment becomes payable under the provision; or
(b) if the contract does not contain a provision about the matter or contains a provision that is void under section 16 or under the Queensland Building Services Authority Act 1991, section 67U or 67W--10 business days after a payment claim for the progress payment is made under part 3

(2) Subject to subsection (3), interest for a construction contract is payable on the unpaid amount of a progress payment that has become payable at the greater of the following rates--

(a) the rate prescribed under the Supreme Court Act 1995, section 48(1) for debts under a judgment or order;
(b) the rate specified under the contract.

(3) For a construction contract to which Queensland Building Services Authority Act 1991, section 67P applies because it is a building contract, interest is payable at the penalty rate under that section."

s100 of the Act provides that the parties' legal rights (apart from the operation of s99 of the Act) are unaffected by the adjudication carried out under Part 3 of the Act and the adjudication is confined to only matters contained within s26(2) of the Act. Accordingly, the adjudication process is not designed to allow full ventilation of all the legal issues associated with a construction contract, and in the event such issues are raised by the parties that fall outside of s26(2) matters, I will make reference to such issues in this adjudication, and state that I have not considered them in this adjudication with the attendant reasons why. In this dispute there is a paucity of information about the terms of the contract and an adjudicator does not have the benefit of oral evidence from the parties in reaching a decision, so this analysis is particularly difficult. However, I have confronted those difficulties and stated why they have been confronted in these reasons.

At all times, as stated previously, I must be satisfied that the Claimant is entitled to payment for this work, and the burden of proof lies with the Claimant.

Substantive Issues

61. It is now necessary to consider what issues arise in this dispute so that my decision can be properly confined within s26(2) of the Act. At the same time I must ensure that all the issues (and only those issues) ventilated by the parties in the payment claim, payment schedule, adjudication application and adjudication response, together with the relevant submissions on both sides are properly considered. To this end I have decided that some broad issues that have arisen should now be listed, so that the parties can follow the reasoning below. Accordingly in exercising my judgement within s26(2), I consider that the following issues need be dealt with in this adjudication:

    1. The extent of the contract between the Claimant and Respondent; including whether the contract:
        a. included exclusion 4 relating to "Security";
        b. required the Claimant to allow for Security costs;
        c. included plans;
        d. governed the responsibility for the accuracy of the plans;
        e. included rates or prices in the contract;
        f. included the right for the parties to vary the contract;
        g. provided a time to complete the project;
    2. Whether the Respondent is entitled to withhold monies for damages associated with lost trading;
    3. Whether the Respondent is entitled to withhold monies for variations not carried out, work not carried out, or substandard work and materials being provided.

62. I can now turn to the provisions of the construction contract in accordance with s26(2)(b) from which the application arose, as far as I have not already done so, and this analysis therefore encapsulates those issues above.

63. I have already found as a threshold issue that a contract was entered into by the Respondent accepting the Claimant's written quote dated 21 October 2004 because both the Claimant and Respondent refer to a quote with that date and fact of its acceptance. What is not agreed is whether exclusion 4 dealing with *Security* is a term of the contract.

    The Claimant exhibited "RB2" to paragraph 9 of its submissions which was a quote dated 21 October 2004 containing "Exclusion 4: Security". The Respondent, in paragraph 9 of its submissions, entirely disputes paragraph 9 of the Claimant's submissions and stated that it had only received one quote (and not several as asserted by the Claimant) and that exhibit "RB2" was not a true copy. The Respondent provided exhibit "A" to paragraph 9, which was asserted to be a true copy of the quote. This quote did not contain "Exclusion 4: Security". The Respondent further asserted that the quotation had been reprinted by the Claimant to bolster the Claimant's case.

Having regard to the contending assertions, I need to decide whether the quote included Exclusion 4 because the Respondent claims in paragraph 7 of the payment schedule that it is withholding money because the Claimant must pay the sum of $2,553.38 relating to security costs pursuant to the contract. If the contract specifically excluded these costs, then this sum is not payable by the Claimant. If the contract did not specifically exclude these costs, I will still need to decide whether the contract required those costs to be included, and if so, that those costs are claimable by the Respondent under the contract.

In deciding which is the better version of the contending assertions, I have considered paragraph 17 of the Claimant's submission in which the Claimant stated that it had no knowledge of security costs, nor was it informed that they needed to allow for such additional expenses. The Respondent's paragraph 17 of submissions stated that the cost of security should have been allowed by the Claimant, and that in mid December 2004 the Claimant's agent, Reece Trembah, had advised the Respondent that the Claimant had forgotten to allow for security.

Before I further deal with the exclusion issue, I need to deal with the Respondent's assertion that Reece Trembah was the Claimant's agent. If he was an agent for the Claimant and he did say what the Respondent asserts, albeit some 2 months after the date of the quote, then I may be persuaded, on balance, that the Claimant had knowledge of the need to allow for the cost of security at the time of the contract, which may be found by me to be a term of the contract, and had simply forgot to exclude it. This could be construed as tantamount to an "admission" by the Claimant of a failure to allow for these costs in the contract sum.

I have reviewed both parties' submissions in relation to references to Reece Trembah/Trembath and I take little notice of the difference in spelling of this name. He is identified by the Claimant as the Respondent's consultant/agent in paragraph 1 and 9 of its submission, and is also referred to in paragraphs 2, 3, 5, 11 and 15 in circumstances where the consultant (as he is most often referred to) is carrying out functions on behalf of the Respondent.

The Respondent's submissions in paragraph 1 did not dispute the Respondent's paragraph 1 assertion and provided that Trembath was asked to find a shop fitter for the Respondents, but that was all, and that he ended up becoming the Claimant's project manager. In paragraph 2 the Respondent expanded upon the instructions that Trembath was given by the Respondent. In paragraph 3 the Respondent did not dispute that Trembath attended meetings on behalf of the Respondent, and in paragraph 5 did not take issue that Trembath provided plans to the Claimant. The Respondent in paragraph 9 of its submission disputes the Claimant's paragraph 9 entirely, but does not specifically take issue with Trembath's position as consultant.

In paragraph 11, the Respondent denies paragraph 11 of the Claimant's submissions in respect of the provision of plans, but not specifically as to the consultant's status. Finally, in paragraph 15, the Respondent merely rejected that Marcia Neal gave instructions in November 2004 but did not reject the fact that Trembath was its consultant as asserted. On balance, and because the Respondent did not in paragraphs 3, 5, 11 and 15 take issue with the Claimant's assertions regarding Trembath's status, I prefer to accept that Trembath was the Respondent's consultant/agent from October

2004 until at least through November 2004 by which time the contract had been entered into. Accordingly, it is open for me to find that whatever Trembath may have said to the Respondent in December 2004 about the Claimant being aware that security costs were required and that the Claimant had forgotten them, it was not said in the context that Trembath had been an agent for the Claimant prior to entry into the contract, when he may have been privy to such information. Therefore, I do not give much weight to any "admission" by the Claimant in paragraph 17 of the Respondent's submissions regarding needing to allow for these costs.

Returning to the exclusion issue, and applying common sense to the contending submissions regarding the exclusion, I find that it is unlikely that Exclusion 4 was in the quotation because the Claimant said it had no knowledge of such security costs in paragraph 17 of its submissions. I cannot be satisfied that a person who has no knowledge of a fact of security costs would then include that fact as an exclusion in a contract. Accordingly, I find that exclusion 4 was not part of the contract. I find that the contract was comprised of the 21 October 2004 quote as found in exhibit "A" which had been orally accepted by the Respondent on 23 November 2004. The written terms were those contained in exhibit "A". The contract sum I find was $49,500.

64. I must then consider whether security costs formed part of the contract, for which the Claimant should have made an allowance. I will first consider whether it was an express term of the contract that the Claimant allow for security costs in the quotation, or in any discussions that may have been held after the quotation was provided, but before acceptance of the Claimant's offer on or about 23 November 2005. I find that exhibit "A" did not expressly provide for security costs to be allowed.

I have already found that the Claimant did not have any knowledge that such costs were to be allowed and this is consistent with the inference that I've drawn from the quotation that the Claimant could not have excluded costs that it did not have in its contemplation as being required under the contract. I am prepared to accept the Respondent's assertions in paragraph 10 of its submissions that the Claimant had never carried out a shop fit before, from which I can draw the inference that security costs would not have been something in its contemplation. This means that I will have to find as a matter of fact that there was an oral agreement that security costs were to be provided under the contract after the quote was delivered to the Respondent, but as stated previously, before the Respondent accepted the Claimant's offer.

In paragraph 17 of the Respondent's submissions, the Respondent stated that the Claimant ought to have allowed for these costs but the Respondent made no positive assertions that such costs were brought to the Claimant's attention prior to the contract being entered into. I have already discounted the "admission" of the Claimant as asserted in paragraph 17 of the Respondent's submissions, so there is no evidence on which I could rely to find that it was an express term of the contract that security costs ought to be allowed in the contract sum.

If there is no express term in a contract dealing with a particular issue, it may be open for me to find that a term is implied. However, in my view, if the parties have not made positive submissions and led evidence of the need to imply terms into a contract, I am only able to consider implying a *customary term* that is in a particular class of contract, because this is implied as a matter of law whether or not the parties had an

actual or presumed intention to do so: *paragraph [65-570] Halsbury's Laws of Australia: LexisNexis online service.* In my view this approach is open to an adjudicator because adjudication is a rapid dispute resolution process requiring construing contracts with limited information with a necessity of "filling in the blanks" in order to reach a considered decision in accordance with law. The law implies these terms, whatever the intention of the parties, so that any evidence and submissions put forward from the parties to counter the implication of such terms must fail, because the law operates despite their evidence and submissions. Accordingly, to adopt such an approach does not, in my view, contravene the rules of natural justice, since neither party is disadvantaged because the law merely "fills in these blanks". Of course, if the parties' contract is substantially complete, there is no need for an adjudicator to have recourse to implying *customary terms.*

However, it is not in my opinion open for an adjudicator to imply terms to give *business efficacy* to the contract as provided in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337 at 346 per Mason J* without submissions from the parties. At paragraph [65-595] of *Halsbury's* the learned authors stated that a term of this type will be implied in a written contract only where it is:

- *reasonable and equitable;*
- *necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;*
- *so obvious that it goes without saying;*
- *capable of clear expression; and it*
- *does not contradict any express term of the contract.*

For an adjudicator to imply terms under the *business efficacy* rule without having had submissions, would deprive at least one, if not both parties of the opportunity to make submissions in relation to the implication of such a term. In addition, an adjudicator would have to find evidence that the 5 tests required had been satisfied, and that evidence would have to be adduced and commented on by the parties. To carry out such an analysis without the parties requiring the adjudicator to do so, would in my view constitute a breach of natural justice.

Accordingly, I will confine the decision to implying *customary terms* only, because although the parties make reference to security costs, with the Claimant saying they were excluded (which I have not found) and the Respondent saying they were included, without providing evidence of how they were included, the parties have not submitted that the term should be implied. To imply a customary term as a matter of law, the learned authors in *Halsbury's* at paragraph [65-570] state that it must be proved that the term is:

- notorious in the trade at the time of contract;
- certain;
- reasonable and not contrary to law; and
- not inconsistent with the express terms of the contract.

The evidentiary onus has shifted to the Respondent to demonstrate that these costs were notorious, because it asserts that the term should be part of the contract, and I find that the Respondent has not proved this fact. In paragraphs 17 and 18 of the Respondent's submissions there are assertions that such costs were the responsibility

of the Claimant, but led no evidence in support of this. Mr Turnbull's statutory declaration (as an experienced shop fitter) could have referred to security costs being *notorious*, but he did not do so. Accordingly, it is my view that one cannot imply a term as a matter of law that security costs relating to construction activities carried out in a shopping centre need to be factored into the contract price without evidence of *notoriety*. Such a term could possibly be implied under the *business efficacy* rules, but neither party has made submissions for me to do so in this case. Accordingly, I cannot find that such a term could be implied to the contract.

I therefore find that there is no term in the contract requiring the Claimant to make allowance for security costs in the contract price. This means that the Respondent's withholding of the sum of $2,553.38 is untenable and should be paid to the Claimant.

65. It is now necessary for me to determine whether the contract included plans, because there is significant dispute over the accuracy of plans and approximately $5,000.00 is claimed by the Claimant as costs for variations associated with additional work and materials provided by the Claimant because the plans were in error. I shall firstly consider whether there was an express term of the contract that plans formed part of it. The quote in exhibit "A" in detail number 3 provided for "*manufacture and installation of shop front to specifications as shown on plan*".

There is no other reference to a plan in the quote, however, it is open to draw an inference from Details 2, 4 and 5 that some detail or plan was contemplated by the quotation. Moreover, in paragraph 5 of the Claimant's submissions, the Claimant makes reference to "*certain approved plans by Ghap design for the tenancy fit out to enable to Claimant to finalise his quote*" and plans were exhibited in "RB1". There are a number of other paragraphs in which the Claimant, particularly, and the Respondent make reference to plans, and accordingly I am satisfied that the contract included construction in accordance with plans. There is only one set of plan exhibited in "RB1" in evidence, and I find on balance that they were the plans that the parties used in the contract. There is sufficient reference within the quotation and the assertions made by the Claimant and Respondent for me to be satisfied that the contract required the shop fit out to be carried out in accordance with the plans. Exhibit "RB1" contains two site and floor plans numbered as CD-01/A with various hand written alterations or comments thereon. The comments on the two site and floor plans differ. In addition, there is one plan number CD-03/A which is called "Elevations" which is also in evidence. I find that these plans constituted the plans under the contract.

66. The next issue that needs to be decided is which party was responsible for the accuracy of the plans because it is raised an issue by the Claimant. In order to make a finding on this point, it is first necessary to determine which party provided the plans under the contract. I have already concluded that the Respondent's submission contained a number of references to there only ever being one set of plans, so I turn to the Claimant's submissions in relation to the source of those plans. In paragraph 5 of the Claimant's submission the Claimant stated that the Respondent provided certain approved plans through their consultant and these were exhibited as "RB1". In this paragraph the Claimant submitted that it required *scaled plans*, which were provided much later. In paragraph 11 of the Claimant's submission it appears that "much later" constitutes about mid November 2004 in which the Respondent's consultant provided

the Claimant with *scaled plans.* However, it is for the Claimant to prove the existence of these *scaled plans*, and they failed to exhibit any other plans apart from those in exhibit "RB1" and I have already found that they are the only plans under the contract.

Nevertheless, it is important to have regard to paragraph 5 of the Respondent's submissions in relation to the assertion that the Respondent had provided the Claimant through their consultant with certain approved plans. The Respondent did not take issue with the assertion that its consultant provided certain plans for the tenancy fit out. The assertion by the Respondent that there were only ever one set of plans, does not in my mind detract from the fact that the Respondent has not denied that it provided the plans to the Claimant. Accordingly, I find that the Respondents provided the Claimant with the plans for the contract.

It is now important now to determine whether the Respondent was responsible for the accuracy of those plans because a significant component of the Claimant's variation claims relates to having to carry out extra work and provide additional materials because these plans were inaccurate. Although I have found that the Respondent provided the plans to the Claimant, I need to determine whether there was a term of the contract requiring the Respondent to warrant the accuracy of those plans. This is where I encounter significant difficulty. I must first establish whether there was an express term that the Respondents warranted the accuracy of the plans. And I am unable to find any reference to such a warranty in exhibit "RB1". In addition, the Claimant has provided no evidence in its submissions to which I can have regard that, prior to entry into the contract, the Respondent expressly said that the plans would be accurate. Whilst the plans were not drawn by the Respondent, but by an architectural firm known as Ghap Design, I have scrutinised the plans to ascertain any assertions as to their accuracy, so as to determine by some reasoning that such a warranty exists. In exhibit "RB1" under drawing numbers CD-01/A and CD-03/A there are some notes which state as follows:

> *"**NOTES**"*
>
> *All discrepancies shall be referred to the architect for clarification before proceeding with the work.*
>
> *Verify all dimensions on site.*
>
> *Do not scale drawings"*

Whilst I have already stated that the Respondent merely provided the plans to the Claimant and was not the creator of those plans, it is open to conclude that these notes ought to have put the Claimant on notice that there may be discrepancies with dimensions shown on the plans and that such discrepancies ought be brought to the architect's attention before commencing work. Given that I find that the Respondent did not draw the plans and that the architect had provided warning notes, I am unable to find that the Respondent expressly provided a warranty as to the accuracy of the plans at the time the contract was entered into.

I then turn to whether a *customary term* warranting plan accuracy can be implied by the law. I have had regard to the statutory declaration of Timothy Christopher Slade,

which was attached to the Claimant's application because it is in support of the variation claims in the payment claim. He said in paragraph 4 and 5 of his statutory declaration that there were incorrect measurements and dimensions on the drawings which were out as far as a few hundred millimetres and which did not match the actual measurements of the shop premises. I have also had regard to a statutory declaration of Glen Turnbull provided in support of the Respondents adjudication response, which in the third paragraph of a letter by Mr. Turnbull dated 11 April 2005 he stated that "in most cases it would be necessary to site measure and set out before construction commenced." I am entitled to have regard to both the statutory declarations because they are in support of the respective submissions made by the parties and relate to the payment claim and payment schedule respectively. In considering the weight of both statutory declarations, I must first consider the experience of the respective declarants. Mr. Slade advised that he was a cabinet maker and had been working in this industry for the past 17 years, and Mr Turnbull was a qualified carpenter and joiner of over 15 years experience with his company being in the shop refit renovation business for some 6 years. Having regard to the relative experience of both men, I am unable to discern any difference in their respective qualifications and experience to favour one or the other in relation to the issue of plan accuracy.

The Claimant in support of its assertion said that it was entitled to rely upon the plans provided by the Respondent. Mr Slade could have attested to the fact that in the industry one was entitled to rely upon the accuracy of plans as a matter of trade usage. Mr Slade did not do so and he merely commented in his affidavit of the inaccuracy of plans in early-mid January 2005 at which time he stated in paragraph 5 that "*the completed joinery could not fit*". I am prepared to find that there were errors in the plans, despite the Claimant and Respondent not agreeing on this point (apart from a concession by the Respondent that there were inaccuracies as regards the shop front in paragraph 6 and 30). Mr Slade referred to the inaccuracy in his paragraph 5 of the statutory declaration, and Mr Turnbull's statement that less than 40% of the fit out was constructed as per drawings allows me to draw the inference from that statement that the drawings were not followed because they were incorrect. I do not find the extent of the inconsistency in the drawings, but merely that the drawings were inaccurate.

Whilst considering the matters relating to Mr Slade, I find that I am satisfied from Mr Slade's comments that the Claimant had already completed joinery and then discovered that the plans did not accurately reflect the dimensions within the shop premises, but this was after the joinery had been constructed. In this regard I prefer Mr Slade's sworn evidence and do not accept the Respondent's assertions that no joinery had been constructed as identified in paragraphs 29, 30, 31, 37 and 38 because Mr Slade would have been in a better position to see whether joinery had been completed. However, not much turns on this finding unless a warranty can be made out, and I find that it is unlikely to be able to imply such a warranty in the face of paragraph [65-580] in which the learned authors in *Halsbury's* stated with reference to a proprietor's implied obligations that:

*"There is no implied warranty by the proprietor that the site is appropriate for the works, that the information contained in a site investigation report issued to tenderers is accurate or <u>that the design is capable of being constructed.</u>***[my underlining]***"*

Mr Turnbull, on behalf of the Respondent expressly stated that, *"in most cases it would be necessary to site measure and set out before construction commenced."* It is not clear from his evidence whether this project fell within his definition of *in most cases.* Had Mr Turnbull felt that this project would have fallen within one of the *most cases* he could have said so, but he did not, so again I have no evidence of trade usage that measurement was required before construction commenced. Nevertheless, *he who asserts must prove*, and I do not find that the Claimant has proven through Mr Slade that it was reasonable to rely upon the accuracy of plans for this type of work.

Accordingly, it is open for me to draw the inference from the notes on the drawings that the Claimant ought to have compared the measurements of the actual premises with the plans prior to commencing any construction, including prefabrication of joinery work. In support of this finding I refer to paragraph 10 of the Respondent's submissions in which it asserts that the Claimant had not previously done a shop fit out. Such an assertion sits comfortably with the reality of what happened on the site, that in January 2005, when installation of joinery was to take place, the Claimant first discovered the plan discrepancy. Furthermore, based on the notes on the plans, I find that the Claimant ought to have been put on alert as to the necessity to check measurements prior to commencing work. It is possible to draw the inference that the Claimant had not done so, because the completed joinery made in accordance with the plans, did not fit with the actual dimensions in the shop with reference to paragraphs 29, 30, 31 and 37, of the Claimant's submissions in particular.

Accordingly, I find no implied term that the Respondent warranted the accuracy of the plans. If I had found that there was a warranty of accuracy of the plans, the Claimant could not have succeeded in recovering costs for breach of this warranty, unless the contract provided the mechanism for recovery of these costs. Adjudication does not provide for the valuation of damages claims at large, as valuation is constrained to what may be calculated under s14 of the Act. If damages are available under the contract, then they may be valued under s14(1), but I have not found that there was a breach of warranty so I do not need to determine whether the contract contained terms relating to damages at this stage. I will need to return to this issue of damages later in relation to the Respondent's claim for damages. The effect of finding no warranty as to plan accuracy is that the Claimant must succeed in making out a right to vary the contract because of the incorrect plans, in order to recover the costs associated with the additional work it claims it had to carry out. I turn to the variations issue later.

67. Before considering the issue of rates and prices, I need to consider whether there were any other written terms of the contract. In paragraph 9 of the Claimants submissions the Claimant asserted that it had delivered an HIA contract for signature by the Respondents, which contained various terms including the prepayment of $15,000.00 towards material costs. The Claimant submitted in paragraph 13 that the HIA contract was not signed and Respondent in its submission 9 denied that it was ever given any form of contract to sign, which it reiterated in paragraph 13 of its submissions. Accordingly, I find that there were no further written terms of the contract.

68. I need to determine whether the contract contained rates or prices. I have just found that there were no other written terms of the contract apart from exhibit "A", so I would need to find oral agreement as to rates and prices. Neither party has made

submissions to me, or provided any evidence of agreed rates and prices, so I find that there were no rates and prices stated in the contract.

69. I must now turn to the difficult issue of variations in this contract. Both the Claimant and Respondent are claiming costs associated with variations. The Claimant submits it is entitled to $8,965 for variations associated with errors to the plans and variations ordered by the Respondent. On the other hand the Respondent submits that it is entitled to reduce the amount payable by $5,588 for variations that constituted a reduction in the contract sum. Variations do not have a special meaning under the Act, and are in fact not defined in Schedule 2, so one must give the ordinary meaning to the term as understood in the construction industry, and *Halsbury's* definition is applicable in this case. The learned authors in *Halsbury's* at paragraph [65-1110] characterise *variations* as:

"*Works which are not expressly or impliedly included in the contract work, but which is agreed that the contractor will perform for the proprietor. The contract may provide for variations. Alternatively the parties may agree under a separate agreement that the contractor will perform such extra work. Whilst any separate agreement must be supported by valuable consideration, this is not a requirement when a variation provision is contained in the contract as there is no separate agreement, but merely a utilisation of terms of the original agreement. If the work is not the subject of a separate agreement and there is no contract provision entitling the proprietor to require its performance, the contractor is not obliged to undertake the work.*

If extra work is undertaken by the contractor in these circumstances, the contractor may not recover payment of the work, unless:

> *(1)a new contract can be implied from the circumstances for which quantum meruit can be claimed; or*
> *(2) the claim constitutes a restitution claim by the contractor against the proprietor."*

I have already found that the written terms of the contract are limited to those on exhibit "A" and I find that there is no written variation term in that document. Accordingly, I must then determine whether there was an oral variation term of the contract, and this requires an analysis of the evidence relating to the dealing between the parties from 21 October 2004 to 23 November 2004, because I have found that the contract was concluded on 23 November 2004.

In paragraph 8 of the Claimant's submissions there is reference to an *oral variation* by Mr Josh Neal prior to the quote being supplied regarding replacement of the tiles to the front of the shop floor with carpet. This is not evidence of agreement of a variation term because it was prior to the contract being made. The Respondent asserts that this oral variation took place after the contract was made which resulted in a cost saving to the Claimant and yet the Respondent claimed a reduction for this variation in the sum of $600 in paragraph [B] of the payment schedule and Respondent's arguments 1(a).

In paragraph 34 of the Claimant's submissions, the Claimant said that it advised the Respondent that the variations would be an additional expense, and that it had the Respondent initial most of the variations on the actual plans, and that directions were

given by Mr Josh Neal and Mrs Jennifer Neal. There are some notations on the plans exhibit "RB1" with some initials next to some of them. I infer from the dates of the notations of 21 December 2004 and 19 January 2005 on the plans that these were the dates of instructions. The Respondent in paragraph 34 of its submissions deny that the Claimant had said that variations would be an additional expense, and that variations were invariably to a reduced version of what the plans showed, all of which resulted in savings. It has claimed in these reductions in paragraph [B].

Having regard to the material, I am not satisfied that the Claimant has established that the parties agreed to variations as an express oral term of the contract at the time the contract was entered into. The only material relating to the time period between 21 October 2004 and 23 November 2004 from the Claimant relates to an oral variation prior to the quote being supplied, which does not attain the quality of the parties agreeing to a term relating to variations. However, the same finding applies to the Respondent regarding variations to reduce the work at the time the contract was made. There is no evidence to conclude that the parties had agreed at the time of the contract to reduce the work required under the contract. Accordingly, I am not satisfied that there was an express term in the contract dealing with variations, either to increase or decrease the work.

This means that an agreement to allow variations to the contract would have had to be made after the entry into the contract on 23 November 2004. According to *Halsbury's* at [65-1110], I would need to find a separate agreement that the parties had entered into, supported by consideration, for me to then consider the claims by the parties for variations, for extra work as asserted by the Claimant and for reduced work as asserted by the Respondent. Neither party in submissions has pointed me to evidence constituting consideration for this separate agreement. In cases of consideration, it is the promisee who must prove the presence of consideration: *McKay v National Australia Bank Ltd [1998] 1 VR 173 at 177,* and neither party in their contending for variations for extra work or reduced work respectively, have identified what the other party offered as consideration to vary the contract of 23 November 2004, so as to allow the works under the contract to be varied to allow for more or less work. Accordingly, I am unable to find that the contract allowed for variations.

The consequence of this finding is, according to *Halsbury's* [65-1110], that extra work undertaken by the Claimant cannot result in for payment of the work, *unless a new contract can be implied from the circumstances for which quantum meruit can be claimed; or the claim constitutes a restitution claim by the contractor against the proprietor.* Even if I could find a new contract from the circumstances, which I don't, it is not open for me as an adjudicator to consider valuing work under quantum meruit or restitution. s14 of the Act essentially constrains one to value work under the contract, or by using the contract price and agreed rates or prices stated in the contract, and any variation agreed to by the parties to vary the contract price or any other rate or price, and not on some other basis. Even if I am wrong on this point, the Claimant has made no submissions that valuation should be made on the basis of quantum meruit or restitution. This means that the Claimant's claim for $8,965 for variations cannot be valued under the Act, because:

- they cannot be valued under the contract under s14(1)(a) as the contract does not include the right for variations;

- they cannot be valued having regard to the contract price: s14(b)(i), and other rates or prices stated in the contract: s14(1)(b)(ii), because I have been unable to find any rates or prices stated in the contract, and I have found no agreement between the parties for variation to the contract price, so there is no basis for valuation under s14(1)(b)(iii), as I cannot find that there were variations agreed by the parties.

I come to the same finding in relation to the claim by the Respondent for variations resulting in a reduction of work in the sum of $5,588. They cannot be valued under s14 of the Act for the same reasons that I have just stated above. In my opinion having regard to the purpose of the Act, which is to facilitate rapid progress payments, the legislature's intention appears to only require a facilitator in this rapid time frame, to make decisions in relation to the construction contract and the agreements associated with the contract, and not to venture outside these parameters prescribed by s26(2)(b) in valuation of the adjudicated amount. As I have already identified, the parties respective legal rights are preserved under s100 of the Act, particularly in this context in relation to s100(1)(c) of the Act, so they are liberty to select another forum to have their dispute more fully ventilated in relation to variations. This forum essentially deals with the valuation of progress payments under what it is established that the parties agreed.

Accordingly, I find that neither the Claimant nor the Respondent are able to have the value of their respective variation claims decided in this adjudication for the reasons I have given. This means that the Claimant is not entitled to its claim of $8.965 for an increase of the contract price for additional work characterised as variations to the contract, and the Respondent is unable to withhold $5,588 on the basis of deductions to the contract price also characterised as variations. I also find that the Claimant is not entitled to claim the $422.40 electrical costs because it is claimed as a variation, but find that the Respondent admitted to being liable to pay the $613.80 for electrical work, so I find that amount payable.

70. I now turn to the issue of time for completion of the contract because it is a precursor to the Respondent's claims for delay costs.

I have found there were no written terms of the contract other than those contained in exhibit "A." I have examined exhibit "A" and found no reference to an express term regarding the time within which the contract was to be completed. I therefore need to consider whether there was any oral agreement as to time that became a term of the contract. The Claimant at paragraph 7 of its submissions describing a context of unavailability of tradespeople until early February 2005, said that Mr Josh Neal requested that the fit out be completed as quickly as possible and for the Claimant to try and complete the work by Boxing Day. These discussions were asserted to have been made, before the contract was entered into. The Respondent in its paragraph 7 submissions said that other trades were unavailable until early January 2005, but more importantly that the Claimant promised to complete the work by 15 December 2004, and that after the contract had been entered into the Claimant then told the Respondent that they would be complete by Boxing Day.

Given that the contract was entered into on 23 November 2004, I cannot accept the Respondent's assertion that the Claimant said that it would be complete by 15

December 2004. The Respondent included Mr Turnbull's affidavit in its adjudication response, and I am prepared to accept Mr Turnbull's evidence in relation to the timing for completing a fit out of this size. He said, "A fit out of this size would take approximately 2 weeks on site after a 3 week planning and fabrication stage offsite." By my calculations, using Mr Turnbull's timing, he would have expected the work to be complete by approximately 28 December 2004, which is consistent with the Boxing Day target. I cannot accept that, however, inexperienced the Claimant may have been with shop fit outs, that it would have said that it would complete the work 2 weeks after the contract was entered into without having had the materials ordered and the joinery prefabricated. The Claimant indicated in paragraph 12 of its submissions that it was anxious to secure an agreement so that it could order materials before the Christmas close down, and the Respondent did not take issue with this statement in its paragraph 12 of its submission. Accordingly, I accept that the Claimant was aware of the need to order materials, and that a more reasonable time to have completed the work would have been Boxing Day as calculated using Mr Turnbull's estimate. This presupposes that there was agreement about the time to complete, which I have not yet found.

The Claimant made no positive assertions in its material about a specific time to complete, it merely said that it would try to complete by Boxing Day. Given that the time to complete was an issue raised by the Respondent, on which it seeks to rely on a claim for damages, to which I will turn later, the evidentiary onus shifts to the Respondent to prove the contract contained a term about the time to complete. The Respondent positively asserted that the contract had the 15 December 2004 as the completion date, and I have found against it for the reasons stated above. Accordingly, I cannot be satisfied that the contract contained a term about the completion date of the contract.

I then need to have regard to whether a time can be implied into the contract as a *customary term* as I have done with other issues above. [65-575] of *Halsbury's* deals with a contractor's implied obligations and the learned authors advise that it is implied in a construction contract that the work would be completed within a reasonable time. This is considered a question of fact, so it depends on the facts of each case. I am satisfied therefore that the work needed to be completed within a reasonable time having regard to what occurred at the site.

It probably serves no useful purpose to traverse the evidence in too much detail, for the reasons that I will outline below. Nevertheless, the Claimant's submissions provide a chronology of work activities and problems with the project, particularly in January 2005, and I have found that the work was complete on 5 February 2005. In particular I refer to paragraph 42 of the Claimant's submissions of working 7 nights a week on the respondent's fit out, except the public holidays. I refer to the Respondent's submissions stating that there was no work on site for most of January 2005 (paragraph 39) and until 20 January 2005 virtually nothing was done since Christmas (paragraph 42). I find these submissions inconsistent with the Respondent's own evidence in exhibit "B" which is evidence of forms regarding *After Hours Access Contractors*. Access to the site was restricted during trade times, according to the note on each form and I infer this means shopping centre trade times. On 18 & 19 January 2005, the Claimant had 6 persons at the site between 6pm and 2am and I accept these times as correct because they are actual records of contractor's attendance at site. In

addition, Mr Slade's statutory declaration paragraph 4 referred to the Claimant requesting Mr Slade's attendance at the site in early-mid January 2005 to deal with the joinery not fitting, and I accept this is correct. It appears to me more likely that the Claimant was on site at the times it claims, supported by the forms and Mr Slade, and I am not prepared to accept (due to the inconsistency with other evidence) of the Respondent's assertions of it not being on site. I find that there was extra work done at River Walk because both parties accept this fact and agree that this amount of work required payment, which took place during the contract. I have also found that the plans were inaccurate, from which I can draw the inference that time was required to resolve these inaccuracies. Accordingly, I am satisfied that in the circumstances that the Claimant completed the work in a reasonable time.

Even if I found that the Claimant had not taken a reasonable time to complete the work, I have already found that the written terms were confined to what is exhibited in exhibit "A". In paragraph [65-1005] the learned authors in *Halsbury's* state that a breach of the contract in failing to complete in time is a breach of contract. I have already decided that I cannot consider claims for damages for breaches of contract because they do not fall within the valuation provisions contained within s14 of the Act, unless the contract provides a mechanism for dealing with late completion. I find that there in nothing in exhibit "A" referring to an express term relating to damages or liquidated damages for delay. Neither party has referred me to there being an express oral term regarding an agreement for damages for delay, and I do not find that there was such a term. To imply such a term would in my opinion require implying such a term under the *business efficacy rule*, which I have already said I am not prepared to consider. Accordingly, even if there was a breach of contract in failing to complete in a reasonable time, which I have not found, the Respondent would be unable to claim damages for delay in adjudication because there are no rates or prices, or a variation agreed by the parties as required in s14(b) of the Act which would enable a calculation to be made.

Accordingly, I find that the Respondent is unable to withhold $40,000 or any monies as damages for delay in this adjudication.

71. I turn to the final issues in this adjudication relating to the withholding by the Respondent of monies, apart from those relating to variations and damages about which I have already decided. In the payment schedule the Respondent refers in paragraph [B] 2 to works that have not been performed and that the costs of attending such works amounted to $3,960. In this matter the Respondent bears the evidentiary onus because it asserts that defects exist, for which it is entitled to withhold monies. The Respondent referred in paragraph 5 of the payment schedule to unsatisfactory works or substandard works, but only identified one example of the use of laminate being used in place of stainless steel, and no amounts were identified, or other details provided. I have not taken this paragraph 5 into account because there is insufficient detail of what is substandard, and there is no quantum identified in any event.

I have also not had regard to the submission in the adjudication response relating to *"Defence (sic) Work or Materials* in which a list was provided and exhibits "E" through to "K" were attached. Apart from the reference to the laminate in this defects list, which had been referred to in the payment schedule, the balance of the defects (b) through to (h) had not been identified in the payment schedule. The Act at s24(4)

prohibits the Respondent from including in the adjudication response reasons that had not been included in the payment schedule, and this specific list in the adjudication response, in my view was not identified in the payment schedule. Accordingly this submission was not taken into account. In any event there is no quantum specified for these items, so it would have not been possible to use them for calculating the cost of rectifying defects.

The payment schedule identifies 3 items of unfinished work, which I may find as "defective" relate to external corner finishes to shop front which would cost $1,200, a bookcase which would cost $700 and lowering the floor to accommodate new strip which would cost $1,700. These figures were supported by Mr Turnbull's statutory declaration. Turning now to the meaning of defective work, I note that defective work is not defined in the Act, so I am able to have regard to the ordinary meaning of this term. In paragraph [65-1495] the learned authors in *Halsbury's* referred to defects which they described as *work is defective where it fails to comply with the requirements of the building contract* and *unless otherwise indicated, defective work includes defective work and materials, as well as work which is required to be performed but is not performed, and materials which are required to be supplied but are not supplied.* Accordingly, if I find work is defective, and under this issue it appears that I would need to find that work which is required to be performed is not performed, then I am obliged to have regard for the estimated cost of rectifying the defect under s14(1)(b(iv) of the Act.

Turning to the external corner finishes to the shop front and the bookcase, which are bundled together by the Respondent in the adjudication response, it is evident from the Respondent that external corner guards were always to be fitted in stainless steel and that a bookcase had to be constructed. There are no details provided by the Respondent in relation to the provisions of the contract, or any specifications about these issues, and no reference was made to the plans. The plans in evidence make no reference to external corner finishes, nor specifically to bookcases, and it is unclear where in the shop the bookcase was to be provided. There is reference to shelving, but I cannot accept (without further evidence) that this means bookcase.

The Claimant in its response to the payment schedule, in the adjudication application, stated that the joinery items had to be altered to fit the actual dimensions, which was done. I have already found that variations were not part of the contract, so if the onus had shifted to the Claimant, then I would have found against the Claimant on this point. However, in my view the onus has not yet shifted to the Claimant. The Respondent has not pointed to the contractual requirement to provide the external corners and the bookcase, and has merely made a bald assertion, without proof. Accordingly, I am not satisfied that the Respondent has discharged its onus, and find that external finishes and the bookcase were not defective, because I am not convinced this work needed to be performed. Accordingly, the Respondent is not entitled to withhold $1,700 for this work.

Finally, the Respondent refers to the cost of lowering the floor to accommodate a new strip on the basis that the Claimant had miscalculated the floor level and an unsatisfactory metal strip had been added above the floor level. The Claimant takes issue with lowering the floor, which it says cannot be done, and that all that is needed is a reducer strip to be changed, which would cost $150. I have examined the plans,

and in particular the Elevation "CD-03a which refers to a finished floor level with no detail of whether the existing floor level, prior to the contract works, differed from the finished floor level. I cannot be satisfied that the Claimant miscalculated the floor level on the material provided by the Respondent. There is no evidence of what the level is and what the level should have been, so I do not find that there has been a miscalculation, and also cannot find that the floor can indeed be lowered. However, I find that the Respondent admits to the cost of another reducer strip, and I am satisfied that this figure, which is the only figure relating to the strip costs, is appropriate. Accordingly, the Respondent is entitled to withhold $150 for the provision of a new strip.

72. There are a number of submissions made by the Claimant, to which I do not wish to review on an individual basis, because this would add to this lengthy decision, which are not relevant to the issues in dispute. Where matters have not been specifically referred to in the decision, or listed in the adjudication schedule, which I have annexed as "CGL1" then I have not considered the material on the basis that it is irrelevant to the issues. For example the reference to Claimant's financing costs in paragraph 55 of its submission, is something that cannot be taken into account in the adjudication.

The adjudicated amount

73. I have annexed "CGL1" as a summary of the matter in an adjudication schedule, in order to assist the parties in seeing how the adjudicated amount is derived. Essentially, the Claimant is entitled to its unpaid invoices of $10,000 and $24,500 respectively, together with $2,310 and $613.80 both of which are admitted by the Respondent as having been paid, or should be paid. From this figure $150 should be deducted for defects.

74. I am entitled to have regard to the Claimant's submission in paragraph 58, which was admitted by the Respondent, that the Respondent paid the sum of $12,310 to the Claimant on 13 April 2005 pursuant to the payment schedule. However, the adjudicated amount is defined by s26(1) as *the amount of the progress payment, if any, to be paid by the Respondent to the Claimant.* The amount of the progress payment is determined under s13 as *(a) the amount calculated under the contract or (b) calculated on the basis of the value of construction work carried out under the contract.* I have carried out these calculations and determine a figure of $37,273.80 for this progress payment. There is no provision in s13 of the Act or s14 of the Act that allows me to deduct from this figure for the payment of $12,310 made by the Respondent.

75. Accordingly, the adjudicated amount is **$37,273.80**

Due date for payment

76. One must then have regard to s15(1)(b) of the Act, because the contract makes no provision about the due date for payment, and therefore I have found that Part 4A BSAA does not apply under s15(1)(a). There is no evidence of a "pay when paid" clause under s16 of the Act and the contract has no clause that falls foul of s67U or s67W of the BSAA because it is silent about timing for progress payments. This means that s15(1)(b) applies such that payment is to be made within 10 business days after a payment claim for the progress payment is made.

77. The progress claim was made on 31 March 2005, so that the due date for payment is calculated to be 14 April 2005.

78. I find that the due date for payment is 14 April 2005.

Rate of interest

79. I have already found that s15(3) of the Act requires me to have recourse to the penalty rate under s67P of the BSAA, so 15.68% is the rate of interest to apply to the adjudication.

80. I find the rate of interest is 15.68% simple interest payable on the adjudication amount.

Adjudicator's fees

81. The Claimant has obtained substantially what it claimed and I have a discretion to decide who is liable to pay my fees. I am entitled to deviate from the default provision contained in s35(3) of the Act by exercising my discretion. In my view costs in this case should follow the event, because until the Claimant availed itself of the provisions of the Act, it had not been paid outstanding invoices since December 2004. Whilst the Respondent paid the Claimant the sum of $12,310 on 13 April 2005 in response to the payment claim, it required the Claimant to invoke the adjudication process before this amount was paid, and in the adjudication it has substantially succeeded.

82. Accordingly, I decide that the Respondent is liable to pay my fees under s35(3) of the Act.

Decision

83. For the reasons set out above, I have decided that the adjudicated amount in respect of the Adjudication application dated 29 April 2005 is **$37,273.80** (including GST), the date on which the amount became payable is **14 April 2005**, and the applicable rate of interest payable is **15.68%** simple interest. In addition, I have decided that the Respondent is liable to pay my fees.

Chris Lenz – Adjudicator	Witness
Signed	Signed
23 May 2005	23 May 2005

Annexure "CGL 1": Adjudication Schedule developed from material in the adjudication

Payment Claim	$ claimed	Payment Schedule	$ paid or [payable]	$ to be deducted	Relevant Claimant Submission paragraphs	Relevant Respondent Submission paragraphs	Finding
(a) Progress payment – invoice 83 Shop fit out balance – invoice 86	$10,000 $24,500	Admitted in part [A2]	$10,000		7,9,10,11,12,13,14,17,1819,21,22,23,24,25,26,27,29,39,41,42,43,44,45,46,47,48,49,50,51,52,53,54,55,56,57,58,59,60,63	7,9,10,11,12,13,14,15,17,21,22,23,24,25,26,27,29,30,39,41,42,43,44,45,46,47,48,49,50,51,52,53,54,55,56,57,58,59,60,A5	See adjudication decision
		Works not done [B2]		($3,960)			Deduction of $150 allowed
		Damages for loss of trade [B6]		($40,000)		Further submission FS1	Respondent cannot withhold
		Security costs [B7]		(2,553.38)	17,18,19	17,18,19	Respondent cannot withhold
(a) variations – invoice 88	$8,965	Denied and negative variations [B1, B3,B4,B5]		($5,588)	5,6,8,15,29,30,31,32,33,34,35,36,37,38,40,61,62,64	5,6,8,15,30,31,32,33,34,35,36,37,38,40,61,62 Arg1("A1"),A2, A3,A4,A5	Neither party entitled to variations
(b) River walk invoice 89	$2,310	Admitted [A1]	$2,310		20,49	20,49	Payable by Respondent (already paid)
(c) Electrical works for tenancy 303c – Tax invoices 2257 & 2390	$613.80 $422.40	Denied – later admitted in part ($613.80) in adjudication response [B3]	[$613.80]				Payable by Respondent in the sum of $613.80
(d) Carpet for tenancy 303c	?						No finding
Total	**$46,811.20**		**$12,310 & $613.80 to be paid**	**($52,101.38)**			
Adjudication amount	**$37423.80 - $150 =$37,273.80**			**$150**			