Adjudicator's Decision

Pursuant to the Building and Construction Industry Payments Act 2004

BMD Constructions Pty Ltd (Claimant)

and

Hibernian (Qld) Friendly Society (Respondent)

Adjudicator's Decision

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 25 July 2005 is **$93,787.75**
b. The date on which the amount became payable is **19 July 2005**
c. The applicable rate of interest payable on the adjudicated amount is **10%** simple interest.
d. The Respondent pay my fees in the adjudication.

Table of Contents

Background

1. BMD Constructions Pty Ltd (referred to in this adjudication as the "Claimant") was engaged by Hibernian (Qld) Friendly Society (referred to in this adjudication as the "Respondent") to carry out bulk earthworks for a building project known as the Ballycara Retirement Village, Sunnyside Road, Scarborough in Queensland (the "work").
2. The contract for the work had a nominated start date of 15 December 2004 with separable portions A and B, which were certified by the Superintendent, Cardno Alexander Browne, as practically complete on 31 March 2005 and 27 May 2005 respectively.
3. Progress Claims and Certificates of Payment ("Certificates") were issued progressively throughout the building project. 3 Certificates for Progress Claim No. 6 were issued, on 23 June 2005 for $23,249.23 and a revised Certificate on 8 July 2005 for -$5,213.22, with another revised Certificate dated 11 July 2005 for the same amount.
4. For the purposes of this adjudication, Progress Certificate No. 6 (and its various revisions) had certified, inter alia, 2 negative variations (the "negative variations") of:

1. $4,135.78 relating to a provisional item for lime stabilisation that was not ordered by the Superintendent; and
2. $95,000 for fill material which was allegedly not in accordance with the specification

5. Between the date of the first Certificate for Progress Claim No. 6 and the first revised Certificate, the Claimant lodged a Payment Claim under the Act claiming $116,471.70 (including GST) which for the most part is a claim rejecting the negative variations.

Appointment of Adjudicator

6. The Claimant applied to the Institute of Arbitrators and Mediators Australia ("IAMA") on 25 July 2005 for adjudication. By letter dated 26 July 2005 IAMA referred the adjudication application for me to determine.
7. IAMA is an Authorised Nominating Authority under the Act with registration number N1057859. I am a registered adjudicator under the Act with registration number J622914.
8. By letter dated 29 July 2005 sent by facsimile to the Claimant and to the Respondent, I accepted the Adjudication Application and thereby became the appointed Adjudicator.

Material provided in the adjudication

9. The parties provided the adjudicator with 3 lever arch folders of material for consideration, and I consider it prudent to list these documents for identification so that the parties are able to follow these reasons, and the documents to which they refer.

   Claimant's Material
   2 lever arch folders – Vol 1 and Vol 2, divided into folios constituting the adjudication application (the "application")

(i) Adjudication Application dated 25 July 2005 for $116,471.70 (including GST) with the Claimant's submissions in Vol 1 Folio 1 (the "application")

(ii) Payment Claim No. 6 dated 21 June 2005 claiming $116,471.70 (including GST) in Vol 1 Folio 2 (the "payment claim") comprising:

1. a Tax invoice for $116,471.70 (including GST)
2. spreadsheet summaries for Parts A and B of the contract
3. completed schedule of quantities for Parts A and B of the contract
4. Certificates of Practical Completion for Parts A and B of the contract
5. Facsimile transmission dated 12 January 2005 from Cardno Alexander Browne ("CAB") to Coffey Geosciences ("Coffey's") with attached extracts from an earthworks specification pages 50, 57, 58 & 59 ("Coffey's testing duties")
6. Coffey's report on construction control testing on "Portion A" dated 9 March 2005 certifying fill as controlled fill ("Coffey's Portion A certificate")
7. Coffey's report on construction control testing on "Portion B" dated 11 May 2005 certifying fill as controlled fill ("Coffey's Portion B certificate")
8. Coffey's Geotechnical assessment to CAB dated 11 May 2005 for footing design (Coffey's site classification")
9. Coffey's report on "cobbles in fill" to CAB dated 23 March 2005 ("Coffey's cobbles report")
10. Extracts from Specification – Issue "C" pages 50, 52, 57, 76
11. Extract of a Coffey's report dated 23 September 2004 relating to fill placement
12. Copy of "DRG. C20 with "Earthworks notes No. 5" highlighted with an asterix
13. CAB facsimile JI.35 dated 12 April 2005 - minutes of meeting between Claimant, CAB and the Respondent (the "meeting minutes")
14. CAB facsimile JI.39 instruction dated 11 May 2005 identifying a negative variation of $95,000 based on observations and calculations of extent of non conforming fill (the "Superintendent's determination")
15. Claimant's letter to CAB dated 12 May 2005 rejecting the Superintendent's determination (the "dispute letter")
16. CAB facsimile JI.45 instruction dated 23 May 2005 responding to the dispute letter and verifying the Superintendent's determination (the "Superintendent's verification")
17. Claimant's facsimile to CAB dated 25 May 2005 rejecting the Superintendent's verification (the "rejection letter")
18. CAB facsimile JI.51 instruction dated 1 June 2005 responding to the rejection letter (the "instruction on breach")
19. CAB facsimile JI.57 instruction dated 22 June 2005 noting that there was an objection between the Claimant and Respondent as to the Superintendent's determination, and requesting a written notice of dispute from either party and suggesting mediation to resolve the dispute (the "dispute invitation")
20. Poor quality Coffey facsimile transmission to Claimant dated 1 March 2005 regarding recommended lime application rates for treatment of unsuitable material including 2 pages of analysis of acid sulphate soil properties (the "Coffey lime recommendation")

(iii) Respondent's Payment Schedule: Response to the payment claim dated 12 July 2005 (the "payment schedule") valuing the amount the Respondent proposes to pay as $nil in Vol 1 Folio 3 with reference to attachments comprising:

1. Annexure 1 Payment Claim Assessment comprising 10 pages of calculations and contract clause extracts
2. Certificate of Practical Completion for Separable Portion A dated 4 April 2005, nominating practical completion date of 31 March 2005
3. Certificate of Practical Completion for Separable Portion B dated 27 May 2005, nominating practical completion date of 27 May 2005
4. CAB facsimile JI.34 instruction dated 7 April 2005 identifying presence of fill material outside the specification (the "second defective fill instruction")
5. The meeting minutes together with paper prints of 7 photographs dated 9 April 2005 (the "9 April photos")
6. CAB facsimile JI.37 instruction dated 18 April 2005 attaching a letter from Merrin & Cranston Architects to Northbuild instructing Northbuild to provide additional CBR15 material to backfill services excavations and anticipating approval of a fair and reasonable variation after resolution of issues with the Claimant (the "CBR15 letter")
7. The Superintendent's determination
8. The Superintendent's verification
9. The instruction on breach
10. The dispute invitation
11. Coffey lime recommendation
12. Coffey's cobble report
13. 28 colour photographs dated 8 July 2005 depicting trench excavations and excavated material (the "trench photos")
14. CAB's covering letter for a revised Certificate of Payment No. 6 dated 8 July 2005 certifying a payment of -$5,213.22 ("CAB's 8 July certification")
15. CAB's covering letter attaching a revised Certificate of Payment No. 6 dated 11 July 2005 certifying a payment of -$5,213.22 (CAB's 11 July certification")
16. Payment Certificate No. 6 for Separable Portion A for work up to 21 May 2005 amounting to $12,654.07
17. Payment Certificate No. 6 for Separable Portion B for work up to 21 June 2005 amounting to -$17,867.29 (the "revised Certificate No. 6")
18. The CBR15 letter

(iv) CAB's covering letter dated 23 June 2005 in Vol 1 Folio 4 attaching Certificate of Payment No.6 certifying a payment of $23,249.23
(v) Payment Certificate No. 6 for Separable Portion A in Vol 1 Folio 4 for work up to 21 May 2005 amounting to $12,654.07
(vi) Payment Certificate No. 6 for Separable Portion B in Vol 1 Folio 4 for work up to 21 June 2005 amounting to $10,595.16
(vii) CAB's 8 July certification in Vol 1 Folio 4
(viii) CAB's 11 July certification in Vol 1 Folio 5
(ix) Payment Certificate No. 6 for Separable Portion A in Vol 1 Folio 5 for work up to 21 May 2005 amounting to $12,654.07
(x) Revised Certificate No. 6 in Vol 1 Folio 5
(xi) Specification- (Issue "C") Comprising 103 pages and including a Geotechnical assessment by Coffey dated 23 September 2004 together with bore log and other testing information in Vol 1 Folio 6 (the "specification").

(xii) Drawings by CAB numbers 9383-C00, 9383-C010 to 9383-C028, and 383-C041 to 383-C073 (excluding drawings "C042", "C045", "C047", "C050", "C064 to C069") in Vol 1 Folio 7 (the "drawings").
(xiii) Facsimiles JI.01 dated 1 December 2005 through to JI.57 dated 22 June 2005 (with attachments) from CAB to the Claimant in Vol 2 Folio 8 (the "instructions").
(xiv) Minutes of tender assessment meeting held on 22 November 2004 in Vol 2 Folio 9 (the "tender assessment meeting minutes")
(xv) 23 pages of colour photographs numbering 90 in total, some with dates in Vol 2 Folio 10 (the "claimant's photos").
(xvi) Statutory Declaration of Layton Wallace, foreman of the Claimant dated 21 July 2005 in Vol 2 Folio 11 (the "foreman's statement").
(xvii) Statement of Ron McMahon, Associate of Coffey, dated 25 July 2005 in Vol 2 Folio 12 ("Coffey's statement").
(xviii) Statutory Declaration of Edgar Berzins, Construction Manager of the Claimant dated 23 July 2005 in Vol 2 Folio 13 (the "construction's manager's statement").
(xix) Statutory Declaration of Glen Clifford, employee of the Claimant, dated 25 July 2005 in Vol 2 Folio 14 (the "claimant's calculations")
(xx) Claimant's facsimile to the Adjudicator dated 4 August 2005 with an attached declaration of Glen Clifford of the date of service of the payment claim (the "payment claim's date of service proof") and consent to extended adjudication time to 22 August 2005 in Vol 2 Folio 15.

Respondent's Material
1 lever arch folder constituting the adjudication response (the "response")

(xxi) Respondent's facsimile to the Adjudicator dated 4 August 2005 consenting to extension of adjudication time to 22 August 2005
(xxii) Respondent's facsimile to the Adjudicator dated 5 August 2005 confirming the "payment claim's date of service proof".
(xxiii) Respondent's submissions for the Adjudication response dated 2 August 2005
(xxiv) The tender assessment minutes in Folio HFS-1
(xxv) Claimant's facsimile to CAB dated 30 Nov 2004 confirming another source of fill material and a price of $19.52 per m^3 for the supply and placing of fill in Folio HFS-2 (the "alternative fill offer")
(xxvi) The Superintendent's determination in Folio HFS-3
(xxvii) AS4000-1997 General Conditions of Contract in Folio HFS-4 (the "GCC")
(xxviii) Coffey's cobbles report in Folio HFS-5
(xxix) Respondent's letter to CAB dated 30.5.05 electing to retain defective work regarding boulders in fill (the "deemed variation") in Folio HFS-6
(xxx) The instruction on breach in Folio HFS-7
(xxxi) Northbuild's facsimile to Merrin & Cranston Architects dated 28 July 2005 claiming $75,565.71 in Variation No. 19 for extra concrete used as a result of the overbreak in the footing excavations, which excluded delay and disruption costs in Folio HFS-8 ("Northbuild's variation 19 claims")
(xxxii) Ashburner Francis variation claim of 22 July 2005 for $2,508 for additional excavator in Folio HFS-8 ("Ashburner's variation claim")

(xxxiii) Northbuild's facsimile to Merrin & Cranston Architects dated 3 June 2005 claiming $65,419.52 in Variation No. 3 for extra concrete used as a result of the overbreak in the footing excavations in Folio HFS-8 ("Northbuild's variation 3 claims")

(xxxiv) Documentation Relating to Progress Certificate No. 4 amounting to $270,200.03 including Progress Claim No.4 for work done till 21 April 2005 amounting to $0 for Separable Portion A, and $161,499.10 for Separable Portion B, ("Progress Certificate 4") which included:

1. Variance No. 2 for Item 3.3.1 (provisional item for lime stabilisation) not substantiated by job instruction or supporting documentation from Coffey resulting in a deduction of $4,135.78;
2. Variance No.5 with reference to JI.39 of a deduction of $95,000 for Fill material not in accordance with specification

(xxxv) The meeting minutes dated 12 April 2005 together with the 9 April photos

(xxxvi) Various photographs describes as follows:

1. Photographs numbered 10, 11, 12, 16, 17, 18, 25, 26, 27, 28 dated 8 July 2005, which are copies of the trench photos
2. 3 colour photos dated 28 01 2000 showing excavated material (the "28 Jan 2000 photos")
3. 6 colour photos dated 18 05 2004 showing trenches and/or excavated material (the "18 May 2004 photos")
4. 7 undated colour photos showing trenches and/or excavated material (the "undated photos")

10. Given the volume of material in this adjudication, I am prepared to find, unless there are specific submissions or my findings to the contrary, to which I will refer later in my reasons, that the documents referred to above related to this adjudication, and were created on the dates depicted on the documents and addressed to the addressees identified in the documents. This adjudication is not an arbitration where all documents are proved, and in order to proceed with the adjudication in an ordered manner, I am satisfied that this approach does not contravene the rules of natural justice.

Threshold jurisdictional issues

11. 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,
    which must be satisfied before I have jurisdiction to adjudicate this dispute. The fact that neither party has taken issue with the other regarding these issues, does not detract from the responsibility of the adjudicator be satisfied that the adjudication is within jurisdiction. s3 of the Act provides as follows:

    "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."

12. Section 3(1) refers to *construction contracts* entered into after the commencement of parts 2 and 3 of the Act and this date was proclaimed by the Governor to be 1 October 2004 (in the Queensland Government Gazette on 25 June 2004). Accordingly, the *construction contract* must have been entered into after the 1 October 2004, for this adjudication to have jurisdiction.

13. I have already referred to the extensive material provided by the Claimant and the Respondent in the application and the response. At present my interest is only in the date of the *construction contract* (as defined by the Act), which is the subject of this adjudication. I refer to a facsimile transmission JI.01 from Cardno Alexander Browne ("CAB") (in the application Vol 2 folio 8), dated 1 December 2004, which stated that *"On behalf of our client Hibernian Aged Facility, we confirm that your company's tender for the works under the above mentioned contract has been accepted subject to the following items:-…"*

Facsimile JI.01 ("JI.01") (the "acceptance fax") had transmission details at the top, which specified 2 December 2004 at 16:41 as the date of receipt of transmission from CAB. Given that these documents formed part of the application (i.e. the Claimant's documents), I find that the 2nd December 2004 is the date that the Claimant received this document. Whilst I find that JI.01 was qualified by being *subject to the following items*, for present purposes regarding the date of contract, I find that a contract could not therefore have come into being any earlier than this qualified acceptance date of 2 December 2004. This date is after 1 October 2004, thereby attracting the jurisdiction of the Act, provided of course acceptance was made by the Respondent.

CAB sent JI.01, so it is necessary to decide as a matter of law whether CAB was actually acting as the Respondent's agent in sending JI.01, as it ostensibly claimed. I have had regard to Annexure Part A to the Australian Standard General Conditions of Contract AS 4000-1997 ("GCC"), which was found on page 8 of the specification (in the application Vol 1 folio 6). This document states that the Principal was the Respondent, and the Superintendent as CAB. Furthermore, Specification General Clause 1.2 dealing with "Interpretation" defines the Superintendent as;

"Superintendent: Agent of the Principal and the person appointed by the Principal to supervise the work under the contract."

There is no material to the contrary, so I find that CAB was the Superintendent, and acted as agent of the Principal in accepting the Claimant's

tender on behalf of the Principal on 2 December 2004, albeit subject to qualifications. This date is after 1 October 2004, so the Act applies thus far, and I need now to determine whether the adjudication involves a *construction contract* in order to determine whether threshold issue number 1 is finally satisfied.

14. 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."*

JI.01, which I have found was part of the Claimant's documents, stated that acceptance was subject to a list of 5 items that need not be listed here, apart from Item 1 that provided *"1. Tender specifications, drawings, and associated documentation (current issues apply)"*. JI.01 contained a box stamped on the document (the "box") which referring in handwriting to a "Job No. B1512" as well as some ticks in the box and alongside the list of 5 items referred to above. The Payment Claim No.6 in the application, to which I will refer in more detail later, identified the Claimant's Job Number as B-1512. Accordingly, with no material to the contrary, I draw the inference from the material that JI.01 was the Claimant's document because it had the box containing a handwritten reference to B1512, which was the Claimant's Job number.

I further draw the inference and find that the ticks alongside the 5 items belonged to the Claimant. Having seen no material from either party to the adjudication to the contrary, I therefore draw a further inference that these ticks made by the Claimant constituted acceptance by the Claimant of the 5 items in the qualified acceptance of the Respondent. Whether JI.01 is characterised as acceptance of the Claimant's offer, with the Claimant acknowledging that its offer contained the *5 qualification items*, or as a counter-offer by the Respondent, which the Claimant accepted by ticking the *5 qualification items*, I find that the parties had reached agreement as to what was required of each other. I take into account the timing of the correspondence and the extent of the *qualification items* and prefer to find that JI.01 was a counteroffer by the Respondent, which was accepted by the Claimant when it ticked the *qualification items*. Accordingly, I find that a *contract* came into existence in relation to the works when this acceptance was communicated to the Respondent, and I now turn to this issue.

JI.01 had a handwritten note at the top *"Received 6/12/04"* and I draw the inference that this was the date that the ticks were made on the document. It is not clear from the material whether this document signifying acceptance with the ticks was provided to the Respondent, on that date or at all. It is also not clear when verbal advice was given from the Claimant to the Respondent that agreement had been reached. However, I can draw the inference from JI.03 dated 10 December 2004, which contained instructions from CAB, that at least by this date, the Respondent, through its agent CAB, believed it had a contract

with the Claimant, which indicates that the Claimant's acceptance had been communicated. Accordingly, without material to the contrary, I find that the date of the contract was 10 December 2004.

I am further satisfied, with no material to the contrary, that the specification in the Claimant's material (Vol 1 Folio 6) containing a footer on every page stating *"Bally Cara Retirement Village Proposed Bulk Earthworks Sunnyside Road, Scarborough"* was the *Tender specification* referred to in Item 1 of JI.01. Furthermore, I am satisfied that the drawings in the Claimant's material were the *drawings* referred to in Item 1 above. The Respondent did not challenge the inclusion of these documents in its response, so I find that they formed part of the contract. I have confirmed that the contract was after 1 October 2004, and I am satisfied that it was a *contract*, within the first part of the definition of *construction contract* in the Act.

JI.01 referred to bulk earthworks at Ballycara Retirement Village, and the specification heading referred to *"Proposed Bulk Earthworks Sunnyside Road, Scarborough* which I must be satisfied falls within the meaning of *construction work* 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;…*
> *(b) the construction, alteration,… forming, or to form, part of land, including walls, roadworks…;*
> *(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-…*
> > *(i) site clearance, earth-moving, excavation, tunnelling and boring ;…"*

There is no material to the contrary and I find that the works under the contract was bulk earthworks. I am further satisfied that bulk earthworks falls within definition s10(e)(i) above, as *earth-moving, excavation* thereby falling within the definition of *construction work*. I find that the contract demonstrated that the Claimant *undertakes to carry out* the works, because JI.03.2 dated 10 December 2004 nominated the start date of the contract as 15 December 2004. Having found that the contract date was 10 December 2004, I find that construction work could have started no earlier than 15 December 2004. Therefore, I conclude that no work had started before the contract was concluded, so that the Claimant's construction obligations could only be characterised as an *undertaking to carry out the works*, because no work had commenced yet. Accordingly, the contract is a *construction contract* under the Act entered into after 1 October 2004, thereby satisfying threshold issue 1.

15. I need to determine whether the *construction work* was carried out in Queensland. I refer to a letter dated 12 July 2005 from the Respondent to the Claimant enclosing its payment schedule identifying the address for the Respondent was Scarborough Queensland with postal code 4020. With no

material to the contrary, I therefore find that Scarborough is in Queensland, which satisfies threshold issue number 2.

16. Before I finalise the decision as to the documents comprising the contract and identify the relevant provisions within the contract to which this adjudication will relate, 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. These exclusionary provisions are provided in s3(2) and s3(3) of the Act and if any of these subclauses have application then there is no jurisdiction to proceed. In relation to s3(2) of the Act there is nothing in the material to suggest that the construction contract formed part of a loan agreement, nor was it for the carrying out of domestic building work, nor was there any agreement to pay for construction work other than by reference to the value of the work. Accordingly, s3(2) of the Act does not apply and therefore jurisdiction to adjudicate is not excluded.

17. As to s3(3) of the Act there is nothing in the material to suggest that the Claimant was an employee of the Respondent, nor that the contract was a condition of a loan agreement or that one party agreed to lend, guarantee payment of, or provide an indemnity relating to construction work. Accordingly, s3(3) of the Act does not apply to this contract, which means there is jurisdiction to proceed.

18. Consequently, I find I have jurisdiction to adjudicate this matter.

Scope of the determination

19. 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.

20. 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

21. s26(2) of the Act restricts the matters that 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

22. In making this decision I have had regard to the following:

(i) 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* so far as they were relevant*;*

(ii) The payment claim dated 21 June 2005 to which the application relates.

(iii) The payment schedule dated 12 July 2005 to which the response relates.

(iv) The Adjudication Application and the relevant documentation including submissions I asked for under s25(4)(a) relating to the date of service of the payment claim and the extension of time for the adjudication

(v) The Adjudication Response and the relevant documentation including submissions I asked for under s25(4)(a) relating to the date of service of the payment claim and the extension of time for the adjudication.

Material not considered

23. In making this decision I have had regard to all the material provided, and have then referred to what was not taken into consideration in my reasons. At the outset, however, I considered it important to deal with one substantive live issue and explain why I did not consider some material before proceeding further.

(i) The Claimant made claims under the Trade Practices Act (Cth) 1974 (the "TPA") in submissions 32 through to 38 inclusive. The Respondent submitted in paragraph (e) of the response that *"There is no authority for an Adjudicator to consider claims under the Trade Practices Act 1974"*. I could not find any authority either in support of nor prohibiting an adjudicator considering claims under the TPA. In *Kembla Coal & Coke v Select Civil & Ors [2004] NSWSC 628 (23 July 2004),* at paragraph 114, McDougall J referred to the adjudicator's decision to not take Trade Practices Act issues into account, but made no comment whether this approach by the learned adjudicator was correct. On one view, it could be argued that by making no finding that this approach by the adjudicator was wrong, McDougall J had given tacit approval that the approach taken was correct. However, in my view, such an approach would be incorrect because one needs positive findings by Courts for them to become precedents. The better view in my opinion is to consider that the law is currently silent on this point, and I must decide from first principles whether TPA claims should be considered, because it is in issue between the parties.

(ii) A failure by me to address this live issue would constitute a breach of natural justice to the Claimant who has made the claim. The Court of Appeal in *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport and another [2004] NSWCA 394* ("Brodyn") in para 55 required an adjudicator to satisfy "basic and essential requirements and the more detailed requirements" to which I will turn later, but added the requirement that an adjudicator must make *"..a bone 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…and no substantial denial of the measure of natural justice that the Act requires to be given.."*

(iii) I have decided that I must not consider the Claimant's submissions in the application relating to the *Trade Practices Act (Cth) 1974* (the "TPA") because s26(2) of the Act confines the matters which I may consider.

(iv) My first reason for not considering the TPA claims is that s26(2)(a) specifically refers to the provisions of the Act, and relevant parts of the *Queensland Building Services Authority Act 1991*. When read in conjunction with the introductory words to the subsection, viz.,*"..the adjudicator is to consider the following matters only:…"*, it is my opinion that the statutory interpretation rule of *expressio unius est exclusio alterius* is applicable . This rule means that an express reference to one matter indicates that other matters are excluded [DC Pearce (1981): Statutory Interpretation in Australia, Butterworths, 2nd ed p44]. Whilst the author suggests (at page 45) that the Courts apply the rule with extreme caution; in construing this Act, I am of the view that *reference to one matter – in this case the applicable statute law to which an adjudicator may have regard* means that the only statutes which I may consider are those identified in s26(2)(a). A parliamentary drafter would in my opinion have been aware of the existence of the *Trade Practices Act (Cth) 1974* and did not include it in the list of statutes.

This conclusion is further strengthened by noting that the balance of the restricted list of items that may be considered in s26(2)(b) through to (e), make no other reference to any statutes. The balance of the list is confined to the contract, the payment claim and schedule made under the Act, and submissions in support of those documents, together with the results of any inspection that may be carried out. Furthermore, s100 of the Act preserves the parties' rights; and in particular, s100(1)(c) preserves rights that a party *"..may have apart from this Act in relation to anything done or omitted to be done under the contract."* In my view this strengthens the application of the *expresso unius* rule, because it demonstrates that the Act is deliberately restrictive in its application to construction contracts. Accordingly, I find that I may not consider the claims under the TPA.

(v) Furthermore, if I am wrong on this point, I consider that the submissions made by the Claimant under the TPA are not *properly made in support of*

the claim, and are therefore outside s26(2)(c). The payment claim dealt with a progress claim made under the construction contract and listed the amount of work that had been carried out by reference to a schedule of items of work and the amounts claimable for those items, together with variations for portions A and B separately. These amounts were totalled separately for each portion, and portion A yielded a claim of $0.00 and portion B of $116,471.70 (including GST). The conduct of the Respondent did not form part of the payment claim, nor was it referred to anywhere in this claim. Accordingly, submissions dealing with the conduct of the Respondent in the application were independent submissions that were not linked to the payment claim, and must not be considered in the adjudication because they fall outside s26(2)(c), and I find that they do not fall within any other specific provision of s26(2).

Requirements of an adjudication decision

24. In a previous heading "Matters regarded in making the Decision", I identified the statutory requirements that may be taken into account in carrying out an adjudication. Queensland Courts have not yet interpreted the Act and provided guidance as to the requirements of adjudication decisions. New South Wales has had essentially similar legislation to the Act in place for a number of years, and its Court of Appeal has developed a very useful guide for adjudicators. If adjudicators follow this guide, the parties to adjudications should be confident that the statutory regime introduced to rapidly resolve payment disputes has been adhered to.

    The landmark case of *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport and another [2004] NSWCA 3* ("Brodyn") provided this guide. Brodyn is likely to be considered as highly persuasive in interpreting the Act, because it refers to essentially identical legislation and is a decision of a Court of Appeal. This adjudication, therefore, follows the guide identified in Brodyn, so that the parties can be confident that proper consideration has been given to the requirements of the adjudication process.

    Whilst one or both of the parties may consider such an approach tedious in what they may feel is a simple statutory claim for monies due under the contract, which they may think ought only require a brief decision, it is vital that proper consideration be given to all the requirements of this legislation. In the case of *Coordinated Construction Co. Pty. Ltd. v. J.M. Hargreaves (NSW) Pty. Ltd. & Ors. [2005] NSWCA 228* ("Hargreaves") which dealt with s22(2) of the NSW legislation, which is the equivalent of s26(2) of the Act, Hodgson JA said the following with reference to the primary judge's finding:

> *"*50 *Before concluding, I wish to note what I believe may be an important error in the judgment of the primary judge, not bearing on the outcome of the case. In the second half of para.[51] of his judgment, the primary judge said this:*
>
> > *'An adjudicator is bound to consider the provisions of the Act, the provisions to the construction contract, the payment claim and payment schedule and submissions made by the claimant*

> *and respondent respectively and the results of any inspection: s 22(2). It seems to follow from all this that, if the point that an amount claimed is not "for" construction work is not taken in the payment schedule, it cannot thereafter be relied upon by the respondent in the adjudication process. The adjudicator would be bound to determine the matter on the basis of the material to which she or he could properly have regard; and if the adjudicator decided that all the reasons advanced by the respondent were invalid, the adjudicator would determine the amount of the progress payment in favour of the claimant.'*

> *51 That passage could be read as asserting that, if a respondent to a payment claim does not raise any relevant grounds for denying or reducing the progress claim made by the claimant, then the adjudicator automatically determines the progress claim at the amount claimed by the claimant. My tentative view is that such an assertion would be incorrect.*
> *52 The task of the adjudicator is to determine the amount of the progress payment to be paid by the respondent to the claimant; and in my opinion that requires determination, on the material available to the adjudicator and to the best of the adjudicator's ability, of the amount that is properly payable. Section 22(2) says that the adjudicator is to consider only the provisions of the Act and the contract, the payment claim and the claimant's submissions duly made, the payment schedule and the respondent's submissions duly made, and the results of any inspection; but that does not mean that the consideration of the provisions of the Act and the contract and of the merits of the payment claim is limited to issues actually raised by submissions duly made: see The Minister for Commerce v. Contrax Plumbing (NSW) Pty. Ltd. [2005] NSWCA 142 at [33]-[36]. The adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim. The adjudicator may very readily find in favour of the claimant on the merits of the claim if no relevant material is put by the respondent; but the absence of such material does not mean that the adjudicator can simply award the amount of the claim without any addressing of its merits.*
> *53 Indeed, my tentative view is that, if an adjudicator determined the progress payment at the amount claimed simply because he or she rejected the relevance of the respondent's material, this could be such a failure to address the task set by the Act as to render the determination void.*

Basten JA at paragraph 65 referred to judicial review of an administrative decision, and identified succinctly, with High Court authority as to what constituted conduct by a person making an administrative decision that may be subject to review. He said that,

> *"According to the well-known principles governing judicial review under the general law, a decision-maker will fail to exercise a*

> *statutory power if he or she fails to take into account a mandatory consideration. Similarly, there will be a failure properly to exercise the statutory jurisdiction where the decision-maker takes into account an impermissible consideration. The same principles are found in the Administrative Decisions (Judicial Review) Act 1977 (Cth), discussed by Mason J in Minister for Aboriginal Affairs v Peko Wallsend Ltd (1986) 162 CLR 24 at 39-40. As his Honour noted (at p.40), many statutory discretions are in their terms unconfined and the considerations will therefore be unconfined "except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard …". Section 22(2) of the Act is an exception to this rule: indeed, it has a dual function. On the one hand, it prescribes matters to which the adjudicator is required to have regard; on the other hand, it identifies those matters as the "only" matters to which the adjudicator is to have regard. At least on its face, the list is exhaustive.*

Basten JA and Hodgson JA (earlier) essentially did not agree on the extent of the adjudicators powers, and they were discussing this issue in the context of possibly re-opening the findings in Brodyn. Both judges did not feel that their case was an appropriate on for the principles in Brodyn to be revisited, so it is my view that Brodyn remains good law, which is likely to be followed in Queensland.

At paragraph 53 of Brodyn, Hodgson JA, referred to 5 *basic and essential requirements* ("*B&ER*") to be satisfied for 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). Furthermore, the Court made reference to a non-exhaustive list of *more detailed requirements* ("*MDR*") to be considered by the adjudicator (see paragraph 54). I turn first to the *B&ER* requirements, which are paraphrased and applied below:

Basic and Essential Requirements

25. 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 ("*B&ER 1*").
26. Whether the Claimant served the Respondent with a payment claim as required by section 17 of the Act ("*B&ER 2*").
27. Whether the Claimant made an adjudication application to an authorised nominating authority as required by section 21 of the Act ("*B&ER 3*").
28. 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 ("*B&ER 4*").
29. 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 ("*B&ER 5*").

The Construction Contract

30. The existence of a *construction contract* is part of *B&ER 1* and it is necessary to turn to this issue first. Some preliminary analysis of the contract has already been carried out to ensure that the threshold jurisdictional requirements were satisfied. In that analysis I found that there was a contract, which was characterised as a *construction contract* under the Act. It is now necessary to decide the extent of the documents comprising the contract and its relevant terms, so as to provide the parties with an identified framework within which the adjudication is conducted. There will be, of necessity, a need to further consider aspects of the contract when referring to specific aspects of the substantive issues at a later stage.

31. The material provided by both the Claimant and Respondent identified in "Material provided in Adjudication" includes potential contract documents together with other documentation relating to the administration of the contract leading to this adjudication. These will now be reviewed to decide which documents formed part of the contract.

Documents forming the contract

32. I have already found that a contract was made on 10 December 2004
33. I have also already found that the contract contained the 103-page specification. This specification included and I find accordingly:

(i) *Form Of Tender (Lump Sum)* which was not filled in or signed;
(ii) *Form Of Agreement* which was also not filled in or signed;
(iii) *Conditions Of Tendering* relating to contract number A9383;
(iv) *Part A, Annexure to the Australian Standard General Conditions of Contract AS 4000 – 1997 ("GCC'S Annexure A");*
(v) *Part B Annexure to the Australian Standard Conditions of Contract AS 4000 – 1997 ("GCC'S Annexure Part B");*
(vi) *Civil Works Schedule – Separable Portion A*
(vii) *Civil Work Schedule – Separable Portion B*
(viii) There is no page 28 included in the specification.
(ix) *1.0 GENERAL CLAUSES,* which included clauses that amended the GCC from pages 28 – 41. Some of these particular clauses will be referred to in more detail later.
(x) *2.0 MATERIALS, SUMISSIONS & QUALITY* from pages 42 – 46
(xi) *3.0 EARTHWORKS* from pages 47 – 73
(xii) *4.0 STORMWATER* from page 73 – 80
(xiii) *5.00 CONCRETE* from pages 81 – 103.

34. The Claimant's documents also included a Geotechnical assessment from Coffey dated 23 September 2004, which had attachments relating to important information, borehole logs and locations, building pad classifications and laboratory test certificates. Specification 3.1.7 refers to *Nature of site* and included "*2. Site investigation report"* which made specific reference to the Site investigation and enclosure of the copy of the report by Coffey as follows:

> *"A site investigation has been carried out by Coffey Geotechnical Pty Ltd and a copy of the report is included in the Contract documents. The bore logs give information on the nature of the ground at the*

> *location of the boreholes only. This information is issued for the convenience of the Contractor but the Principal does not accept any responsibility for an interpretation which the Contractor may place on it."*

The Respondent does not take issue with the inclusion of the site investigation report in the contract documents and I find the Geotechnical assessment of Coffey as part of the contract documents ("Coffey's geotechnical report").

35. In the Claimant's documents are the drawings referred to in the Claimant's material and I have found that Item 1 of JI.01 referred to drawings which I accept are part of the contract but it is necessary to determine the extent of them. With reference to specification 1.8 which refers to *Drawings*, there are specific drawing numbers referred to in the specification commencing at A9383 – C000, A9383 – C010 through to C013, A9383 – C020 through to C029, A9383 – C040 through to C044, A9383 – C046, A9383 – C048 to C049. The actual drawings provided in the Claimant's material did not include A9383 – C029 nor A9383 – C040 and C042. I find that the drawings actually provided by the Claimant from A9383 – C000 through to A9383 – C049 constituted the drawings for the contract. The additional drawings in the Claimant's material, VIZ.9383 – C052 through to C073, at this stage, I have not found to constitute part of the contract drawings because they are not referred to in the specification.
36. Referring back to JI.01 apart from item 1 in the list already referred to and incorporating the specification, drawings and associated documentation, there were a further 4 items on the list.

(i) As to item 2 both the Claimant and Respondent refer to the tender assessment meeting minutes and I found that the Claimant ticked this item, so I find these minutes formed part of the contract.

(ii) As to item 3 which referred to an amended tender amount, together with reference to provisional quantities relating to topsoil and that the provisional quantities amount nominated in the schedule had been altered to the lump sum quantities, so that together with the tick by the Claimant and no material to the contrary from the Respondent, I find that this item referenced formed part of the contract, apart from the amended tender amount of $1,773,001.70 dated 26 November 2004

(iii) The reason for not accepting the amended tender amount referred to above as "the contract sum" for the contract is that in item 4 there was reference to further amendments to the tender provided by the Claimant on 30 November 2004 in which the revised tender amount was $1,610,567.30. I find that this figure was the *contract sum* as defined in Clause 1 of the GCC because it is the sum of Portion A original contract price of $460,149.99 and Portion B of original contract price of $1,150,417.31 (which I find from Progress Claim No.6). I make this finding also in light of the fact that it also had a tick next to it, which I have found was made by the Claimant

(iv) Furthermore, as far as it may be relevant and in light of the ticks from the Claimant I find that contract was subject to the relocation of a temporary access road, and that the bill of quantities were to be used to administer variations and progress payments under the contract with completion

dates for separable portions A and B to be 6 weeks and a further 10 weeks from commencement of works.

(v) In addition, I find that the contract was to start upon receipt of "operational works approval", and I find that the contract was subject to *operational works* approval.

37. In JI.02 which is an instruction from CAB, in item AI02.01 and JI02.02 there is reference to approval of the *operational works* and inclusion of a copy of a decision by Redcliffe City Council for the Claimant's information. These documents were attached to JI.02 and a document from the Redcliffe City Council dated 7 December 2004 and headed "Development Application Decision Notice" referred to conditions imposed and also referred to a series of drawing numbers which comprised the contract drawings already found by me to form part of the contract drawings together with drawings 9383 – C050 through to C071, so of those already provided by the Claimant in the Claimant's material I find that these drawings also constituted the contract drawings, apart from C073, which was not referred to.
38. In the Respondent's material HFS-2 is the alternative fill offer, and because the Claimant does not take issue with this document, I find it also formed part of the contract.
39. In the Respondent's material HFS – 4 is a copy of the GCC, and because the Claimant does not take issue with these General Conditions of Contract and the fact that I have found Annexures Parts A & B to the GCC, I find the GCC also formed part of the contract.

Relevant terms of the contract for the adjudication

40. The relevant terms of the contract will be determined progressively through this adjudication because value judgements will need to be made as to the meaning of the contract terms which will need to be considered in light of further material.
41. At this preliminary stage I have only had regard to the specification "*1.1 General Conditions Of Contract And Precedence"* which provides as follows:

> *"The General Conditions Of Contract are the "General Conditions of Contract AS 4000 – 1997", and this will form an integral part of the contract documents and shall apply to all sections of the Specification as though written in full.*
>
> *Should there be any discrepancy between the conditions of contract and this Specification, this Specification shall take precedence. The descending order of precedents shall be this Specification, the general Specifications and then the drawings with the following exception. Where there is a conflict between this Specification and a general Specification or drawing and the requirement/s of the general Specification or drawing is/are more stringent and where the particular occurrence has not been specifically referred to in this Specification, then the more stringent requirement/s of the general Specification or drawing will apply."*

42. As previously stated, further interpretation and identification of relevant terms of the contract will be carried out further in this adjudication after fulfilling the requirements identified by Brodyn.
43. Accordingly, the first basic and essential requirement is satisfied.

Chronology of Service of Documents

44. *B&ER 2* requires the service of the payment claim on the Respondent in accordance with s17 of the Act, so it is a useful exercise to consider this, as well as the chronology of service of all documents, because these steps impact on the other *basic and essential* and *more detailed requirements*, which in turn will have a significant bearing on the extent of and conduct of the adjudication.

45. The payment claim, the attached tax invoice and Progress Claim No. 6 were all dated 21 June 2005, and without material to the contrary, I find this is the date of the payment claim. The critical issue, however, for *B&ER 2* is service of the payment claim and this is where I encountered a discrepancy. On page 2 of the application, there were statements:

> *"Date payment claim served on respondent: 21/6/2005"*
> *"Date payment schedule, if any, served on claimant: 12/7/2005"*

s18(5) of the Act provides that the Respondent is liable to pay the claimed amount to the Claimant on the date due for progress payment unless it has served a payment claim, which refers back to s18(4) of the Act that provides:

> *"Subsection (5) applies if-*
>
> *(a) a claimant serves a payment schedule on the respondent; and*
> *(b) the respondent does not serve a payment schedule on the claimant within the earlier of-*
> *i. the time required by the relevant construction contract; or*
> *ii. 10 business days after the payment claim is served"*

If I find that the date of service of the payment claim was 21 June 2005, as identified in the payment claim and the application, it would mean that the payment schedule was served later than 10 business days after service of the payment claim, which would have put it out of time, because s18(4)(b) of the Act requires the earliest date of service of the payment schedule. The response identified Progress Claim No.6 and stated:

> *"Reference date: 21 June 2005"*
> *"Date of Service on Respondent: 28 June 2005"*

I was confronted with 2 differing dates of service of the payment claim from the Claimant and Respondent, and for the adjudication to proceed properly in

accordance with the law, it was essential to find the correct date of service of the payment claim. Accordingly, on 3 August 2005, I requested the Claimant under s25(4)(a) of the Act to provide me with a written submission by 4 August 2005 (with a copy to the Respondent) supporting its assertion of the 21 June 2005 date of service of the payment claim, and requested the Respondent provide its written submissions in response to those of the Claimant by 5 August 2005 (with a copy to the Claimant). In this letter, I also requested an extension of time until 22 August 2005 to complete the adjudication.

On 4 August 2005, the Claimant faxed to the Respondent and me a declaration by Glen Clifford that the claim had been sent by express post to the Respondent on 27 June 2005, together with a copy of a facsimile from the Respondent stating that it had received the payment claim on 28 June 2005. Furthermore, on 5 August 2005, the Respondent faxed to the Claimant and me a letter confirming that the payment claim had been received on 28 June 2005, in accordance with the declaration by Glen Clifford. Accordingly, it is common ground, and I so find that the date of service of the payment claim was 28 June 2005.

Both the Claimant and Respondent also advised me in writing that they consented to the adjudication being extended to 22 August 2005.

46. The payment schedule was dated 12 July 2005, and the Respondent's covering letter to the Claimant also dated 12 July 2005 bore ink stamps in blue stating "RECIVED BMD MANLY" and a stamp in red stating "12 July 2005". There is no material to the contrary, so I find that 12 July 2005 was both the date of the payment schedule and the date of service of the payment schedule on BMD - the Claimant. I have referred to a diary for 2005, and confirm that the 12 July 2005 is 10 business days after 28 June 2005, the date of service of the payment claim. This timing satisfies the requirements of s18(4), resulting in the payment schedule being delivered within the time required by the Act.

47. Under cover of a letter dated 19 July 2005, the application dated 25 July 2005 was delivered to IAMA.

48. IAMA nominated me as the adjudicator on 26 July 2005, and I accepted the nomination by facsimile to both parties and IAMA on 29 July 2005.

49. On 2 August 2005, the Respondent delivered the response to me, which identified a copy for the Claimant.

Further analysis on the *basic and essential requirements*

50. With reference to the above chronology, I have found that the Claimant served a payment claim on 28 June 2005 thereby satisfying *B&ER 2*.

51. *B&ER 3* requires me to determine whether the Claimant made an adjudication application to an authorised nominating authority as required by section 21 of the Act.

I have already found that IAMA, 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."

52. On 26 July 2005 the ANA provided me with the Claimant's 2 lever arch folders containing documentation, which I have already described as the application, and I find this satisfies the requirements of writing in s21(3)(a). There is no material to controvert the existence of the application and the Respondent provided a response without taking issue with the timing of the application.

The application contained the Claimant's covering letter signed by *Gary Dobrich, General Manager Construction* on 19 July 2005, which attached an adjudication application to the ANA, satisfying s21(3)(b), which was also signed by *Gary Dobrich* and dated 25 July 2005. There is a stamped date of 25 Jul 2005 with a handwritten note 1:20pm on the adjudication application. I draw the inference that this stamp and the note were those of the ANA in receiving the documents. I prefer to find that the date of the application was 25 July 2005 rather than 19 July 2005, because there are 2 references to this date on the application.

53. Accordingly, *B&ER 3* is satisfied. There are other issues regarding timing and further contents of the application, which form part of Brodyn's more detailed requirements, to which I will refer later.

54. *B&ER 4* requires me to be satisfied that there was compliance with the Act regarding the reference to an eligible adjudicator: s21(6). I have stated that the ANA referred the adjudication to me in writing on 26 July 2005, and without material to the contrary, I find that this constitutes compliance with s21(6), providing I am an eligible adjudicator under s22 of the Act.

    I find that am eligible adjudicator because I am registered under the Act with registration number J622914 thereby satisfying s22(1) of the Act. I am not a party to the contract and I have no conflict of interest , which satisfies s22(2) and s22(3) of the Act. However, I need to be satisfied that I have been properly appointed under the Act and I turn 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 have found that that the application was referred to me on 26 July 2005. In the chronology above, I identified that I accepted the application in writing to the parties by facsimile on 29 July 2005, and without contrary material, I find that this constitutes serving notice of acceptance under s23(1) of the Act thereby constituting a valid appointment in accordance with s23(2) of the Act.

    Accordingly, *B&ER 4* has been satisfied.

55. *B&ER 5* requires that the Adjudicator decide the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable in accordance with s26(1) of the Act. The decision is required to be in writing: s26(3)(a) and the parties have not agreed to waive the requirement of reasons: s26(3)(b).

    This requirement is the essence of the adjudication, and my decision on page 1 adheres to this requirement. However, the decision was made after consideration of the other preliminary issues characterised as *more detailed requirements* in Brodyn and the merits of the case, to which I now turn.

More detailed Requirements

The *MDR* 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.) I paraphrase these requirements below:

56. Whether the contents of the payment claim are sufficient to satisfy section 17 (2) of the Act ("*MDR 1*").

57. 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 ("*MDR 2*").

58. Whether the time required under section 25 of the Act has been adhered to allow the Adjudicator to make a decision ("*MDR 3*").

59. Whether the Adjudicator has considered the matters required to be considered under section 26 (2) of the Act ("*MDR 4*").

60. Prior to giving consideration to *MDR 1*, it is useful to extract the essential features of both the payment claim and payment schedule at this stage so that the parties can follow the reasoning in this adjudication.

Payment Claim

61. The essential features of the payment claim provided as follows:

*"**To**: Hibernian (QLD) Friendly Society **CC**: Cardno Alexander Browne…*
…..
This is a payment claim made under the Building and Construction Industry Payments Act 2004 (Qld)

***From:** BMD Constructions Pty Ltd…*

Contract Details

Project: Bally Cara Retirement Village
Proposed Bulk Earthworks, Sunnyside Road, Scarborough.
Contract Number: A9383
Reference date: 21 June 2005. (Claim No. 6)
Total amount of this Payment Claim $116,471.70 (Including GST)
The construction work or related goods and services in respect of which this Payment Claim is made and the method of calculation of the total amount of the claim are set out in Attachments(s) to this Payment Claim….

Attachment(s)

Details of Claim (attach other relevant documentation as required):

1. *Tax Invoice No. 6.*
2. *Progress Claim No. 6 – 21st June 2005 for Portion A & B.*
3. *Certificate of Practical Completion for Portion A & B…"*

Payment Schedule

62. The essential features of the payment schedule provided as follows:

"Payment Schedule
Response to Progress Claim No. 6
Submitted by BMD Constructions Pty Ltd
Under the Building and Construction Industry Payment s Act 1004(Qld)

To: *BMD Constructions…*

This is a payment schedule under the Building and Construction Industry Payments Act 2004 (Qld)

From: *Hibernian (Qld) Friendly Society…*

Project:	*Ballycara Retirement Village* *Proposed Bulk Earthworks, Sunnyside Road* *Scarborough*
Contract Number:	*A9383*
Reference Date:	*21 June 2005*
Date of Service on Respondent:	*28 June 2005*
Due Date for Payment:	
Total amount of Payment Claim:	*$116,471.70 (including GST)*
Amount that the Respondent proposes to pay:	*$NIL*

The reasons why it is less the amount claimed in the Payment Claim and the reasons for withholding payment are set out in the Attachment(s) below:…

Attachments:

1. *Annexure 1: Payment Claim Assessment…*
2. *Practical Completion Certificate…*
3. *…"*

Analysis of the *more detailed requirements*

63. Turning now to *MDR 1*, which deals with 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 bulk earthworks at the Bally Cara Retirement Village at Sunnyside Road, Scarborough. Attached to the payment claim is supporting material for the claim for construction work, which follows the progress claim format required by Clause 37.1 of the GCC relating to progress claims. This was the 6th Progress Claim, and the Respondent had included Progress Certificate No. 4 in its material, so I can safely draw the inference that the Respondent was content that this format provided it with adequate information upon which the Superintendent could certify progress claims and upon which the Respondent could pay progress certificates. I refer to the test suggested by Einstein J in *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Limited [2003] NSWSC 1103* ("Leighton") that I must be satisfied, as a matter of fact, that adequate information has been provided in this payment claim. I find, without material to the contrary, that the construction work is identified sufficiently enough for the Respondent to respond with a payment schedule (which the Respondent provided without querying the adequacy of the material), and the attachments to the payment claim provided the calculation of the amount payable, having taken off the amounts already paid by the Respondent.

The payment claim states the amount of $116,471.70, which in my view satisfies s17(2)(b), because it expressly states the "Total amount of this Payment Claim $116,471.70 (Including GST)." The invoice formed part of payment claim and the amount is calculated under the contract, because the attached Progress Claim No. 6 attached the schedule of quantities with the relevant amounts claimed, thereby satisfying *the amount calculated under the contract* required by s13(a) of the Act. The work was valued under the contract, thereby complying with s 14(1)(a) of the Act. Without material to the contrary, I therefore find that $116,471.70 is the **"claimed amount"** as identified in s17(2)(b).

The endorsement is clearly on the payment claim, so that s17(2)(c) is complied with, so I find that *MDR 1* is satisfied.

64. I must now turn to *MDR* 2 to determine the:
(i) time when the adjudication application could be made, as well as
(ii) the requirements of the contents of the application.

65. I have already found that the payment schedule was served on 12 July 2005, and I must have recourse to the Act to determine the time within which the application is required to be made. s21 of the Act 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.."

66. I have extracted relevant information from the payment schedule above and it clearly states that the Respondent proposes to pay "$NIL". Without material to the contrary, I find that the amount of $nil in the payment schedule is less than the "**claimed amount"** of $116,471.70. This enlivens the Claimant's rights to apply for adjudication of a payment claim under s21(1)(a)(i), however, it is necessary to determine whether the application was made within time.

    I have found that the application was made on 25 July 2005, and I have referred to the 2005 diary, which identifies that this date is 9 business days after 12 July 2005, the date of service of the payment schedule. S21(3)(c)(i) of the Act provides that an application must be made within 10 business days after the Claimant received the payment schedule, so the application was within time thereby satisfying the first limb of *MDR 2*.

67. I must now deal with the adjudication application's contents for the second limb of *MDR 2*, and these are covered by s21(3)(d) which essentially requires the application *to identify the payment claim and the payment schedule, if any, to which it relates*. The application refers to the payment claim details in the amount of "$116,471.70 (including GST)", together with the payment schedule details of having being served on "12/7/2005", with the scheduled amount of "Nil". Without material to the contrary, I find that this sufficiently identifies the payment claim and schedule in compliance with s21(3)(d).

    s21(3)(e) also needs to be satisfied and I note from the application 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, without contrary material, that s21(3)(e) has been satisfied.

    I now turn to s21(3)(f) and have noted in the Claimant's material above that the Claimant has provided submissions relevant to its application in accordance with this subsection. Given that there is no material to the contrary, apart from the issue regarding claims under the TPA, which I have already dealt with, I find that submissions relevant to the application have been provided. I may have to exclude some further submissions as being irrelevant during my more detailed analysis later, however, for present purposes I therefore find that *MDR 2* is satisfied.

68. I now need to turn to *MDR 3* which deals with the time when an adjudication decision may be made under s25 of the Act, as I may not decide the adjudication until after the Respondent may give an adjudication response to me: s25(1). In particular, 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."*

    s24 of the Act provides the time within which the Respondent could give a response and I have found the response was made on 2 August 2005. s 24(1) of the Act 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 application, the claimant stated, *"The claimant will serve a copy of this adjudication application (including all attachments) on the respondent on the same day as it is lodged with the **Institute of Arbitrators and Mediators Australia**. If it is not served on the same day the applicant will immediately notify the **Institute of Arbitrators and Mediators Australia** of 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 25 July 2005. An adjudication response was provided to me on 2 August 2005. I have already found that I provided the parties with notice of acceptance of my nomination on 29 July 2005. Having regard to the 2005 calendar, 2 August 2005 is within 2 business days of notice of my acceptance of the nomination, which satisfies s24(1)(b) as the later of the 2 possible dates within which a response is required under the Act. I commenced to decide the adjudication on 3 August 2005, the day after receipt of the adjudication response. Accordingly, *MDR 3* is satisfied.

69. I must now satisfy *MDR 4*, which requires me to deal with those matters to be considered under s26(2) of the Act.

70. In considering whether s26(2)(a) is complied with, I consider that it is firstly necessary to decide 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. I have already found that the Claimant undertook to carry out construction work for the Respondent as it falls within that definition under the Act. s12 of the Act provides as follows:

> *"**12 Rights to progress payments***
>
> *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 a reference date of 21 June 2005, and the Respondent in the payment schedule also identifies the reference date as 21 June 2005. Even though there is agreement about the reference date, I need to be satisfied that it falls within the definition of the Act.

71. A reference date is defined in Schedule 2 of the Act 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…"*

In the contract documents, Part A of the GCC, at page 13 of the specification, with reference to Item 28 referred to:

> *"28 Progress Claims (Subclause 37.1)*
>
> *a) Times for Progress Claims…..…..21st……day of each month for WUC done to the..14th….day of that month…"*

I therefore find that the reference date for this payment claim is 21 June 2005, in accordance with Item 28, with the proviso that it dealt with work under the contract up to 14 June 2005. The Claimant's material, which includes the Respondent's payment schedule identifies the respective dates for practical completion of Portions A and B as 31 March 2005, and 27 May 2005 respectively.

72. I find that this contentious aspect of this adjudication appears for the most part to deal with a dispute over Portion B of the Contract because:

(i) The payment claim makes a claim of $0.00 for Portion A
(ii) The payment claim makes a claim of $116,471.70 for Portion B
(iii) The payment schedule certifies an amount of $12,654.07 for Portion A due to the Claimant comprising only the release of $11,503.70 retention monies (2.5% of revised contract sum of $460,149.99) plus $1,150.37 GST on this sum
(iv) The payment schedule certifies an amount of -$17,867.29 for Portion B in which the two deductions of -$4,135.78 for PC item of lime, and -$95,000 for oversize fill material together with the release of retention monies of $28,760.43 (2.5% of revised contract sum amount of $1,150,417.31) was made. The calculations included the amounts paid to date to the Claimant, which essentially were considered an overpayment
(v) The deductions made in Portion B are those with which the Claimant takes issue. However, this is where I have established that the negative variation regarding oversize fill material encompasses the whole site, despite the fact that the deduction is only made in Portion B
(vi) Accordingly, when dealing with the facts, it will be necessary to have regard to both Portions, with perhaps on Portion B

73. At this stage, it is important to find when Portion B was practically complete, because it may have a bearing in determining whether all work claimed under the payment claim had been finished by 14 June 2005, as required by the contract for the Progress Claim for 21 June 2005. The payment claim made no claim for work done or monies owing in Portion A, which was practically complete on 31 March 2005. There is some difficulty in finding Portion B's

practical completion date. Clause 1 of the GCC defines the *date of practical completion* as:

> *"a) the date evidenced in a certificate of practical completion as the date upon which practical completion was reached; or*
> *b) where another date is determined in any arbitration or litigation as the date upon which practical completion was reached, that other date;"*

I could simply refer to the Certificate of CAB dated 27 May 2005 and find that this is the date as defined in the contract and also because Clause 34.6 of the GCC provides:

> *"If the Superintendent is of the opinion that practical completion has been reached, the Superintendent may issue a certificate of practical completion…"*

However, JI.50 issued by CAB on 24 May 2005 provided:

> *"JI.50.1 In response to your fax dated 24 May 2005, regarding an extension of time claim for wet day on May 20, please be advised that this claim is approved. The revised date for practical completion for Separable Portion B is 7 June 2005."*

This 24 May 2005 statement in JI.50 is inconsistent with the date of practical completion that was certified 3 days later. After JI.50, CAB issued instructions JI.51 through to JI.57, but there was no further reference to practical completion. Despite the statement in JI.50.1, I prefer to find that the date of practical completion of Portion B was 27 May 2005, as it was issued on this date after JI.50. Furthermore, the contract provides that the date of practical completion is evidenced by the certificate, and adjudication is not in my view *arbitration or litigation*, allowing another date to be decided under the definition in b) above.

However, I am obliged to value the payment claim, and this requires me to consider, inter alia, the contract and the history of the contract administration because I am to decide the true merits of the payment claim: Hargreaves, at para 52 ,extracted above. Accordingly, I note that a variation was issued by CAB on 30 May 2005 in JI.52.1 for $2160.04 for supply and installation of rock over geotextile fabric downstream of a triple cell culvert (the "triple culvert work"), which is after the date of practical completion. Clause 36.1 of the GCC states that, "*The Superintendent, before the date of practical completion, may direct the contractor to vary the WUC by any one or more of the following…*" I find that this work ordered on 30 May 2005 was directed after 27 May 2005, the date of practical completion. In the payment claim I find that the Claimant made a claim for this work in Item 6.00 Variations, Claim No.6 – 21/6/2005 under Item 12.

A *variation* is defined in Clause 1 of the GCC as having the meaning in Clause 36 of the GCC. It is arguable that an order for work after 27 May

2005, in this case, is not therefore a variation under Clause 36 of the GCC, and by necessary implication, not a variation under the contract. In this event, the contract does not provide for valuation, as contemplated by s14(1)(a) of the Act. I must then have regard to s14(1)(b) of the Act *in the case of the contract not providing for the matter*, and ss(iii) allows me to have regard for *"any variation agreed to by the parties…"* The JI.52.1 order by CAB, as agent of the Respondent, together with acceptance by the Claimant of the order, and the carrying out of the work, together with the acceptance in the payment schedule by the Respondent of Variation Item 12 indicates that the party had agreed to this variation, and I find that this triple culvert work was a *variation under the Act*, notwithstanding I cannot characterise it as such under the contract.

I have not been given material to identify whether this triple culvert work was carried out on or before 14 June 2005, so as to fall within the reference date for this progress claim. I have found that the Respondent accepted Variation Item 12, so I am prepared, because there is no material to the contrary, to find that this work was carried out on or before 14 June 2005, thereby falling within work claimable for this reference date. Accordingly, I am satisfied that the Claimant has entitlement to this progress claim under s12 of the Act

74. To further satisfy *MDR 4* 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 further 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 need to consider whether Part 4A of the *Queensland Building Services Authority Act 1991* (the "BSAA") applies. 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.

75. Referring back to s26(2)(a), the BSAA deals with *building work*, whereas the Act considers *construction work*, a much wider definition that includes *building work*. Part 4A of the BSAA deals with *Building contracts other than domestic building contracts* so I will need to decide whether this *construction contract* falls within the definition of a *building contract* under the BSAA. 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…."

76. Furthermore, s67A of the BSAA provides:

"67A Definitions for pt 4A

In this part--

***'building contract** see section 67AAA'*

'67AAAMeaning of building contract

*'(1) For this part, a **building contract** means a contract or other arrangement for carrying out building work in Queensland but does not include-*

(a) a domestic building contract; or
(b) a contract that includes construction work that is not building work.

(2) In this section-

***Construction work** see the Building and Construction Industry Payments Act 2004, section 10."*

I have earlier found that the *construction contract* in this adjudication was for bulk earthworks, which fell within the definition of *construction work* under the Act. I must decide whether this is a *building contract* under this part 4A of the BSAA. A *building contract* is defined above *"...for carrying out building work in Queensland." Building work* defined above in the "Dictionary" above refers to the construction of a building, but does not include work that is excluded by regulation (my emphasis).

77. The *Queensland Building Services Authority Regulation 2003* provides in Regulation 5 as follows:

"5 Work that is not building work
(1) For the Act, schedule 2, definition building work, the following work is not building work—…
(zb) work consisting of earthmoving and excavating; ..."

Accordingly, I find that the work the subject of this adjudication is not *building work* under the BSAA because I have found the work to be bulk earthworks, which consists of earthmoving and excavating. It is *construction work* that is not *building work*, which falls within the exclusion provided by the new s67AAA. This in turn leads to the conclusion that the *construction contract* is not a *building contract* under the BSAA because it is not for *building work*. I therefore conclude that Part 4A of the BSAA has no application to this adjudication.

78. I have already found that the Claimant was entitled to a progress payment under s12 of the Act. s17(5) of the Act prohibits the making of more that one payment claim in relation to each reference date. There is no material to suggest that there is another payment claim for 21 June 2005. However, the

bulk of the payment claim appears to relate to work that had already been carried out and claimed in the previous progress claims. This still complies with s17 of the Act because s17(6) provides that *subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.*

79. Adjudication is essentially the valuing of debt arising from work done under a construction contract. Valuation 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 as I have already done with the Claimant's TPA claims, and state that I have not considered them in this adjudication with the attendant reasons why.

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.

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

80. The Claimant asserts that it is entitled to:
(i) the balance of the contract sum;
(ii) together with variations and that the negative variations are not justified

81. The Respondent asserts that it has in fact overpaid the Claimant the monies it is entitled to under the contract and that any monies not paid are due to legitimate negative variations:

(i) for a reduction of the PC items for work that had not been ordered/or not been performed under the contract
(ii) for a reduction in the contract sum for variations to the work that did not meet the required standard and substandard materials were used in part

History of contract administration

82. It is considered important to highlight specific documents that have already been identified earlier and to extract relevant statements in them so as to create the correct factual context for the dispute which is the subject of the adjudication. I have already referred to Hodgson JA at para 52 in Hargreaves stating that I must decide the true merits of the payment claim.
83. As the point of departure, I turn to the first instruction that identified a problem with the fill material. It is considered particularly important to identify the words used by the Superintendent and the Claimant regarding this issue, and the valuation of the $95,000 negative variation, because this is the genesis of the contractual dispute that is to be adjudicated.
84. I find that contract started on 15 December 2005 –JI.04
85. Coffey's testing duties faxed by CAB to Coffey on 12 January 2005
86. Coffey's Portion A certificate was provided on 9 March 2005.
87. On 23 March 2005, Coffey provides Coffey's cobbles report to CAB
88. On 4 April 2005, Certificate of Practical Completion dated 31 March 2005 for Portion A provided by CAB with qualification regarding some oversize materials that may result in a claim by the building contractor
89. On 4 April 2005 in JI.32 in the "first defective fill instruction", and in particular JI.32.5 the Superintendent stated:

> *"Fill in certain area of the building pads did not comply with Section 3.2.4 of the Specification, which requires that all fill material have a maximum dimension of 75mm. The fact that this fill material does not comply with the specification may result in future claim from the building contractor. It is your responsibility to conform with all aspects of the specification. We note that the Geotechnical Engineer stated that the material is suitable as structural fill and with the exception of the over size fragments complies with the specification. Should any future claim arise from the building contractor regarding fill materials that do not comply with the Specification these claims will be passed onto (sic) BMD…"*

90. On 7 April 2005 in JI.34, the second defective fill instruction, the Superintendent identified that the builder, Northbuild intended to lodge a claim due to the size of excavated materials being removed from trench excavation for building footings and service trenches. The Superintendent again identified that the Respondent could suffer consequential losses if a claim was received, and in this event, the Superintendent stated that "*…the works undertaken would be considered as rectification of the works done under the contract and not in compliance with the contract specification*".
91. In site instruction JI.34.2 the Superintendent noted that the Geotechnical consultant had advised that, with the exception of a few larger fragments, the material complies with the specification; however, the Superintendent identified that the problem was more widespread than a few larger fragments and required that the Geotechnical consultant verify the adequacy of structural quality of the fill platform.
92. On 12 April 2005 in JI.35, minutes of a meeting, which was held on 8 April 2005, were provided. Relevant matters arising out of these minutes will be referred to at a later stage.
93. On 18 April 2005 in JI.37 the Superintendent provided the CBR 15 letter.
94. On 11 May 2005 Coffey provided Coffey's site classification and Coffey's Portion B certificate
95. On 11 May 2005 in JI.39 the Superintendent's determination stated:

"*1. We refer to previous advice that the filling does not meet the specified requirements and consequently the Principal has suffered damage. It is proposed that the following deduction for this be made from the contract to off set the client against the impact of that variation.*
2. It is considered that this is a variation to work under the contract by the contractor".

JI39.1 *Estimate of oversize material included in imported fill supplied by BMD.*

Based on observations taken by Peter Meadows, Cardno Alexander Browne Structural Engineer, on 7 April 2005 during excavation of 400mm by 300mm foundations for the RACF Building.

Approximate frequency of oversize material being excavated from rib foundation was observed as follows:

1 Particle>300mm every 1.5m of excavation.
1 Particle>300mm every 1.0m of excavation.
1 Particle>150mm every 1.0m of excavation.

During excavation the sides of the trench were falling into the excavation such that the excavated profile had a base width of 300mm, a depth of 400mm and side slopes – 1 in 1.

If we consider a 3m long section of excavation the total volume excavated would be:

$$3 X \quad \frac{0.3 + 0.9}{2} \quad x\ 0.4 = 0.72m^3$$

The 3m long section of excavation would contain oversize particles as follows:

2 Particles>300mm
3 Particles>200mm
3 Particles>150mm

The estimated volume of oversize particles is as follows:

2 x 0.3 x 0.3 x 0.3 = 0.054 m3
3 x 0.2 x 0.2 x 0.2 = 0.024m3
3 x 0.15 x 0.15 x 0.15 = 0.010m3
0.088m3 Total volume of oversize material in 3m excavation.

The percentage of oversize material observed is as follows:

$$\frac{0.088}{0.72} = 12.2\%$$

The total volume of imported material in separable Portion A is 16673m3. The total volume of imported material in Separable Portion B is 34095m3. Assuming that the observed percentage of oversize material would be consistent throughout the imported fill, the volume of oversize material in Separable Port (sic) A would be 16673 x 12.2% = 2034 m3.

The volume of oversize material in separable Portion B would be 34095 m3 x 12.2% = 4160 m3. The total volume of oversize material would be 6200 m3.

We believe that the supply of oversize material which does not comply with the specification is a variation to the contract this non conforming material has been valued as follows:

1. Separable Portion A
Value of Oversize material at Scheduled Rate.
2043 m3 x $19.52 = $39,703.00
2. Separable Portion B
Value of Oversize Material at the Scheduled Rate
4160 m3 x $19.52 = $81,203.00

Value of non conforming oversize material

=$39,703.00 + $81,203.00
=$120,906.00

The presence of the non conforming fill is having a direct impact on the principal in that he is being subjected to consequential losses because of the presence of this material. On this basis, the potential exists for the principals (sic) to suffer an economic loss in excess of the value of the cost of placing the material.

We have not "valued" the potential damage that the principal may suffer as a result of the above.

We have determined that a deduction of 80% of the above value apply and the value of the work under the contract is reduced by a portion of the above value, being $95,000.00 (excl GST)…"

96. On 12 May 2005, the Claimant wrote the dispute letter to the Superintendent and rejected the Superintendent's determination in stating:

"I respond to your facsimile Ref: JI.39 dated 11 May 2005.
1. a) Please advise the specific breach and relevant clause you are basing your determination….filling does not meet the specified requirements.

b) Please advise the contractual basis for your proposal to apply a monetary penalty

2. a) We do not accept your determination as a variation to our contract. Your application of this determination will constitute a clear breach of contract and I give you fair warning that BMD Constructions will vigorously pursue a remedy.

b) The basis of your determined deduction is rejected in its entirety. I am surprised and perplexed that the Superintendent's Representative would propose such a flawed basis for a determination to breach the contract…"

97. On 23 May 2005 in JI.45 the Superintendent responded to the dispute letter as follows in JI45.1:

"1a) The specific breech (sic) is that the material exceeds the maximum fill size of 75mm (refer Specification Clause 3.2.4) and the size is noted on the drawings (Note 5 Drawing C20).

1b) Work is considered to be WUC varied for the convenience of the contractor without the approval of the Superintendent and has been valued under AS4000 Cl 36.4 as a negative change in the quality of the Works rather than being a financial penalty. The negative change in quality has been notified to the Contractor. We have been advised that the Contractor is proposing not to rectify the negative change in quality.

2a) The change in quality is considered to be an unauthorised variation carried out by the contractor. The Superintendent has valued the impact of

the change. It is considered that the Superintendent made a determination based on a rational assessment in accordance with the conditions of contract. We do not consider that the Superintendent's determination is part of Contract No A9383, Bulk Earthworks Sunnyside Road Scarborough between the Queensland Hibernian Society and BMD Constructions.

2b) We have reviewed the evaluation method and considered the method to be reasonable..."

98. The Claimant responded in the rejection letter as follows:

"The contents of you (sic) fax JI.45 are noted. I respond as follows:

- *I note that your justification for applying a monetary penalty has changed significantly between JI.39 and JI.45.*
- *It is worthy of comment that;after (sic) some 5 months and 50,000+m3 of import; you have determined that an "unauthorised variation" exists.*
- *Our tender offer and your acceptance have not varied. This is evidenced by the unqualified accepting and certification of the fill platform by your nominated Geotechnical Consultant and supervision of work in progress by Cardno's.*
- *If your determination is not part of the contract; what is the basis of deducting $95,000 from monies due and payable under a legal contract?*

We do not accept your determination….".

99. In JI.51, the instruction on breach facsimile, the Superintendent stated as follows:

"JI.51.1 In response to your fax dated 25 May 2005, we reply in the same order as presented.

1) JI45 states that BMD have breeched (sic) the contract by incorporating material that exceeded the maximum fill size of 75mm. This breech (sic) was fully set out in our early (sic) correspondence JI39 which provided an estimate as to the extent of over size material in the imported fill. JI39 then went on to state that the supply of oversize material which did not comply with the specification, was a variation to the contract and valued the potential damage to the Principal at $95,000 (excl GST).

JI45 merely restates that the fill work was varied for your convenience causing a negative change in the quality of work required under the Contract. This unauthorised variation was valued under AS4000 CL36.4. Our justification to apply a monetary penalty remains unchanged. In short, you have not completed the works to the standard required in the specification. A negative variation has been imposed as the value of the works completed by you is not to the standard tendered by you.

2) You have been advised that oversize material was incorporated into the imported filling works under JI.32 and JI.34 after Northbuild commenced trench excavation for footings and services trench (sic). Until that time defective work, being the oversize fill materials, had been covered and not brought to our attention. Nor was oversize material seen being incorporated into the works during our site inspections.

3) Your Tender offer has varied from the work completed by you for (i) the works incorporate oversize material which do not comply with the specification, and (ii) the value of works completed by you are not to the standard BMD tendered to undertake.

Excavation into your filling works clearly shows that the fill incorporates oversize materials and this has been referred to by the Geotechnical Consultant in their letter dated 29 March 2005 which stated:

"An inspection of materials excavated from trenches was made on 23 March 2005. It was noted that a number of cobbles were present in the excavated soils. One very large cobble, about 500mm across was noted. Numerous smaller cobbles including some between 200mm and 75mm were also noted in the excavated materials. It was estimated that these larger fragments represented about 5% of the materials excavated. Smaller cobbles, less than 75mm, were estimated to make up a further 10% of the excavated materials.

This material is considered suitable as structural fill. With the exception of a few larger fragments, the materials comply with the requirements of the relevant Australians Standards for Earthworks and the specification provided to Coffey by Cardno Alexander Browne."

4) You have been advised in our early correspondence that the fill placed by you does not conform to the specification. AS 4000 clause 29.4 provides the Superintendent to direct the Contractor that the Principal elects to accept the subject work, with oversize material, and that the subject work has been deemed a variation. As a deemed variation, caused for your convenience without approval of the Superintendent, we have valued the work as a negative variation under AS 4000 Cl 36.4. Our determination is consistent with the contract.

5) "We note that you do not accept our determination. This is your right and you are entitled to dispute a decision of the Superintendent under AS 4000 clause 42.

If this is your intention then a notice of dispute in accordance with CL42.1 should be issued to the Principal and the Superintendent outlining the basis of the claim.

Should you wish to dispute the decision we suggest you issue a notice in accordance with the requirements of the contract so that the matter can be addressed appropriately…"

100. In instruction JI.57 dated 22 June 2005 the Superintendent stated in JI57.1 as follows:

"In response to meetings held regarding oversize material present in the fill provided by BMD, please be advised as follows:

1. *Meetings have been held with both the Principal and Contractor with respect to the negative variation caused by over sized materials in the fill works.*
2. *As Superintendent, we are of the view that we have acted fairly and impartially in the assessment of the negative variation and we acknowledge that both parties appear to object to the evaluation. As Superintendent we believe that there is a dispute in that regard.*
3. *Currently the Principal and Contractor hold significantly different views as to the value of the negative variations. As a dispute appears to exist between the parties we do request that one of (sic) either party provide the other party and the Superintendent with a written notice of dispute adequately identifying and providing details of the dispute being the required course deal with this under the contract.*
4. *That within 14 days of service of the notice of dispute the Superintendent will convene a conference for the parties to resolve or agree a method of doing so. It is suggested that the parties do consider mediation by a mediator appointed by the President of the Queensland Branch of the Institute of Mediator's and Arbitrator's.*
5. *Should the parties not agree to mediation than either party may refer the dispute to arbitration 28 days after service of the written notice of dispute."*

Substantive Issues

101. It is now necessary to identify the issues established in this dispute so that the adjudication can properly be confined within s26(2) of the Act. Only those issues ventilated by the parties in the payment claim, payment schedule, the application and the response, together with the relevant submissions on both sides are properly considered. Accordingly in exercising my judgement within s26(2), and after a great deal of analysis of the material and determining the the best way to consider and present the material in these reasons, I consider that the following issues need be dealt with in this adjudication:

1. The status of Coffey on the project:
   (a) Whether Coffey is an agent of the Respondent
   (b) Whether Coffey is a subcontractor of the Claimant
2. Whether the payment schedule correctly determined:
   (a) The negative variation for the lime stabilisation

(b) That the fill material was defective,
(c) The amount of defective fill material; and
(d) The value of the deemed variation

Decision on the issues

102. In determining the issues that arise in this adjudication, the Claimant bears the legal burden of proof, and retains this burden in relation to its payment claim. However, the evidentiary onus of proof shifts to the Respondent when the Claimant has substantiated an issue with relevant and probative material, which requires material in rebuttal from the Respondent.

Status of Coffey

a. Whether Coffee is an agent of the Respondent

103. The Claimant has made assertions, that Coffey were the agents of both the Respondent and CAB onsite. In particular Claimant's submission 8 especially alleges that Coffey *"were the Principals and Supervising Engineers Agents on site."* Furthermore, in the rejection letter dated 25 May 2005, the Claimant dated, *"Our tender offer and your acceptance have not varied. This is evidence by the unqualified accepting and certification of the fill platform by your nominated Geotechnical Consultant and supervision of work in progress by Cardno's"*. In addition, in submission 4(d) of the Claimant's submission it stated, *"a Geotechnical Consultant (Coffey Geosciences) was appointed by the supervisor to supervise the placement compaction and suitability of the fill (see clause 3.1.12 of the contract). Its representative was on site to view all fill with a direction to advise the Claimant if any fill was unsuitable. This direction from the Claimant was made for the reason that it did not wish to import a large quantity of fill only to have the problems which are now the subject of this adjudication."*

104. In Claimant's submission 14, the Claimant extracted clause 3.1.12 relating to the engagement of the Geotechnical engineer. The Respondent in its submissions accepted the existence of clause 3.1.12 of the specification but disagreed that Coffey was appointed by the Superintendent to supervise the placement, compaction and suitability of the fill. In paragraph 7(d) of the Respondent's submissions the Respondent specifically asserted that Coffey was a subcontractor of BMD and that the Respondent had nominated Coffey as a subcontractor to BMD to act as the Geotechnical consultant as outlined in clause 3.1.12 of the specification. I will turn to the issue of whether Coffey was a subcontractor of the Claimant in the next heading.

105. Further, in response to Claimant's submission 7 that approval of the fill by Coffey and subsequent certification meant that the Respondent ought to pay the Claimant for this work, the Respondent in submission 13 denied that Coffey was the agent of the Respondent or of the Superintendent. Furthermore, in paragraph 22 of the Respondent's submissions, the Respondent denied that Coffey had been appointed to act on behalf of the Superintendent, and did so again in submission 25.

106. An agent is a person who authorised, expressly or impliedly, to act for a 'principal' so as to create or affect legal relations between the 'principal' and a third party. The principal is bound in law by the acts of her agent as a result of and generally only to the extent of the authority given to the agent: Vermeesch & Lindgren: *Business Law of Australia*, 8th ed, Butterworths para [20.02] , p540. The Claimant has asserted that Coffey is the agent of the Respondent and needs to provide material in support of that assertion. The submission 4(d) the Claimant asserts that the basis of establishing that Coffey was the agent of the Respondent was in reliance of its interpretation of clause 3.1.12 of the contract, which both the Claimant and the Respondent provided in their respective submissions.

107. This clause specifically required the Claimant to provide in his tender to engage Coffey to carry out inspections and testing to level 1 standard relating to the following work:

- "The suitability of proposed fill material
- Preparation and compaction of the sub-grade and fill layers
- The compaction of backfill in service trenches
- Design and inspection of boulder walls

And to provide certification of these items as specified below…"

- Coffey was to decide on the extent of testing with a minimum to be in accordance with section 2 - Quality
- They also needed to provide certification provided by a Registered Professional Engineer in Queensland within 10 days after completion of the earthworks that:

1. the fill layers under the proposed buildings and in service trenches constituted controlled fill in accordance with the requirements of a class M site the maximum ys value of 30mm in accordance with AS2870
2. the as constructed boulder walls will retain material behind the walls with an adequate factor of safety

In addition, the clause specifically prohibited the Geotechnical engineer from authorising variations to the contract or the use of provisional items without approval of the Superintendent.

108. Furthermore, in the Claimant's submission 15.3 it referred to the facsimile sent on 12 January 2005 from CAB to Coffey, the Coffey's testing duties letter, with select pages 50, 57, 58, and 59 of the contract specification. I have already found that the specifications formed part of the contract and therefore clause 3.1.12 regarding the engagement of Coffey was part of the contract between the Claimant and the Respondent. In paragraph 22 of the Respondent's submissions, the Respondent agrees that the Superintendent sent a facsimile to Coffey but disagrees that the facsimile was sent for the purposes of the Superintendent appointing Coffey as Geotechnical Consultant for the project. The Respondent added that it had never been responsible for the appointment of Coffey as Geotechnical Consultant and that the Claimant was responsible for Coffey's engagement.

109. In clause 3.1.12 there are no express words identifying Coffey as the Respondent's agent. In fact, the words expressly state that the Claimant was required to engage Coffey as the Geotechnical Consultant for the project. The effect of the Claimant's assertions is that if Coffey was the Respondent's agent, it would bind the Respondent to the approval and certification of fill by Coffey and thereby oblige the Principal to pay for the construction work related to provision of fill material. The importance of such an assertion cannot be overstated in this context, because 50 000 cubic metres of this fill material was to be provided by the Claimant. I am of the view that the far reaching consequences of such a potential Principal and Agent relationship between the Respondent and Coffey should be clearly identified in the contract documents. This relationship would specifically cut across the duties of the Superintendent who has the powers under the contract to direct the Claimant in relation to defective work in clause 29.3 of the GCC. If, as the Claimant asserts, Coffey acted as agent for the Principal, then this approval and certification function of the fill material could constrain these functions of the Superintendent. However, the precedence clause 1.0 of the specification has identified that in cases of ambiguity within the contract, the specifications should prevail. Accordingly, to this extent it may be possible to construe that clause 3.1.12 provided a mechanism of agency regarding the testing and certification of the controlled fill that effectively rendered the Superintendent's duties in relation to this material under clause 29.3 nugatory.

110. In addition, the Claimant has asserted that the Coffey's testing duties letter was for the purposes of appointing Coffey as Geotechnical Consultant. This facsimile referred to the project and was directed to Matthew Morely of Coffey in which CAB stated *"please find attached a copy the Earthworks specification pages related to the following:*

- *Engagement of Geotechnical engineering Consultant*
- *Compaction*
- *Boulder walls*

This facsimile identified 6 pages for transmittal, however, I have only been provided with 5 pages in the Claimant's documents, and I assume without contrary material that the page relating to boulder walls is not included in the Claimant's material. This omission ought not affect this adjudication because boulder walls are not in issue. The Engagement of Geotechnical Engineering Consultant was linked to page 50 of the specification which referred to specification item 3.1.12 Engagement of Geotechnical engineering Consultant. In this facsimile there is no further reference to any other terms of engagement, nor does the Respondent require that the Geotechnical Engineering Consultant act as its agent. Accordingly, I am unable to find that this facsimile somehow strengthens an assertion that Coffey was the Respondent's agent. Furthermore, there are insufficient clear words in Clause 3.1.12 to specify the terms of the agency, which I find is necessary in this case because the effect of the agency would be to cut across some of the express functions of the Superintendent referred to above. I find therefore the Coffey was not the agent of the Respondent.

111. If I am wrong on this point, and that the letter constituted an engagement by CAB of Coffey, it would have to be on the basis that CAB, as agent of the respondent, was engaging Coffey as agent of the Principal. The

law in relation to the engagement of agents is that an agent cannot delegate authority to a sub agent, unless expressly or impliedly authorised to do by the Principal: *John McCann & Co v POW [1974] 1 WLR 1643*. Clause 3.1.12 expressly provides that the Claimant must appoint Coffey under the contract, so I cannot find that the Respondent gave authority to CAB to engage Coffey as its agent. This means that I find that the Coffey's testing duties letter cannot be construed as engagement of Coffey as agent of the Respondent.

112. The Respondent in denying the existence of agency makes particular note of the fact that Coffey, in accordance with clause 3.1.12, was unable to direct variations to the contract thereby proving that they could not be considered as agents. I do not accept that such a submission takes the matter this far, because Coffey could well act as agent of the Respondent under the contract in representing the Respondent without the power to direct variations. The power to direct variations was expressly given to the Superintendent under Clause 36 of the contract, and the Respondent has no power under the contract to direct variations, so that its agent would equally have no power to do so.

113. However, for the reasons that I have already outlined, and in absence of any further specific material identifying the actual terms of engagement of Coffey as the Respondent's agent, I find that no such agency relationship exists. This means that Coffey could not bind the Respondent to pay the Claimant because of its certification and approval role so that the GCC provisions are preserved in requiring certification by the Superintendent.

114. I also find that one could not construe the Coffey's testing duties letter as an engagement by the Superintendent of Coffey because it is in direct contradiction to the words in Clause 3.1.12 that required the Claimant to allow in its tender to engage Coffey. There are no words in the testing duties letter to suggest that Coffey was engaged as an agent of the Superintendent. Furthermore, Coffey was expressly prohibited by Clause 3.1.12 from authorising variations without approval of the Superintendent. The material points away from being able to find that Coffey was the Superintendent's agent, and accordingly I find that Coffey was not CAB's agent as asserted by the Claimant.

b. Whether Coffey is a subcontractor of the Claimant

115. Whilst the Claimant bears the legal onus in relation to its claim, the Respondent throughout its submissions in support of the payment schedule asserts that Coffey was the Claimant's subcontractor. The reason for such an assertion is that if I find that Coffey was the Claimant's subcontractor, then the Claimant was bound by Coffey's conduct, with the effect that the negative variation claimed by the Principal could be justified on the basis that the fill material was substandard and that the Claimant's subcontractor Coffey had failed to warn or ensure that the fill was of adequate standards. To this end, therefore, this assertion by the Respondent needs to be supported by the material as a matter of an evidentiary onus, which the Respondent is required to discharge.

116. I'm obliged to conduct this adjudication in accordance with the Act, and it is necessary for me initially to refer to s24 (4) of the Act which provides that:

> *"The Respondent can not include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule served on the Claimant."*

I have already stated that there are a significant number of submissions by the Respondent in the response in relation to the claim that Coffey was the Claimant's subcontractor, and this point was not taken anywhere in the reasons for withholding payment in the payment schedule. However, I characterise these submissions in relation to the status of Coffey as subcontractor of the Claimant as being in response to the application made by the Claimant and not as forming another reason for withholding payment. The status of Coffey in the project itself I find is not a reason for withholding payment, so that I find that I am obliged to consider these submissions.

117. The Respondent's principal submission in relation to Coffey being the Claimant's subcontractor is contained within it's submission 7(d) in which it stated:

> *"At all material times, Coffey was a subcontractor of BMD and did not have the requisite authority to vary the terms of the contract. Prior to the design of the project, HFS engaged Coffey to prepare a Geotechnical report. As a result of Coffey's prior involvement with the project, HFS nominated Coffey as a subcontractor to BMD to act as the Geotechnical Consultant as outlined in 3.1.12 of the specification."*

Given that the Respondent has asserted that it nominated Coffey as a subcontractor, it is necessary to have regard to the provisions of the contract. The definition in clause 1 of the GCC makes no reference to a *nominated subcontractor*. However, in the GCC there is reference in the definition section to *selected subcontractor* which *has the meaning in sub clause 9.3.*

Clause 9 of the GCC refers to assignment and subcontracting and in particular provides as follows:

> *"**9.3 Selected sub-contract work***
>
> *If the Principal has included in the invitation to tender a list of 1 or more selected subcontractors for the particular work, the contractor shall subcontract that work to a selected subcontractor and thereupon give the Superintendent written notice of that selected subcontractor's name.*
>
> *If no subcontractor on the Principal's list will sub-contract to carry out the select subcontract work, the contractor shall provide a list for the written approval of the Superintendent.*
>
> ***9.4 Novation***

When directed by the Principal, the contractor, without being entitled to compensation, shall promptly execute a deed of novation in the form included in the invitation to tender, such deed being between the Principal, the contractor and the subcontractor or selected subcontractor stated in item 18 for the particular part of WUC.

9.5 Contractor's Responsibility

Except where the contract otherwise provides, the contractor shall be liable to the Principal for the acts, defaults and omissions of the subcontractor's (including selected subcontractors) and the employees and agents of subcontractors as if they were those of the contractor.

Approval to subcontract shall not relieve the contractor from any liability or obligation under the contract."

118. There is no material identifying a list of *selected subcontractors* provided in the contract. In addition, although neither party had made submissions on this point, there's no material pointing to a deed of novation from Coffey as the original Geotechnical Consultant of the Respondent (which I have found) to the Claimant as contractor. In addition, there is no definition of *subcontractor* either in the GCC, or in the interpretation clause 1.2 of the specification.

The references to Coffey as Geotechnical Consultant are provided in clause 1.7.1 (c) and 1.7.2 (d) which refers to *Engagement of Coffey Geosciences Pty Ltd as Geotechnical Consultant.* Furthermore, there is reference in clause 1.4.1 as to the engagement of a Geotechnical Consultant which refers to clause 3.1.12 which has been referred to earlier. I have been unable to find in the form of tender (lump sum), form of agreement and the conditions of tendering together with annexure's part A and B to the GCC the existence of any list relating to selected subcontractors or the name of Coffey. Coffey's name clearly is referred to within the specifications, however, I am unable without further material to characterise the specifications as "the invitation to tender". Accordingly, I am unable to find that Coffey was considered a *selected subcontractor* in terms of Clause 9.3.

The specification makes further reference to subcontractors as follows:

*"**1.32 Subcontractors***

The contractor's attention is drawn to the general conditions of contract concerning "assignment and subcontracting".

Where any subcontract is let, the same conditions of contract shall apply in all applicable details to the subcontract as apply to the main contract. The same conditions shall apply to any nominated supplier of goods and/or services.

> *Before the main contract is signed, the approval or rejection of any of these firms shall be made in writing by the Superintendent to the contractor and an agreement will be made as to the firms chosen as approved firms. This list will then be attached to, and form part of the contract. Such list will remain confidential to protect the contractor.*
>
> *Subcontractors and others employed for any section of the works will be required to conform in all detail to the general program of the work and strictly in accordance with the time schedules as set out by the contractor. The contractor shall be responsible for all payments to subcontractors and shall be responsible for delays caused by their subcontractor's failure to adhere to the program."*

119. Given that the contract does not provide me with guidance regarding the meaning of *subcontractor*, in accordance with the rules of construing a contract by giving the words their ordinary meaning, I have had recourse to a dictionary meaning of the words *subcontractor* and *consultant* so as to obtain assistance before classifying the status of Coffey under the contract. I turn firstly to the meaning of *subcontractor* in the New Penguin English Dictionary published in 2000. The dictionary definition refers to the word *subcontractor* as a noun in the same paragraph where *subcontract* as a verb is the defined as follows:

> *"1 To engage a third party to perform under a separate contract all or part of (work included in an original contract).*
> *2 To undertake (work) under such a contract.*

In analysing the dictionary definition I have concluded that the *subcontractor*, which is the noun, is the third party who has been engaged to perform all or part of the work under a separate contract. The difficulty I have in finding that Coffey was a *subcontractor,* is that clause 3.1.12 of the contract specifically requires the Geotechnical Engineering Consultant to carry out inspections and testing under the contract. It is not an obligation of the Claimant to carry out this work, which it could then oblige subcontractors to carry out on their behalf. In my mind to engage a *subcontractor* connotes delegating duties that a contractor may have to a subcontractor to carry out in their stead. Based on this interpretation, I am unable to find that Coffey is the Claimant's *subcontractor*. I will also have recourse to Halsbury's Laws of Australia to check whether my conclusion is plausible.

120. Before doing so, I considered it prudent to have regard to the dictionary definition of *consultant*, because that term is used extensively throughout the contract documents to describe Coffey's functions as a Geotechnical Engineering Consultant. It may assist in determining Coffey's status. The Penguin dictionary describes *consultant* as *"an expert who gives professional advice or services…"* Whilst this does not assist much in determining the status of Coffey, it provides some guidance that Coffey is in a position of providing professional services.

121. Returning to term *subcontractor*, para [65.70] of Halsbury's refers to a *subcontractor or supplier* as follows:

> *"The contractor is usually permitted to, and does, let the work or parts of it to subcontractors and suppliers. The sub-contract is a party who agrees to provide labour or labour and materials or to make a part of the work…often the proprietor, normally on the advice of his or her design consultant, retains and exercises the right to direct the contractor to engage a specific subcontractor or supplier. A subcontractor or supplier who is imposed upon the contractor in this way is called a nominated subcontractor or a nominated supplier."*

I have already found that the Claimant did not have testing and certification duties, as Clause 3.1.12 specifically required Coffey to carry out these duties, and particularly to certify work by means of a RPEQ certification. None of these duties were required to be carried out by the Claimant under the contract, so I conclude that Coffey was not the Claimant's subcontractor.

122. In addition, when one has regard to Halsbury's Laws of Australia with reference to *consultants* the context is generally on the basis that the owner engages the consultant. However, this is at odds with clause 3.1.12 of the contract that specifically requires the Claimant to engage as a consultant. Nevertheless, the functions of the *consultant* under 3.1.12 is to carry out testing in accordance with a laid down regime under the Australian Standards with no less than a minimal amount of testing to be carried out, but with testing within the discretion of the Geotechnical Consultant. RPEQ certification is required, and boulder wall stability is also to be certified. As a matter of commonsense, these are not the duties of a contractor. Having regard to the functions required to be carried out by Coffey and the dictionary definitions and Halsbury's Laws of Australia definitions, I cannot find that Coffey could be a subcontractor of the Claimant, because in my view a *subcontractor* is subject to the direction of the contractor. Clause 9.5 of the GCC provides that the contractor retains the obligations to the Principal for the subcontractor's acts, defaults and omissions of subcontractors (including selected subcontractors). It is my view that the Claimant could not be considered responsible for the acts, defaults and omissions of Coffey who had the discretion to carry out whatever testing it liked and had to provide certification of the quality of the fill without being constrained by direction from the Claimant as contractor. Accordingly, I find that it is not possible to characterise Coffey as a subcontractor on the material provided to me.

123. I draw the inference from the material, and in particular the documents identified above, that Coffey is more likely than not to be considered as an independent expert checking and certifying the quality of the material on the project, who is neither under the direction of the Claimant nor the Respondent. In Coffey's Geotechnical Report, which I have found was part of the contract documents, on page 4, Coffey recommended that a minimum of Level 2 Overview, as defined in Appendix B of AS3798-1996 was recommended. Clause 3.1.12 of the specification increased this level of overview to a Level 1. I have considered Item B2 *Geotechnical Testing Authority* in AS3798-1996

because it is specifically referred to in the contract documents, even though it was not provided to me in either parties' material. In both Coffey's Portion A and B certificates Coffey specifically referred to Level 1 Overview in AS3798-1996, so it was important in my view to find out what was prescribed in this standard. The opening words strengthen my conclusion that Coffey was akin to an independent expert. The standard, as far is relevant to the introductory words and Level 1 responsibility (which is expressly referred to in Clause 3.1.12 of the specifications states:

> *"The owner (and for that matter also the constructor), should be satisfied that the geotechnical testing authority has the necessary independence and is equipped and competent for all testing called for…The geotechnical testing authority should forward results of tests as soon as practical to allow construction to proceed with minimal delay and to assist in decisions on any necessary alterations to construction procedures…Broadly, three levels of responsibility may be identified:*
>
> *(a) Level 1 The geotechnical authority provided a full-time inspection and testing service on all earthworks (including stripping, proof rolling, and associated operations), on the project and decides the locations and timing of sampling and testing operations.*
>
> *On completion of the earthworks, the geotechnical testing authority may be required to provide a report setting out the inspections, sampling and testing it has carried out, and the locations and results thereof. Unless very unusual conditions apply, the authority may also be required to express an opinion that the works, so far as it has been able to determine, comply with the requirements of the specification and drawings.."*

124. This level 1 supervision referred to in the Appendix mirrors very closely the duties carried out by Coffey on this project, and strengthens my already formed view that Coffey's status was not as agent for the Respondent, nor a subcontractor of the Claimant, but rather akin to an independent consultant.

125. Suffice is it to say that, for the purposes of this adjudication I find that the actions of Coffey did not bind the Claimant or the Respondent in the administration of this contract.

Whether the payment schedule correctly determined the negative variation for the lime stabilisation

126. The Claimant argues in submission 8 that the lime broadcasting was at the direction of Coffey, who acted as the agent for the Respondent and Superintendent, in directing that lime be broadcast to deal with acid sulphate levels. The Respondent argues that the provision of lime was a provisional quantity under Clause 1.30 of the specification, which was to be expended at the discretion of the Superintendent, and deducted from the contract sum, if it was not expended.

127. I have found that Coffey was not the Respondent's agent, and could not as a matter of law have been engaged by CAB (already the Respondent's agent) to act as the Respondent's agent. I have also found that Coffey could not be considered as an agent of the Superintendent. There is no material to support an assertion that the Superintendent directed the use of this lime stabilisation. The Claimant's material was based solely on Coffey's lime recommendation, and I have found that Coffey could not bind the Superintendent to expend money for this work.

128. I find the Respondent's reference in the payment schedule to this lime procedure as Cost Schedule Item 3.3.1 is consistent with the blank Civil Works Schedule on page 20 of the specification. The words "*Extra over for addition of lime"* does not of itself indicate that it was a provisional quantity. However, when one looks at Progress Claim No.6 by the Claimant in the payment claim, I note the Item 3.3.1 is now identified as (PROVISIONAL QTY), with the same Tender Quantity of 3418m^3.

129. I have not been given material to explain why all the Earthworks Schedule 3.3 Items now carried the words (PROVISIONAL QTY), which was not evident in the tender documents Items 3.3.1 through to 3.3.4. Nevertheless, the fact that the Claimant referred to Coffey's lime recommendation as support for its claim, suggests that the parties were considering this item as a provisional quantity because it had to specifically directed, and I find that this is the case. Furthermore, clause 1.30 of the specification specifically identifies provisional quantities being expended only at the discretion of the Superintendent, and there is no material to suggest that the Superintendent directed this expenditure. In the event that the amount was not directed by the Superintendent then Clause 1.30 required that the sum be deducted from the Contract Sum before final payment is made to the Contractor.

130. I find that this work was not directed to be done by the Superintendent, which results in the amount being deducted from the contract sum, and I find that the payment schedule, relying upon the Superintendent's earlier certificates correctly identified this deduction and correctly calculated the sum as a deduction of $4,135.78. I carry this sum to my calculations of the adjudicated amount below.

Whether the payment schedule correctly determined that the fill material was defective, the amount of defective fill material and the value of the deemed variation

131. Whilst in reality this heading consists of the 3 distinct issues already identified above, it was necessary to review the matters together, because of the volume of material and the fact that for the most part these issues were contained within the same document. I will draw the distinctions after review of the material, and my findings on the material. If I find that the payment schedule did not correctly determine the issue, then I will make a decision on the issue by having regard to the facts that I have found.

132. The quality of the fill material under the contract forms the substantial part of the dispute between the parties. Essentially the Claimant rejects the notion that the fill material was substandard because it had been approved by Coffey who had provided appropriate certifications. The Respondent on the other

hand relies upon the Superintendent's determination of 11 May 2005 that a certain component of the fill material was defective on the basis that some of the fill material exceeded the 150mm maximum dimension.

It appears from the material that from 4 April 2005, the consequences that followed from the "over sized material" was that Northbuild, the building contractor carrying out foundation and trench excavation work stated that it intended lodging claims for additional costs, collectively called the "overbreak claims". The basis of the overbreak claims, according to the "CBR15 letter" related to the excavation of oversize material in the fill which resulted in "over break" in foundation and trench excavations that required back filling with CBR 15 material or with concrete. The "Northbuild's variation 19 claims" and "Northbuild's variation 3 claims" claimed $75,565.71 and $65,419.52 for the costs associated with this work and "Ashburner's variation claim" of $2,508 were also for costs relating to this work. I refer to these claim documents and the CBR15 letter collectively as the "overbreak documents"

133. At this stage it is important to note that in reaching my decision I have not taken into consideration the "overbreak claims" or the "overbreak documents" or any assertions in support thereof, including further anticipated claims as a result of this "defective work". I do this for a number of reasons, viz.:

(i) These claims arise out of a separate contract which is not the subject of this adjudication.

(ii) If the Respondent's inclusion of the overbreak claims and overbreak documents was to respond to the Claimant's submission 30e to show damage, the Respondent quantified a claim on it of $143,265.23 so far. I note that the Respondent has not directly asserted that the overbreak claims are damages, however, if such claims are to be considered as damages by inference, I find that I cannot value the Respondent's claim for damages because there is no basis to do so under the contract. The only contractual provision relating to a "set-off" is contained within Clause 37.6 where the Respondent could "*elect that moneys due and owing otherwise than in connection with the subject matter of the contract also be due to the Respondent pursuant to the contract.*" The Respondent has not show that it did so elect, nor have I material on which to find that there were moneys are due and owing. In any event, I am of the opinion that the adjudicator's functions does not extend to valuing the Respondent's damages.

In the case of Hargreaves referred to earlier, at para 41, Hodgson JA said that an adjudicator could consider damages for the claimants if they can be considered as part of the total price of construction work, but otherwise he said that damages for breach of contract could not be considered, as they are not an amount due for construction work. If damages for breach of contract cannot be considered by the adjudicator in valuing a claimant's payment claim, I am of the view it could also not extend to damages for breach of contract claims by respondents. In my opinion, the only other potential for a set-off available to the Respondent is provided in s14(1)(b)(iv) in which one can value the estimated cost of rectifying defects. However, there is no authority to support valuation of the

Respondent's damages claim, if indeed the Respondent is trying to advance such a claim by implication.

(iii) If, however, the reason for the Respondent including the overbreak claims and overbreak documents was that they are specifically provided to support its reasons referred to in the payment schedule, then I need to consider the matter in a little more detail. The payment schedule, provided inter alia:

- the CBR15 letter; and
- reference on page 5 to "***Deductions made:****…($95,000) plus damages*"; and
- reference on page 10 to the "deemed variation" letter from the Respondent to CAB in which it reserved its rights to seek compensation for the consequential losses resulting from the oversize material; and
- further reference on page 10 to foreshadowed claims by Northbuild in excess of the $95,000 defective work deduction but stood by the assessment (presumably of the $95,000 deduction) until such time as Northbuild fully quantified its claim

I remain of the view that these are still damages claims because the assertion is that the Respondent is liable to compensate Northbuild and others for their claims because the Claimant breached the contract by providing oversize fill, which for the reasons I have already provided, cannot be considered in an adjudication decision. s100 of the Act preserves the parties' rights to deal with these issues in another forum.

134. The Superintendent's determination on 11 May 2005 follows from a history of instructions relating to the defective material from 4 April 2005, as already identified from the listed documents above.
135. I have decided to analyse the facts in their historical context regarding the oversize material because this draws together the arguments from the Claimant's and Respondent's perspectives of what the contract requirements for the fill are.
136. I need deal with the Superintendent's various instructions during the course of the contract because these instructions have been relied upon by the Respondent in the payment schedule.
137. The Superintendent is not a party to the contract, and I was initially reluctant to traverse its conduct and make any findings in that regard, because at first blush such an exercise could be considered to fall outside the restrictive requirements laid down in s26(2) to which I have already made several references. I had concerns that dealing with the Superintendent's valuation of the negative variations could be construed as a breach of natural justice because I did not ask for submissions from the Superintendent. However, the Superintendent is not a party to this dispute entitling it to be heard, and the restrictive nature of the adjudication does not contemplate access to the adjudication process by third parties. Furthermore, my reluctance was unable to withstand the overriding duty to consider the provisions of the construction contract, the payment claim and schedule and the respective submissions of the parties in support thereof as required by s26(2). At the outset, Clause 20 of the GCC specifically obliges the Respondent (who is of course a party to

the contract) to have a Superintendent. Essentially the contractual obligation regarding the Superintendent's valuation is sheeted home to the Respondent, and I am obliged to consider the provisions of the contract, particularly since this valuation is the basis of the payment schedule. Furthermore, Hargreaves is authority for me deciding the true merits of the payment claim, and this requires regard to the conduct of the parties and the Superintendent on this project. It is not possible to isolate the Superintendent's conduct regarding the valuation from the material that needs to be considered. The first paragraph of Clause 20 provides:

> *"The Principal shall ensure that at all times there is a Superintendent, and that the Superintendent fulfils all aspects of the role and functions reasonably and in good faith."*

138. The earlier and later instructions, the Superintendent's determination and subsequent documentation and the reliance on these documents by the Respondent in the payment claim and response requires me to carry out this analysis so as to fulfil my statutory obligations. I need to consider the conduct of the Superintendent to determine, whether in the particular circumstances the Respondent has adhered to the requirement that *"The Principal shall ensure that.....the Superintendent fulfils all aspects of the role and functions reasonably and in good faith."* This conduct is in issue in this adjudication because the genesis and support for the negative variations arises from what the Superintendent has done, and these negative variations essentially encompass this payment dispute. If I find that the negative variations were not identified and valued reasonably, then I am obliged by this Act to value them based on the material before me. I appreciate that this may be a difficult exercise, and it would be so much easier to merely rely upon the Superintendent's functions carried out under the Act. However, my statutory duties oblige me to consider the true merits of the payment claim. Furthermore, it is only by reference to the historical context of the contract administration that inferences can be drawn from the facts to decide whether such valuation was reasonable and also what are the actual facts regarding the dispute, on which I may safely make a valuation of the adjudicated amount. I will confine the inquiry to issues of *reasonable conduct*, as notwithstanding my statutory obligations, I do not think that adjudication is an appropriate forum to determine whether or not the Superintendent fulfilled its role *in good faith*.

139. I have already made a finding about the negative variation for the lime stabilisation claim, so I do not need to consider this matter any further in my present inquiry. It is to the oversize material in the fill negative variation that the attention must now turn.

140. The first defective fill instruction on 4 April 2005 identified fill material greater than 75mm which was outside the specified requirements in Clause 3.2.4(b) that:

> *"Fill material to be free from stones, bricks, rubble over 75 mm maximum dimension…The grading of all fill material shall conform*

with grading B or C for Subtype 2.5 material in the Queensland Department of Transport specification for unbound pavements.."

The instruction further noted that if a future claim from Northbuild arose regarding oversize materials that these claims would be passed on to the Claimant.

141. At this point, it is important to put matters in historical context. By 4 April 2005:

1. Coffey's portion A certificate dated 9 March 2005 had issued. This certified the fill as controlled fill
2. Coffey's cobbles report dated 23 March 2005 had been sent to CAB
3. A letter confirming Certificate of Practical Completion for Portion A as at 31 March 2005, which was dated 4 April 2005 foreshadowed some oversize material which *"may result in a future claim from the building contractor"*

142. At this time, the Superintendent did not point to a provision in the contract that allowed for the Respondent to pass these claims on to the Claimant.

143. On 7 April 2005, the second defective fill instruction confirmed a claim was forthcoming from Northbuild, and foreshadowing potential consequential losses for the Respondent and in such an event the works undertaken would be considered as rectification of works done under the contract and not in compliance with the specification.

144. If I understand this instruction properly it appears that the Superintendent is suggesting that works undertaken (presumably by others – Northbuild?) could be considered as rectification of the Claimant's works under the contract. Clause 29.3 of the GCC allows the Superintendent to direct the Claimant to essentially rectify defective work, and if this is not done then the Superintendent may direct the Claimant to do one or more of a list of things, and I construe this provision as only allowing others to rectify this work, if the Claimant fails to comply with such direction. There is no material before me of such a direction having been given, nor of the failure of the Claimant to comply with the direction.

145. It is clear that the Superintendent convened a meeting on 8 April 2005. In JI34.3 the instruction requested the Claimant attend the meeting which was to be between CAB, the Claimant, the Respondent, Merrin and Cranston Architects and Northbuild, but the minutes of meeting only acknowledged the presence of the first three parties above, and so far as is relevant to this adjudication I find:

(i) The meeting was to discuss oversize material in the fill
(ii) It was acknowledged that the quality of the fill had been approved by Coffey
(iii) It was acknowledged that oversize material delivered to site had been crushed using a mobile crushing plant
(iv) Coffey's certificate acknowledged some oversized material and Coffey had been requested to confirm their certification
(v) Inspection of trenches was carried out by CAB and the Claimant and the *"volume of additional overbreak (and photographed as appended) did not appear to be substantial"*
(vi) There was discussion regarding a potential claim by Northbuild
(vii) Some CBR15 backfilling had occurred

(viii) The Claimant acknowledged some oversize material was present, but the majority of the material could be reused as backfill, and that observations on site indicated that the impact of oversize material on overbreak was negligible. Furthermore, the Claimant was prepared to meet with Northbuild rather than involve the Respondent, but that they were not prepared to fund other parties' activities, and that in the event of a dispute all parties had an obligation to minimise the cost of the work.

146. The 9 April photos attached to the minutes of meeting, which I find to be similar to the trench photos 1-7 dated 8 July 2005 from the Respondent's payment schedule, showed excavated material, but it was not possible to glean any indication whether material was oversize or not.

147. Instruction JI37 dated 18 April 2005 attached the CBR15 letter and suggested that the Claimant maintain its own records regarding trench overbreak

148. HFS-9 of the Respondent's material attached Progress Claim No.4 and extracts from Payment Certificate No. 4. As regards Portion B, the Certificate (which is undated, but by inference from the facts must have been after 11 May 2005, the date of JI.39), which referred to work up to 21 April 2005 included Variations with:

"Variance No. 2…	*-$4,135.78…*
Variance No. 5 …as per JI.39…	*-$95,000*

I can therefore infer that the fill work for Portion B was at least complete by 21 April 2005, if not earlier.

149. JI.39, which was the Superintendent's determination of 11 May 2005, then valued a deduction to be made from the contract to offset the Respondent from the damage it had suffered. This deduction was characterised as a variation to work under the contract by the Claimant. The valuation of the oversize material based on some observations by Peter Meadows on 7 April 2005, and calculations resulted in a figure of $120,906.00 ("value of oversize material"). This valuation was made in the context of a further reference to the Respondent suffering consequential losses and with the potential for the Respondent to suffer economic loss in excess of the value of the cost of placing the material, but without valuing the potential damage, the Superintendent then valued a deduction to the contract of 80% of $120,906.00, yielding a figure of $95,000.

The Superintendent made no reference to the contractual provisions as to how this oversize material was characterised as a variation. This was challenged by the Claimant in the dispute letter of 12 May 2005. In my view Clause 36.1 of the GCC required variations to be directed by the Superintendent in writing, and it is my interpretation that this connotes that the Superintendent's writing should precede the variation. Accordingly, as at 11 May 2005, it was not possible for this oversize material to be classified as a variation, because there is no material provided to me establishing that the Superintendent made such a direction in writing before the work was done. Furthermore, there is no basis as to why 80% of the value of oversize material was taken to be the figure for the deduction.

150. The Superintendent's JI.45 instruction in response to the dispute letter dated 23 May 2005 referred to the fill material exceeding the 75mm maximum fill size, and that this oversize material was considered to be *WUC* varied for the convenience of the Claimant, and under Clause 36.4 was valued as a negative change in the quality of the works. Clause 36.3, which provides for variations for the convenience of the contractor commences with the words, *"If the Contractor requests the Superintendent to direct a variation for the convenience of the Contractor…"*

I find from JI.45 that the Superintendent was putting forward a new basis for characterising the negative variation. However, there is no material before me to find that such a request was made by the Claimant, so I conclude that the oversize material could not be *a variation for the convenience of the* Claimant. Having reached this conclusion, I cannot find a justification for valuation under Clause 36.4, at this stage, because it was not a variation.

151. On 27 May 2005, the Certificate of Practical Completion for Portion B issued with reference to specific defects that were referred to in JI.52 had to be rectified as soon as practical. JI.52's list of defects made no mention of the oversize material.

152. On 30 May 2005, the Respondent sent CAB the "deemed variation" letter, which stated as follows:

> *"…Dear Mark,*
>
> *Re Presence of Rock in fill*
>
> *We are aware that there has (sic) been some boulders found on site. It is agreed that these were placed during the fill contract by BMD. The presence of these boulders is causing problems with subsequent work being carried out. As BMD are not removing the boulders and it is vital that work continues, as the Principal we elect to retain this defective work.*
>
> *Regardless of the progress of the work, we do not surrender our rights to seek compensation for consequential loss that may result from the presence of boulders in the fill…"*

It has not been established from the material that the Claimant received advice of the deemed variation at this time, so I find the existence of a deemed variation arose on receipt of instruction JI.51.

153. The 1 June 2005 instruction on breach facsimile JI.51 stated that JI.45 had identified the breach of contract in the oversize material classification exceeded a fill size of 75mm and that this oversize material was a variation to the contract and valued the potential damage to the Respondent at $95,000. It added that JI.45 restated that the fill work was varied for the Claimant's convenience and valued under Clause 36.4, and that the monetary penalty justification remained.

It then referred to Clause 29.4 and the Superintendent directed a deemed variation on the basis that the Respondent elected to accept the oversize material, and added that the deemed variation was for the Claimant's convenience and valued under Clause 36.4. It added that the Superintendent's determination was consistent with the contract.

I find that the Superintendent had found another new basis for characterising the variation, but find that the deemed variation approach was contemplated by Clause 29.4, and I find that the Respondent had elected to accept the oversize material. However, in JI.51 the Superintendent maintained the assertion that it was a variation for the convenience of the Claimant, and that the monetary penalty justification remained. It is by no means clear why the Superintendent insisted that the variation was for the convenience of the contractor. I have found that there was no contractual basis for making such a variation. Furthermore, the reference to a monetary penalty at this late stage (1 June 2005) taken in context of all the dealings between the parties over the oversize material that I have referred to above, leads me to draw the inference that the $95,000 was valued by the Superintendent as some sort of penalty to compensate the Respondent from claims by Northbuild and others.

154. The $95,000 remained the valuation by the Superintendent of the deduction, despite there being at least 3 different bases for characterising this deduction from 11 May 2005 through to 1 June 2005.

155. I will now split up my analysis to consider each issue separately, and the quality of fill is the first port of call.

c. Was the fill defective under provisions of the contract?

156. The Claimant's first assertion in its submissions is that the parties in pre-contractual meetings agreed that non quarry fill material would be used as fill. The Respondent agreed that these meetings took place but denied that there was alteration to the specified requirements of the fill. The Claimant did not provide any further material on which I could find that there was agreement as to a term of the contract regarding the use of non quarry material. Given that I was not referred to any documents supporting this assertion, I presume that the Claimant is alleging the existence of an oral term.

157. The Respondent on the other hand referred to the tender assessment meeting minutes, which I find was held on 22 November 2005 and formed part of the contract. In particular in Item 1.5, I was referred to the statement that option B fill material was to be adopted for the contract. The Respondent also attached a facsimile from the Claimant dated 26 November 2004 containing the alternative fill offer, which I have also found to be part of the contract, which referred to another source of material and a price for this material.

158. I prefer the Respondent's version of events regarding the fill material because it is more likely that an important issue regarding fill quality would be negotiated in writing, and this is supported by 2 separate documents dealing with fill quality. Accordingly, I will only have regard to the written terms regarding fill quality as disregard the Claimant's submission that there was an agreement regarding non quarry fill.

159. In submission 4, the Claimant asserted there were 4 ways to determine the fill size and initially focussed on submission 4(d) which provided that Coffey was appointed by the Supervisor (I take this to mean the Superintendent) and that Clause 3.1.12 of the contract provided that Coffey needed to supervise the placement, compaction and suitability of fill.

160. The Claimant's submitted that the fill material complied with the contract because Coffey provided appropriate certifications regarding the fill, and Coffey was the Superintendent's representative on site. I have already found that Coffey was not an agent of the Superintendent, so this submission must fail.

161. In submission 7, it tied the Respondent into having to pay the full amount for the fill because of Coffey's approval of the fill. I have found earlier that Coffey was not the agent of the Respondent, so I find that the mere approval of fill by Coffey does not bind the Respondent to pay.

162. I must now have regard to the other bases for determining fill suitability dealt with by the Claimant and Respondent. Both parties agreed that Clause 3.2.4 was one basis of determining fill suitability with a maximum dimension of 75mm. Whilst this was the initial position adopted by the Superintendent, in JI.39 it changed its requirement from a maximum size of 75mm to that of 150mm based on Drawing C20, and I find that it was entitled to do so under Clause 8.1 of the GCC on the basis "*upon otherwise becoming aware*" of a discrepancy. I will need to turn further to this exact wording later, but it is unnecessary to further consider submissions regarding the 75mm criterion (or the consequences of this requirement, including the "rubble" submission) any further because it was considered ambiguous and was read down by the Superintendent.

163. The Claimant in submission 4(b) suggested that the Earthworks Notes on Drawing C20 refers to fill with a minimum particle size not exceeding 150mm. I find the words used in this note are actually, as stated by the Respondent as, "*..Suitable materials for filling should generally have a maximum particle size not exceeding 150mm…*" I have already referred to the Superintendent being able to clarify an ambiguity (under Clause 8.1 of the GCC) between a particle size of 75mm as specified in Clause 3.2.4, and that of Earthworks note 5 on Drawing C20 of having a maximum particle size not exceeding 150mm. I find thus far that this constituted the maximum dimension for fill material. I reject the Claimant's submission that Drawing C20 should be read in light of Coffey's testing duties which only provided clause 3.6.3 because I find Coffey was not in a position to be directed by the Superintendent about its duties. It is not clear why only parts of the specification were provided to Coffey, and Mr McMahon in his statement said the CAB had sent the specification, but I cannot find that the limited material provided to Coffey thereby constrained classification of the fill material using the *backwards calculation* that I reject below. Although it is open for Coffey's to say that the rock size could be 2/3 the layer thickness and still be in accordance with Australian standards, I find that the Claimant was responsible for complying with the fill material requirements, whatever Coffey's responsibilities may have been.

164. In submission 4(c) the Claimant asserts that by reference to Clause 3.6.2 a stone size of two thirds of the uncompacted layer depth was permissible, and the layer thickness was 300mm, resulting in a maximum

particle size of 200mm. The Respondent rejects this approach on the basis that this is a work method clause and not a material specification clause. I agree with the Respondent's submission. In construing the meaning of contract one looks to the words to find out what the parties' agreed. In my view the strict statutory interpretation rules of the requirement to disregard headings does not apply in determining what the parties meant under a contract. Having regard to Clause 3.2.4 Fill material, and *b: General Requirements* in particular, it is my view that these general requirements of the fill material prevail, unless some other specific provision deals more specifically with the matter. The heading to Clause 3.6 refers to compaction, and the body of the clause deals with issues associated with compaction, and in my opinion this does not constitute a specific requirement of the dimensions of fill material. One has to *work backwards* from uncompacted layer depth in Table 3.3 to calculate stone size under Clause 3.6.2, and I do not find that such a *backwards calculation* is what the parties contemplated at the entry of the contract. It is more logical that the specific fill material criteria be followed, and this could then govern the layer thickness by *working forwards* in Clause 3.6.2 without causing any ambiguity in interpreting the contract. Accordingly, I prefer to find that references to Clause 3.6 to determine specific fill material dimensions as an incorrect method.

165. I remain of the view and so find that the dimension of the fill material was provided in Drawing C20 as suitable materials for filling should generally have a maximum particle size not exceeding 150mm because the Superintendent has to power to direct the interpretation and construction to be followed. It is not appropriate in my view for the Superintendent to read down the words " s*hould generally have a maximum particle size not exceeding 150mm"* to state that this *meant non-compliant material was any material over 150mm* as submitted in the Respondent's submission 7(b). It is not for the Superintendent to read words into potential ambiguous clauses; they are obliged just resolve the discrepancy and direct the appropriate interpretation, without creating a new requirement.

166. Accordingly, I find that compliant fill material should generally have a maximum dimension not exceeding 150mm. As to what is meant by *generally*, I draw the inference that we are not dealing with precision materials, and I am prepared to be guided by Coffey, who was the Geotechnical Consultant with expertise in such matters. Coffey in *2.0 Investigations* in its cobbles report referred to some large fragments comprising about 5% of the materials excavated, and identified 1 large cobble of about 500mm. Coffey went on to say that the material was suitable as structural fill, and with the exception of the larger fragments complied with the Australian Standards for earthworks and CAB's specification.

167. I will return to Coffey's cobble report later, but suffice is it to say that Coffey's classification of 5% oversize materials in a trench excavation on 23 March 2005, seems to suggest material over 200mm fell into this category, and yet apart from the exception of a few larger fragments, this material was suitable for structural fill. This strengthens my view that classification of this material was not an exact science, and the word *generally* should be given a liberal meaning when classifying suitable material. As an aside I find it surprising that neither party nor the Superintendent sent the fill material for analysis to see whether the grading conformed with the Queensland

Department of Transport Specification, which was specified in 3.2.4 b) of the specification.

168. For the reasons I have already stated, and having considered the material, I do find that material should generally not exceed 150mm maximum dimension is oversize material. It is now necessary to consider, if any, the extent of oversize material.

d. *What is the amount of defective fill material*

169. This issue is the most difficult to resolve and the entire quantification of the oversize material in the payment claim hinges on the Superintendent's determination of 11 May 2005 because the payment schedule adopts the determination. I have already extracted JI.39 in its entirety and made further comments about the significance of this determination in the historical context of the contract administration.
I find that, despite the Superintendent changing the basis of classifying the deduction for oversize fill material in response, I infer in part, to the challenges made by the Claimant, the Superintendent did not appear to properly turn its mind after 11 May 2005 again to the quantification of the oversize material. It reiterated in JI.45.2 2b) that *"We have reviewed the evaluation method and considered the method to be reasonable..."* Furthermore, in JI.51.1 4) the Superintendent again stated that its determination was consistent with the contract.

170. With great respect to the Superintendent, and in the context of the administration of this contract, I cannot find that such a determination was reasonable for the following reasons:

(i) I find from the Payment Certificate No. 6 that this quantification of the oversize fill (based on a single calculation) which resulted in the deduction, to which I will turn under the valuation issue, comprised 80% of the entire deductions for Portion B and outweighed any single positive or negative deduction by no less that a factor of 2.6 and generally in the order of a factor of 100

(ii) Generally the variations in the Payment Certificate followed careful calculations, and by inference from the facts, some sort of measurement of the amounts e.g. *Deduction JI06.2/3.3.8 Import selected fill 165@19.52 = -$3,220.80,* whereas in this variation a global percentage of 12.2% defects was applied across the whole site, and then for a reason known only to the Superintendent the monetary sum was reduced to 80% of the calculated sum

(iii) Under the Superintendent's determination, the Superintendent based its entire quantification on observations made by Peter Meadows on 7 April 2005, who was on site observing rib footing excavations for the RACF building in his role as structural engineer. I note the Claimant's submissions that Mr Meadows' calculations should not have been made by him as a structural engineer, but rather by a Geotechnical Consultant. I find that as an engineer observing trench excavation he was in as good a position as anyone to make observations. I do, however, prefer Coffey's approach to the determination of unsuitable material because I infer that such work is part of geotechnical engineering. It is not clear how many observations were made by Mr Meadows on 7 April 2005, but I infer from

his observations that his investigation could probably be characterised as having taken one sample. Clause 2.7 of the specifications relating to *Material Properties* specifically requires a minimum of 1 type of sample to be taken every 1,000m^3. The calculations resulting from Mr Meadows' observations yielded oversize material of 6200m3, and there is no material to demonstrate that at least 6 samples were taken to verify the material properties of this fill.

(iv) I have had regard to Drawing 9383-C022 and find that the RACF building was in Separable Portion A. The observations relating to this building in a separate part of the contract was applied to the whole project (both Portions A and B) and the result was that the entire deduction was made on Portion B of the contract.

(v) The Superintendent applied Mr Meadows' observation on this building's rib footings across the whole site on the basis of an assumption that the percentage of oversize material would be consistent throughout the imported fill. Such an assumption is to my mind unreasonable because the Claimant submitted in 30a that fill had come from 6 different sources, and in response the Respondent submitted in 45(a) that *"it does not concern HFS where the fill came from. The fact that the fill came from 6 different sources is of no consequence to HFS."* Mr Wallace in his statement dated 21 July 2005 declared that there were a number of sources from which the fill material was sourced, and I accept his statement as there is no controverting material from the Respondent on this point. I find that the Respondent did not deny the existence of 6 different fill source sites, and I therefore find that fill came from 6 different sources. Such a finding means that the Superintendent's assumptions as to consistency of oversize material across the entire site cannot be considered reasonable

(vi) The calculation for the oversize fill material resulted in a calculated percentage of 12.2% oversize material across the site yielding a quantity of 6,200m^3 of oversize material. The parties both concede that Coffey was the Geotechnical Consultant and that Coffey provided certifications for the fill material for each Portion A and B. Neither party took issue with the competence of Coffey's work, nor have either alleged that Coffey failed to carry out Level 1 Overview. Accordingly, without contrary material I find that Coffey carried out Level 1 inspections, which meant that it was on the site carrying out daily testing and inspections. I cannot accept as a matter of commonsense that Coffey would allow over 10% of the fill material to be oversize, as this would have contravened its obligations on the project. There is no material to suggest Coffey had failed in these obligations.

(vii) In Coffey's cobble report, there was a concession that there were some large fragments comprising about 5% of materials excavated. I prefer to accept this report as a better indicator of the amount of oversize material in the fill because it was based on daily observations of an experienced Geotechnical Engineer. Mr McMahon's statement dated 25 July 2005, which I accept, without contrary material from the Respondent, confirmed his or his staff's constant attendance on site. I prefer Coffey's report and its Portion A and B certificates as to the adequacy of the fill material at the site rather than a determination based on 1 day's observations of some

trench excavation in a part of the site that did not relate to Portion B. In addition Mr Wallace confirms the attendance of Adam Crawford from Coffey, and that oversize material was in any event minimal. I prefer Coffey's assessment of the amount of oversize material because they are Geotechnical engineers whom I assume are well versed in such assessments, rather than Mr Wallace on this point, whom I consider would be more subjective in his assessment because of his position as foreman.

(viii) I am satisfied from Mr Wallace's statement and find that a mobile crushing plant was used on the site to crush all large sized particles. This is further substantiated by the minutes of meeting held on 8 April 2005 and I find that this plant crushed the larger particles, with the proviso that some large fragments still existed in the fill

(ix) The minutes of the meeting I find in JI35.5 confirmed that the Superintendent inspected the trenches with the Claimant and confirmed that the volume of overbreak observed and photographed did not appear to be substantial. Despite this admission, the Superintendent did not turn its mind to reviewing its calculation of 12.2% oversize material, which I cannot find to be insubstantial.

171. In my view the Superintendent did not act reasonably in determining the extent of the oversize material. The Respondent has relied upon this valuation in the payment schedule, and the Respondent is the person contractually responsible for the Superintendent's valuation, and I find therefore that it has failed to ensure reasonable certification of the payment claim on which it has relied in the payment schedule.

172. However, I do not need to decide, nor should I decide whether or not the Respondent is consequently in breach of its obligations. Adjudication does not quantify damages arising out of a breach of contract because such an inquiry is outside an adjudicator's jurisdiction.

173. Since I have found that the quantification of oversize material was not reasonable, I need to make an evaluation of this quantity, if I find that there was oversize material in the fill. In conducting this inquiry, which I find is necessary to provide a proper valuation of the payment claim, I am not at liberty to make my own determinations as regards whether the fill material is defective nor determine a suitable percentage from my own observations. This would breach the rules of natural justice. I must therefore sift and evaluate what the parties have submitted is the appropriate amount.

174. I have already said that the Claimant asserts that there is no defective (oversize) material because Coffey has certified the material as satisfactory. I find that this assertion was made is in the context that Coffey was the agent of the Superintendent or Respondent, and I have not found that Coffey was agent of either. In this event, for the Claimant to substantiate its assertions it needs to provide material to support its contentions without reliance on agency. It needs to do so in the context that I have found that oversize material is not considered over 200mm as the Claimant asserts, but generally should not exceed 150mm.

175. In conducting this analysis, I state that I have not had regard to the Superintendent's material for the reasons identified above. This means that I reject any of the Respondent's submissions in support of the payment claim as regards this aspect because I find that the classification of the oversize material and the quantification, which is dealt with later, was not determined

reasonably. I will now look to any other material that may assist because it remains for the Claimant to make out its case.

Photographs

176. There is no sieve analysis of the oversize material, and there are many photographs in the material, but very few of them depict a tape measure against a boulder. Furthermore, I cannot be satisfied that the photographs are representative of the whole area, not that it would be safe to draw my own conclusions from the photographs. I consider that photographs are akin to view in an arbitration or litigation, which merely provide a framework within which to consider other material. For example the 9 April photos to which I have already referred appeared to be identical to the first 7 of the trench photos, and did not demonstrate definitively that material was defective, but rather that there were some large fragments amongst smaller fragments.

177. However, photograph 10 in the trench photos showed a tape measure which indicated the maximum dimension of this rock as approximately 230mm, which I find is oversize. There was a folder placed on some rocks in other trench photos showing the relative size of the rock to the folder, but there was no dimension of the folder - see Photos 17, 18, 20, 25 in the trench photos. I am not much persuaded by the probity of these photographs in determining the difficult question of defective material, so apart from photograph 10 I have not considered the trench photos as proving defective material. Photograph 10 is merely demonstrating an oversize rock, and does not assist it identifying how much material is defective.

178. The claimant's photos were not helpful to me because I was not sure where they were taken on the project, and in the main did not depict fill material, and they have also not been considered in the decision

179. The 28 Jan 2000 photos depicted some large rocks, but it was not clear whether these had come from the fill, or were outsize rocks that were considered by Coffey in Mr McMahon's statement as being not suitable and placed in non structural building areas and I have not considered them in the decision. Furthermore, the date on the photos was 28 Jan 2000, so I considered it unsafe to have regard to them

180. The 18 May 2004 photos also depicted a date well before the contract, and although there is a spiral bound notebook against some of the rocks, I do not have an indication of the actual dimensions of this material and they have not been considered

181. The undated colour photos depicted what anyone could infer as large boulders in trenches but I have no means of knowing where these photos were taken so I have not had regard for them for quantification purposes. However, I do consider that they depict some significantly oversize material for which I had had regard, the extent of which is unable to be determined

Coffey's material

182. I have had regard to Coffey's material for a number of reasons:

(a) They are Geotechnical experts
(b) They had been involved in the project before the contract
(c) They were on the project daily
(d) They had the responsibility of certifying the fill material
(e) They were independent of the Claimant and Respondent

(f) I infer they have no pecuniary interest in the outcome of the adjudication

183. Coffey's Portion A certificate dated 9 March 2005 and Portion B certificate dated 11 May 2005 essentially certified that the fill and trench backfill could be regarded as controlled fill in accordance with AS2870. I have not referred to AS2870 because it deals with the quality of fill and backfill in relation to "Residential Slabs and Footings". However, I consider that such an inquiry by me without a sufficient connection as to how such a standard could assist, would constitute a breach of natural justice, and I cannot therefore glean anything from this document that could assist me in determining the adequacy or otherwise of the fill in the context of being oversize, and if so, the extent of such material. I therefore have not considered these documents in the reasons.

184. I have the same view of Coffey's geotechnical assessment as, so far as is relevant it is also a controlled fill certification amongst other thing. It therefore has not been considered further.

185. Coffey's cobbles in fill report (received on 1 June 2005) is relevant because it deals with the specific issue of oversize material. It classified large fragments as representing about 5% of the materials excavated in trenches of unknown location ("minor variation classification"). Coffey asserted that the 200 mm rock fragments should have been anticipated by the trenching contractor and only minor additional excavation works and bedding materials would have been required, and that the backfill with large fragments could be avoided if this was likely to cause a problem. The Respondent disagreed with Coffey on the minor variation classification and that 200mm fragments should be anticipate by a trenching contractor. There is no further basis of the disagreement, and I prefer to find that this minor variation classification is probative of the conditions of the fill material. I discount the issue about what a trenching contractor should anticipate because the trenching contractor was not part of the contract the subject of this adjudication. Such an issue merely goes to the issue of quantum of claim by Northbuild on the Respondent, and that is a damages issue with I will not consider.

186. Furthermore, Mr McMahon's statement is considered highly probative because it particularly relevant to the issue. He refers to 2 occasions where Coffey advised CAB of the rejection of oversize material, which was placed in non structural areas of fill, and also that rocks larger than 200mm were picked out by the Claimant. He reiterated that only a small percentage of oversize rock is often present in fill, and that they are generally crushed in the compaction process. I accept this material as being probative of the extent of oversize material

187. In summary, as regards Coffey's materials I find that the fill had a minor variation classification which contained about 5% of material between 200mm and 75mm, some of which therefore exceeds the fill requirement of 150mm. It is unclear what is the percentage of >150mm material of this 5% oversize material. In addition, Mr McMahon said that only a small percentage of oversize rocks are present in fill, but no quantification was made.

The Claimant's statements of its personnel

188. Layton Wallace' statement has already been referred to elsewhere and it supports the use of a crushing plant on the project. I therefore draw the

inference that there was oversize material delivered in the fill to necessitate reducing some rock size. He also pointed out that CAB was aware of the large rocks in the fill, but I do not consider that this would be unusual because the Superintendent had to have been aware of the problem. I do not give as much weight to his assertion that the amount of fill was minimal because it is likely to be considered a subjective comment made by a foreman on the job, whom I infer has less qualifications and experience than Coffey.

189. Mr Berzins 23 July statement is one by a professional engineer in the employ of the Claimant. He rejected the Superintendent's determination as being totally flawed in that:

(a) Peter Meadows qualifications to make geotechnical should be questioned. I did not consider that he had made geotechnical observation. I merely found that he had made observations which he as a structural engineer, is qualified to make.
(b) He argued that the frequency in such a small sample could not possibly have been representative. I have already found that it is unreasonable
(c) There were other comments on the classification and definition with which he took issue, particularly the 80% valuation

More importantly, for present purposes he referred to a sieve analysis of material >19mm from compaction tests and recommended that one retain and measure all oversize material to determine quantities, and that one needed to engage a NATA registered authority to prepare a report.

His sieve analysis calculations based on Coffey's tests yielded the following:

(d)	Portion A Allotment fill	8.5%	> 19mm
(e)	Portion A Fill under road	8.8%	>19mm
(f)	Portion A – imported fill	8.5%	>19mm
(g)	Portion B Allotment Fill	6.1%	>19mm
(h)	Portion B Fill under road	4.6%	>19mm
(i)	Portion B Imported fill	5.9%	>19mm

The Respondent did not take issue with his statement, however, through their criticism of Mr Clifford' calculations which drew on Mr Berzin's calculations, they criticised the foundation on which the sieve analysis was conducted, in particular on the basis that it was not representative because a large portion of the material would not have been considered, nor would have been capable of being part of the samples taken back to the laboratory for testing. I cannot accept the criticism entirely because there does not seem to be a basis for arguing that Coffey did not have a representative sample. However, it is possible that the material in the samples taken by Coffey would not have included the large boulders. However, I infer as a matter of logic that such large boulders, which only represent about 5% of fill, would not be used in the sample by Coffey because of the danger in skewing the results. Nevertheless, I accept that the results of the sieve analysis need careful treatment.

190. Mr Glen Clifford, an employee of the Claimant, with an Associate Diploma, in a statement made on 25 July relied on the sieve analysis of Coffey and the calculations of Mr Berzin and calculated from measurements

conducted from a plan that he attached that depicted the buildings on the site and made some assumptions regarding the site as follows:

(a) Only half the building area has footing and trenches
(b) Trench and footing depth of 500mm
(c) Coffey and Mr Berzin's summary of 8% material > 19mm

He calculated the total area of building s on the site as 12,800m^2 and taking half this area and multiplying by the trench depth of 0.5m and then 8% of that figure to get material >19mm yielded a volume of 256m^3, which he suggested could be estimated to be oversize, with the rider that the calculations were based on >19mm, when a >150mm calculation would have yielded a far less percentage. I find there is a rational basis for his calculations.

I have had regard to the Respondent's criticisms of this approach in relation to the assumption of taking ½ the footprint, which it asserts did not cover the extensive area of underground services, but no other figure was suggested. Accordingly, without contrary material as to the extent of underground services, which require trench excavation, I am prepared to accept Mr Clifford's assumption. The Respondent also disagreed with the trench depth, but offered no alternative, so I am prepared to accept Mr Clifford's assumption. I have already considered the criticism of the sampling technique, but I am prepared to find that Coffey as an experienced Geotechnical engineer, without further specific criticism, is capable of determining representative samples.

Accordingly, I am prepared to accept Mr Clifford's calculations, whilst being mindful that it was probably overstating the volume of defective material at 8%. Coffey had suggested a figure of 5%. However, the sieve analysis, with its attendant inaccuracies and assumptions, may be a more accurate figure than Coffey's estimate in the Cobble report.

191. I therefore find that the volume of unsuitable material, without contrary material from the Respondent is 256m^3. I now need to utilise this figure in valuing the deemed variation. I find that a deemed variation is available to the Respondent because defective material has been found to exist, and the respondent has elected to accept that defective material.

e. What is the proper value for the deemed variation

192. I have already found that the Respondent failed to ensure that the Superintendent acted reasonably in relation to quantifying the oversize material and from the material I have extracted above, I find that the quantification of the deemed variation is unreasonable for the following reasons:

(i) Although there had been changes to the approach of characterising the deduction, which ultimately was classified as a deemed variation, no changes to the calculation took place. I infer from this and the previous history of the deduction that the Superintendent that the Superintendent had no intention of changing its mind, despite certificates and statements from Coffey that the amount of oversize material was minimal

(ii) The Superintendent's view on the consequence of the oversize material on 4 April 2005 was that any of Northbuild's claims on the Respondent would be passed on to the Claimant. I have already found that there was no basis under the contract for such a deduction to be made on the grounds that it was a variation

(iii) Furthermore, matters did not change on 7 April 2005, when it instructed the Claimant that any remedial work that may be taken by others would constitute a rectification of the Claimant's works. I have also found that there is no contractual basis for such an approach

(iv) After the Superintendent's determination on 11 May 2005, the Superintendent on 23 May 2005 then characterised the Claimant's breach of contract as work varied for the convenience of the Claimant, which I have found could not fall within the provisions of the contract.

(v) I draw the inference from this material that as late as 1 June 2005, despite turning its mind to how to justify this deduction under the contract, the Superintendent never really reviewed its calculations of the valuation. At this time it was still justifying the application of a monetary penalty, which leads one to draw the inference that it remained of the view that this variation was to be characterised as a deduction for damages that the Respondent was likely to suffer. This was despite reference to a quantification by Coffey that the larger fragments represented about 5% of the materials excavated

(vi) On 22 June 2005, it was evident that the Respondent was also not satisfied with the Superintendent's determination because both parties were invited to dispute the Superintendent's determination and by this time I find that the *die was cast* in that the Superintendent was not going to change its valuation

193. With regards to the rate applied to this deemed variation regarding oversize material, I find that this rate was applicable because the Claimant did not take issue with this approach, and it was the cost to the Respondent in having fill material placed on the project. The valuation of a variation according to Clause 36.4(a) is initially done in accordance *with unit rates included in the ..Provisional Schedules..if in so far as the Superintendent considers is applicable.* I find that this rate was applicable to this work.

194. I also find that, without any controverting material from the Claimant that the Respondent had a contractual right to a deemed variation under Clause 29.4 as this is the thrust of that section, provided it arises out of a direction by the Superintendent that states that the Respondent elected to accept the material. I find that JI.51.1 at 4) on balance satisfies this direction. What troubles the Claimant is that it says there is not basis for such a reduction because of Coffey's certifications and approvals, and I have to deal with this issue.

195. I have found that the Superintendent had not reasonably valued this negative variation, which therefore puts the onus on me to do so.

196. I do not have the benefit of observations and the history of the project, so I have to rely on the facts established from the material and inferences I can safely draw from them. I have carried out this analysis from consideration of the material and have earlier accepted that there is 256m^3 of defective material in the project.

197. In valuing this variation I can utilise $\$19.52/m^3$ as I have found that this is the appropriate rate. This valuation $256m^3$ x $\$19.52/m^3$ = -$4997.12 is made under the valuation Clause 36.4 of the contract

198. I have made this valuation under the contract as a deemed variation under Clause 29.2, and so this valuation component has been calculated under the contract thereby complying with s14(1)(a).

199. I need to consider whether there should be a valuation under s14(1)(b)(iv) for the estimated cost of rectifying defective work. Since I have characterised the oversize valuation as a deemed variation, there is no need to consider this same issue under the valuation of defects provision.

200. I am prepared to accept the Respondent's calculation in the payment schedule regarding the return of 2.5% retention for Portion A, as now due to the Claimant. I note that the Claimant had not deducted retention in the payment claim, but in the two Progress Certificates 4 and 6 in the material, the Superintendent had deducted retention, so I assume retention is to be deducted, without any contrary material that there were bank guarantees or other security

201. I deducted the unused PC item of lime stabilisation of -$4135.78 in Portion B as well as the deemed variation of -$4,997.12

202. I have not been provided with Progress Certificate No. 5 to determine the previous amounts certified/and/or paid to date. Accordingly I have referred to the payment schedule for the contract sums for each Portion, which agreed with the figures in the payment claim and then made adjustments, if not already taken into account for the variations agreed to date, together with these variation calculations from which I deducted the amounts paid to date to determine the **adjudicated amount**. There was a discrepancy in the amount paid to date under Portion B. The Claimant asserted it was $1,108,343.39 and the Respondent asserted it was $1,102,573.53. I have taken the Respondent's figure because this was the Certified amount, presumably from Progress certificate No.5

Outstanding submissions of the parties not yet specifically canvassed

203. In order to adhere to the principles of natural justice I specifically refer to submissions that I believe were not specifically traversed in my findings, so that it clear that they have been considered by me

Claimant's submissions

204. In relation to submission 25, I find that the Claimant has not sought clarification of this discrepancy as provided in clause 8.1 of the GCC, as submitted by the Respondent, and until such time as this is done, it is unable to assert the correct interpretation of the word "dimension".

205. In relation to submission 28, regarding Coffey not directing the Claimant regarding fill material outside specification, I prefer Mr McMahon's statement that CAB was advised by Coffey of non-conforming fill, which he said was used in on structural building areas. Furthermore, Mr McMahon said that the Claimant was instructed by Coffey to remove oversize rocks.

206. In relation to submission 29, I found that the material did not have to be less than 75mm rendering this submission irrelevant.

207. In relation to submission 30d, I repeat my finding in relation to "dimension" and find that the Claimant has not approached the Superintendent for its determination.

Respondent's submissions

208. In relation to submission (a) I have found that the Superintendent had not followed the contractual procedure for the reasons outlined.

209. In relation to submission (b) I consider it irrelevant as to whether the Claimant should have issued a Notice of Dispute. The Claimant has the right to invoke the Act to seek an adjudicated amount, in addition to its other rights.

210. In relation to submission 27, I make no finding as to whether a stockpile was requested to be moved or not. I have found some oversize material existed and have valued that as a deemed variation

211. In relation to submission 30 I mad no finding on whether the Respondent had made varying claims in relation to fill size, as such claims, if any, were subsumed by the Superintendent's direction on appropriate fill size

212. In relation to submission 32, although I did not make a finding on this matter, it appeared that the Claimant had misinterpreted the Superintendent's comments in JI.45.1 2a) as suggesting that the Superintendent was making a determination outside the provisions of the contract, when in fact, as correctly stated by the Respondent, the Superintendent was merely alluding to the fact that it was not a party to the contract, and therefore could not be construed to have breached the contract as asserted by the Claimant in its dispute letter.

213. In relation to submission 41, it is not clear where this submission takes the respondent. I have found that Coffey had stated that the variations were minor, but have not taken into account their comments about what trenching contractors should anticipate because it related to issues outside this contract.

The adjudicated amount

214. I provide a calculation below of how the **adjudicated amount** of **$93,787.75** is calculated in order to assist the parties.

PORTION A		
Original contact sum		$460,149.99
Revised contract sum		$468,603.33
Value work completed		$468,603.33
Less retention 2.5% on $460,149.99	($11,503.70)	$457,099.63
Less paid to date	($445,595.93)	$11503.70
Plus GST	$1,150.37	
AMOUNT NOW DUE PORTION A		**$12,654.07**
PORTION B		
Value of work performed under payment schedule		$1,214,226.75
Less deductions		
• PQ Item 3.3.1 lime	($4137.78)	
• Deemed variation for oversize fill	($4,997.12)	
• Retention 2.5% of Revised Contract Sum of $1,150,417.31	($28,760.43)	$1,176,331.42

Less paid to date	($1,102,573.53)	$73,757.89
Plus GST	$7,375.79	
AMOUNT NOW DUE PORTION B		**$81,133.68**
ADJUDICATED AMOUNT		**$93,787.75**

215. Accordingly, the adjudicated amount is **$93,787.75**

Due date for payment

216. I must have regard to s15(1)(a) of the Act, because the contract makes provision about the due date for payment. There is no material to suggest that the contract was subject to a pay when paid clause, so I find that it does not contravene s16 of the Act. There is no material to suggest this was a construction management trade contract under s67U of the BSAA, and I have already found that it was not a commercial building contract so that s67U and s67W of the BSAA do not apply.

217. Progress payments (under clause 37.2 of the GCC) are required to be made 7 days after receipt of a progress certificate. The Superintendent has to issue a progress certificate within 14 days of receipt of the progress claim. Item 28 of Part to the GCC provides that the progress claim is to be on the 21st day of each month. However, I have found that the payment claim was delivered on 28 June 2005, and I have no material to suggest that the Claimant had sent Progress Claim No.6 any earlier. I infer that the Progress claim was only sent under cover of the payment claim. Accordingly, in relation to this particular progress claim which I find was received on 28 June 2005, I calculate that the progress certificate had to issue by 12 July 2005 (14 calendar days after receipt of the progress claim). This means that the due date for payment for this claim is 19 July 2005 (7 days after receipt of the Progress certificate.

218. I find that the due date for payment is 19 July 2005.

Rate of interest

219. I have already found that the payment claim is not subject to the provisions of Part 4A of the BSAA. This means that s15(2) of the Act applies to determine the rate of interest payable on the unpaid amount of the progress payment. I find that Item 30 of Annexure Part A to the GCC provides a contractual rate of interest of 2% per annum. S48(1) of the *Supreme Court Act 1995* refers to the rate of interest as prescribed by Regulation and currently Regulation 4 has fixed interest at 10% per annum. Accordingly, I find that the 10% interest is the greater rate, and I find this is the applicable interest to apply to the adjudication

220. I find the rate of interest is 10% simple interest payable on the adjudication amount.

Adjudicator's fees

221. The Claimant has obtained substantially what it claimed (80.5%) 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. However, in my view costs should follow the event, because the Claimant has substantially succeeded in the adjudication.

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

Decision summary

223. For the reasons set out above, I have decided that the adjudicated amount in respect of the Adjudication application dated 25 July 2005 is **$93,787.75** (including GST), the date on which the amount became payable is **19 July 2005**, and the applicable rate of interest payable is **10.00%** simple interest. In addition, I have decided that the Respondent is liable to pay my fees.

Chris Lenz – Adjudicator

Signed

22 August 2005